

38, 1960

IN THE PRIVY COUNCIL

No. 32 of 1960

ON APPEAL FROM

THE HIGH COURT OF AUSTRALIA

BETWEEN :

THE COUNCIL OF THE SHIRE
OF ASHFORD (Plaintiff) Appellant

- and -

DEPENDABLE MOTORS PTY.
LIMITED (Defendant) Respondent

RECORD OF PROCEEDINGS

Fisher Dowson & Wasbrough,
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Solicitors for the Appellant

Galbraith & Best;
1, Essex Court, Temple,
London, E.C.4.

Solicitors for the Respondent.

IN THE PRIVY COUNCILNo. 32 of 1960ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :

THE COUNCIL OF THE SHIRE
OF ASHFORD (Plaintiff)Appellant

- and -

DEFENDABLE MOTORS PTY.
LIMITED (Defendant)RespondentUNIVERSITY OF LONDON
V.C.L.

- 7 FEB 1961

INSTITUTE OF ADVANCED
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Affidavit of John Francis Mant	16th September 1958

IN THE PRIVY COUNCIL

No. 32 of 1960

ON APPEAL FROM

THE HIGH COURT OF AUSTRALIA

BETWEEN: THE COUNCIL OF THE SHIRE OF ASHFORD (Plaintiff) Appellant

- and -

DEPENDABLE MOTORS PTY. LIMITED (Defendant) Respondent

RECORD OF PROCEEDINGS

No.1

AMENDED ISSUES FOR TRIAL

In the Supreme Court of New South Wales

IN THE SUPREME COURT OF NEW SOUTH WALES }

No. 1776 of 1954

No.1

Amended Issues for Trial.

2nd July 1954

BETWEEN:

ASHFORD SHIRE COUNCIL
Plaintiff

- and -

DEPENDABLE MOTORS PTY. LIMITED
Defendant

WRIT issued: 30th March, 1954.

DECLARATION dated 2nd July, 1954, as amended at Hearing.

SYDNEY TO WIT

THE COUNCIL OF THE SHIRE OF ASHFORD being a body corporate and entitled to sue in and by its said corporate name and style by TERRENCE JOSEPH O'CONNOR its Attorney by his Sydney Agent WILLIAM SYDNEY MELVILLE sues DEPENDABLE MOTORS PTY. LIMITED being a Company duly incorporated and liable to be sued in and by its said corporate name and style for

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In the Supreme
Court of New
South Wales

No.1

Amended Issues
for Trial

2nd July 1954
continued

*

*

that by an agreement made by and between the plaintiff and the defendant the defendant bargained and sold to the plaintiff and the plaintiff bought from the defendant a certain tractor and fittings including a 10'10" Cable dozer for the price of Six thousand seven hundred and fifty one pounds fourteen shillings (£6751.14.0) and the plaintiff made known to the defendant that it required the said tractor and fittings for road construction work and that in such road construction work the said tractor would be required to push the said dozer blade drag a 6-8 yard carry-all scraper scoop and to clear land and the plaintiff relied on the defendant's skill and judgment and the said goods were of a description which it was in the course of the defendant's business to supply and thereby it became and was a term and condition of the said agreement that the said goods should be reasonably fit for the said purposes YET, the said goods were not reasonably fit for the said purposes or any of them whereby same were of no use or value to the plaintiff and the plaintiff has incurred expense in and about the use of the said goods and was otherwise greatly damnified.

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2.

AND for a second count the plaintiff being such a body corporate as aforesaid and entitled to sue as aforesaid sues the defendant being a body duly incorporated as aforesaid and liable to be sued as aforesaid for that the plaintiff bought from the defendant a Breda 70D Crawler tractor equipped with a cable dozer for the price of six thousand seven hundred and fifty one pounds fourteen shillings (£6,751.14.0.) and the defendant dealt in goods of that description and that it thereby became and was a term of the said agreement that the said goods should be of merchantable quality YET the said goods were not of merchantable quality and the plaintiff suffered the damages in the first count hereinbefore set forth.

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In the Supreme
Court of New
South Wales

No.1

Amended Issues
for Trial

2nd July 1954
continued

3. AND for a third count the plaintiff being such a body corporate as aforesaid and entitled to sue as aforesaid sues the defendant being a body duly incorporated as aforesaid and liable to be sued as aforesaid for that in consideration that the plaintiff would buy of the defendant a certain tractor equipped with a cable dozer at the price of six thousand seven hundred and fifty one pounds fourteen shillings (£6751.14.0.) to be paid by the plaintiff to the defendant for the same the defendant promised the plaintiff that the said tractor was designed and built for road construction work and that the same was suitable for road construction work using the said cable dozer which included pushing a dozer blade dragging a 6-8 yard carry-all scraper scoop and clearing land and that the same was an 85 horse power tractor and the plaintiff bought the said tractor equipped with a cable dozer of the defendant and paid it the said price for the same YET at the time of the making of the said promise by the defendant the said tractor equipped with the said cable dozer was not designed and built for road construction work and was not suitable for road construction work which included pushing the said cable dozer dragging the said scraper scoop and clearing land nor was the said tractor an 85 horse power tractor. whereby the said tractor equipped with a cable dozer was of no use or value to the plaintiff and the plaintiff suffered the damages in the first count hereinbefore set forth.

PLEAS dated: 1st December, 1954 as amended at Hearing. The Defendant by JOHN FRANCIS MANT its Attorney says that it did not promise as alleged.

2. And for a second plea the Defendant as to so much of the first count of the declaration as alleges that the

In the Supreme
Court of New
South Wales

No.1

Amended Issues
for Trial

2nd July 1954
continued

the said goods were not reasonably fit for the said purposes or any of them denies the said allegations and each and every one of them.

3. And for a third plea the Defendant as to so much of the second count of the declaration as alleges that the said goods were not of merchantable quality denies the said allegation.

4. And for a fourth plea the Defendant as to so much of the third count of the declaration as alleges that at the time of the making of the said promise by the Defendant the said tractor equipped with the said cable dozer was not designed and built for road construction work and was not suitable for road construction work which included pushing the said cable dozer dragging the said scraper scoop and clearing land nor was the said tractor an 85 horse power tractor denies the said allegations and each and every one of them.

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REPLICATION dated: 2nd March, 1955.

The Plaintiff joins issue upon all the Defendant's pleas herein.

DATED this 19th day of March 1957.

W.S. Melville
Solicitor for the Plaintiff
46 Pitt Street,
SYDNEY.

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* Amendments allowed at hearing.

No.2

JUDGE'S RULING ON DISCOVERY

In the Supreme
Court of New
South Wales

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
IN CAUSES)

CORAM: FERGUSON J.
and a Jury of Four.

No.2
Judge's Ruling
on Discovery.
14th November
1956

Wednesday, 14th November
1956.

ASHFORD SHIRE COUNCIL

-v-

DEPENDABLE MOTORS PTY. LTD.

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MR. MEARES Q.C. with MR. CASSIDY for the
plaintiff.

MR. REYNOLDS Q.C. with MR. SINCLAIR for the
defendant.

(At 2.15 p.m. Jury sworn and Mr. Meares
opens to Jury).

(Mr. Meares called for documents, the sub-
ject of subpoena duces tecum - produced).

20

MR. REYNOLDS: I would ask Your Honor's ruling
in regard to the documents contained in that
bundle. I do not know what my friend wants to
see. If he were to indicate any particular
document that he wants to see we might overcome
the problem.

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MR. MEARES: I expect to see them at the earliest
moment, Your Honor. We are asking the defendant
about some informal discovery and we were given
some information as to what he did have and did
not have. I should like to know if my friend
claims any form of privilege.

MR. REYNOLDS: I do not claim privilege, Your
Honor. My only objection is that Mr. Meares be

In the Supreme
Court of New
South Wales

allowed to read only the things he is entitled to see.

HIS HONOR: Are you prepared to indicate the documents you do not object to?

No.2

Judge's Ruling
on Discovery

MR.REYNOLDS: I have not had an opportunity to go through them, Your Honor. I shall have it done overnight. If Mr. Meares wants any particular document at this stage it may be a document I have no objection to his seeing.

14th November
1956
continued

CASE FOR THE PLAINTIFF

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No.3

Plaintiff's
Evidence

EVIDENCE OF FREDERICK ERNEST BOWMAN

No.3

F.E.Bowman
Examination

Sworn, examined, deposed:

MR. MEARES: Q: What is your address? A: No.51 Dolans Pde., Cronulla.

Q: Were you shire engineer for the Ashford Shire Council in 1951? A: That is correct. I was appointed to the position some time in March.

Q: Are you still working for that Council? A: No. I left the Ashford Shire Council. I was there for nearly 3 years. I left there at the end of 1953.

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Q: Who are you with now? A: I am now with Armco Pty. Ltd. They are manufacturers of metal pipes and so on.

Q: Prior to your employment as a shire engineer in 1951 you had been working for the Sydney Water Board for 8 years? A: Approximately 8 years.

Q: You were employed on civil construction and designing work? A: That is right.

Q: Were you with the Dept. of the Interior for 5½ years? A: That is correct.

30

Q: Were you engaged as an engineer supervising

construction on the Captain Cook Graving Dock?

A: That is so.

Q: Were you with the Sutherland Shire Council as an engineering assistant for about a year and a quarter? A: That is so.

Q: Were you also working for the Blaxland Shire Council as a deputy engineer and at Glen Innes as engineer? A: Yes.

10 Q: Was that before your employment with the defendant? A: Yes.

Q: Also, did you pass the necessary examinations to qualify you as a Local Govt. Engineer in 1941? A: That would be correct.

Q: You were not certificated until 1949 because of your not having had sufficient length of time in service in the various shires? A: In Local Govt. - that is right.

20 Q: Were you in Sydney in March 1951 attending the Local Govt. Annual Engineers' Conference?

A: That is so.

Q: Was that conference held in the week preceding Easter Week? A: Every year, yes.

Q: At that time had you been appointed to the Ashford Shire? A: Yes. I had been appointed, but I had not taken up the appointment.

Q: Did you receive a telephone call on or about 12th March 1951 from the Shire Clerk, Mr. Heyward? A: That is right.

30 Q: Following upon that conversation did you call out to Dependable Motors Pty. Ltd.? A: Yes. I am not sure - the following day, I think it was. Monday - the first day of the annual conference.

Q: Would it be in March? A: Yes. It would be about 12th March or 13th March.

Q: Did you go out to Dependable Motors Pty. Ltd.? A: That is right.

Q: Where are they situated? A: Along Parramatta Road - out Camperdown way.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.3

F.E.Bowman
Examination
continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.3

F.E.Bowman
Examination
continued

Q: When you arrived there did you ask to see anybody? A: Yes. I had been given the name of a man named Mr. Corney. I asked to see him and I was introduced to Mr. Corney.

Q: Did you know what his designation was? A: I was not sure, but I think he was the sales manager or something along those lines.

Q: Would you tell us in direct speech what was said and done by both of you then? A: In the first place I said to Mr. Corney - I gave him my name and so on and I said, "I am here on behalf of the Ashford Shire Council. I understand they are interested in a tractor which you have for sale and I would like to see it." He said, "There is the tractor over there". - it was towards the front of the building. We walked over to the tractor and I said to Mr. Corney, "Can you tell me anything about it? and he proceeded to point out a few good points about the tractor - such as its robust construction. I think he bent down to look at it underneath and I bent down too.

He pointed out the framework underneath and then he mentioned something about the construction of the tractor - which was unorthodox so far as tractors were concerned. He pointed out that the tracks were made on what you would call unitary construction. The pads and the rails of the tracks were cast in one piece rather than assembled in two pieces, as is usual with tractors.

MR.REYNOLDS: Q: Is that what he said or what you observed? A: Really, what I observed. I mentioned the fact to him - that they were constructed somewhat along unorthodox lines and he said, "Yes. That is a special construction of this company. It is their own particular method. The tracks are made of a particular type of steel - specially treated to give very long life and work, and it has very high wear-resistance qualities". I think he then started the motor up. The motor seemed quite good actually. It ran for a few minutes. This was a fairly big tractor and it made a big noise in the showroom. He turned it off after a few minutes. We discussed it further and I said to him, "Tell me something about it. What are its capabilities. What is its horsepower?" and he said, "85 h.p." I said, "What about the weight?" and he said, "It is about 7 tons in weight". I then asked, "Do not you think

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that is a bit low for the horse-power?" and he said, "Oh, no. There are 7 or 8 others in this particular make of tractor in operation at the moment". He mentioned one up the North Coast - I think it was at Casino. I am not sure on that point. There was another one up round Tamworth somewhere, I think, and he said they were giving good service. We had quite a lengthy discussion on the actual tracks of the machine. They were of a kind that I was a bit worried about - (Objected to).

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.3

F.E.Bowman
Examination
continued

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HIS HONOR: Q: Would you give the conversation as well as you can? A: Well, it is difficult, of course. I cannot remember much that was said. He pointed out to me that the firm that had made the tractor - he said, "It is a very reputable firm. It is a very big firm engaged in the manufacture of locomotives as well as tractors. It is quite an outstanding firm in Italy". and he added that there was no doubt about the quality of the machine or the quality of the tracks. Then I said to him, "Will this machine do the work we expect it to do?" and he replied, "What do you expect it to do?" I said, "It will be engaged entirely on road construction work," and he said, "What does that entail?". I said, "Clearing, some clearing and a lot of dozer work, and quite a lot of scoop work. The Council had already purchased a 6-8 yard scraper scoop". It was a Le Tourneau make, purchased from Tutt Bryants. I then said, "this tractor will be required to haul that scoop. Will it be capable of doing that?" and he replied. "Yes. That is the type of work the tractor is built for. It is just the type of work to suit it." I then said, "The Council does require a dozer blade," and he said, "Yes. I know something about that. They want the dozer blade to fit on to the tractor". I then said, "That is right. Do you know a reputable firm which is capable of building a good blade?" and he replied, "Yes." I asked him, "Who are they?" and he said, "It is a firm called Brown and Bunyan". I said, "Do they build a good blade?" and he replied, "Yes". I asked, "Welded iron?" and he replied, "Yes". and I then said, "And one capable of doing the work and suitable for the machine?" and he replied, "Yes. You leave that to me. I will see that the proper size blade is fitted to the machine". After that

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.3

F.E.Bowman
Examination
continued

we had some further discussion. I cannot recall very much of importance apart from that. I said, "All right. I will tell the clerk about this view and he will probably send you an order for the tractor". I left the place with the very firm conviction - (Objected to; disallowed).

MR. MEARES: Q: What did you feel about it after the discussion you had with him - (Objected to; disallowed; argued; not pressed).

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Q: Following the inspection did you go back and have certain discussions with the shire clerk - either over the telephone or otherwise? A: Yes.

(Order dated 16th March 1951, pro forma invoice and cheque, together with receipt, called for and produced.)

MR. REYNOLDS: I object to the cheque and receipt being tendered, Your Honor.

(Documents tendered and marked; Exhibit A.)

MR. MEARES: Q: Can you tell us, approximately, when it was that the tractor arrived in the Shire? A: It would be some time in May - round about the middle of May, I think.

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Q: How did it come up? A: It was brought up on a lorry - from Inverell only. I do not know how it arrived in Inverell. It came up from Mr. Wilkins' Garage. Mr. Wilkins had taken the power-control unit from the tractor. It arrived one Sunday morning. It passed the house where I was living. I went down to the Workshop and Mr. Wilkins was there. I think he was driving the lorry. We had a short conversation about the thing and he then started the motor up. There had been previous conversation about the power-control unit. I think there was some -

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Q: I do not think we need worry about that. It was fitted on? A: Yes. Mr. Wilkins started the motor and showed me the thing was fit.

Q: When it arrived on the Sunday about the middle of May was the bulldozer blade fitted to it? A.: Yes.

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Q: At that time did the Council have any other

tractors? A: Yes. It had quite a few tractors. I think it had two T.D.9's - they were International tractors. There was a Cletrac tractor - a Fiat.. I think there was a T.O.14 - another International unit.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.3

F.E.Bowman
Examination
continued

Q: Did you have a workshop there? A: There was quite a good workshop up there.

Q: Who was in charge of the workshop? A: A mechanic by the name of Ted Ackhurst.

10 Q: Did he have any mechanics under him? A: Yes. I think there were three at the time.

Q: Did you arrange for the appointment of a driver for the tractor? A: That had been already arranged. The driver's name was Kramer.

Q: Did the tractor start work the following day? A: Yes. It was a Monday. It went out to the Coolatai Road.

20 Q: From then until when the tractor was "grounded" whereabouts did it work and what type of work did it do? A: It started work on the Wallengra-Coolatai Road, That would be about 20-30 miles from Ashford. The work there was in connection with road construction. Clearing was involved, and bull-dozing.

Q: When you say clearing and bulldozing. Is clearing different work from bulldozing? A: Clearing means the clearing of trees from the roadway.

30 Q: How is that done? A: According to the size of the growth - the small stuff is pushed straight over with the blade of the bulldozer. The larger trees have to be rooted round with the blade to start off with - a bank is built up on the pushing side of the tree to allow the blade to be used on the high side and the trunk of the tree is pushed over. If the tree is too large for the tractor to push it over then one of the boys would go up the trunk and put a rope round it and a tackle is put on it. It is
40 pulled over. It was attached to another tractor with block and tackle and to a back stop further away and it would give some assistance to the tractor.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.3

F.E.Bowman
Examination
continued

Q: Is that a normal user for a tractor in road clearance? A: Yes.

Q: Was this the first time you had seen a tractor or had you had anything to do with tractors previously? A: I had used tractors for some time before that - various makes.

Q: Had you used them in connection with road clearance work in other shires and municipalities? A: Yes.

Q: What was the other expression - bulldozing? A: Actually the material is shifted from the side of the road up on the formation itself. In other words, building a mound according to the requirements - two, three or four feet high - building a mound of earth and levelling it off, and so on.

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Q: Was this done for the purpose of making the road? A: Reconstructing the road.

Q: With your experience, was this unusually heavy work - unusually light work - what sort of work do you say that it was? A: Average work. In this particular instance there had been some rain and in this area there is quite a lot of black soil. That was a bit sticky. That soil is not very good for working under those conditions insofar as it sticks to the tracks and makes it awkward. That has got something to do with performance and output, and so on.

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Q: Do you say that those conditions were very unusual? A: No. After any rain those conditions would prevail in this type of country.

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Q: It was working on the Wallengra-Coolatai Road for roughly a week, do you say? A: Actually it worked about a week and then we had some trouble with the machine.

Q: What other places did it work in? A: It worked for a short time on the Ashford - Wallangra Road. Then it was on the Wallangra - Inverell Road.

Q: What was the work to be done on the Ashford - Wallangra Road? A: I think it was the putting in of a culvert - building up the formation. The work was not extensive.

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Q: What about the Wallangra-Inverell Job? A: It was concerned with the relocation of a short section of road due to the installation of a big culvert. Probably, there was near enough to a quarter mile of road involved.

In the Supreme Court of New South Wales

Plaintiff's Evidence

No.3

F.E.Bowman Examination continued

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Q: Was it being worked with the dozer blade or scoop on those two roads? A: On the Ashford-Wallengra Road it would be using the dozer blade. I am not sure whether the scoop was attached to it on that road later or not. On the Wallengra-Inverell Road it was used entirely with the scoop.

Q: With the six-eight yards scoop? A: That is so.

Q: What does it do then. Does it just scoop up the earth? A: Actually the scoop is a four-wheeled contraption drawn by a tractor which has a blade that is lowered into the earth -

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Q: Can I just put this to you. Would you look at this illustration and tell me what that is? (Document handed to witness) A: That is the type of scoop we have.

(Document tendered and marked; Exhibit B).

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Q: Is there anything that you would like to mention about that which would be of assistance to us? A: About its operation. The operation of the scoop is that the blade underneath the scoop the cutting edge - is lowered on to the ground, or into the ground, and the tractor drags the thing along. It digs into the earth and the earth is forced up into the scoop by the forward movement of the scoop. When the scoop is full there is another gate which is lowered into position and the blade is lifted out of the ground. The tractor just drags it away and the earth is deposited in the reverse position.

Q: How do you lift it up or drop it? A. It is done by operation of the power control unit.

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Q: That brings it up and drops it down? A. That is right.

Q. Does the power control unit also lift the dozer blade up and down, depending on what you want to do? A: That is right.

In the Supreme Court of New South Wales

Plaintiff's Evidence

No.3

F.E.Bowman Examination continued

Q: That is the function of the power control unit? A: That is right.

Q: When you refer to a dozer blade - is that one of the things one sees going along scraping and grading the roads and that sort of thing? A: Not exactly a grader. For the heavier type of work - for construction rather than maintenance. The grader is maintenance equipment and the dozer is construction equipment.

Q: What length was the dozer blade that was supplied? A: I would not be certain of that but I think it was 10'10" - something like that.

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Q: The work that it was doing on the last mentioned roads - was there anything abnormal or unusual, or difficult, about that work? A: No. There was nothing at all unusual about that work. It was quite normal type of work. The conditions were good, really.

Q: Was Mr. Bourke there when it started up the first day? A: Yes. He came up. As a matter of fact he was present the first day the machine went into operation.

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(Further hearing adjourned until Thursday on 15th November 1956 at 10 a.m.).

No.4

Judge's Order Discharging Jury and on Discovery

15th November 1956

No.4

JUDGE'S ORDER DISCHARGING JURY AND ON DISCOVERY

IN THE SUPREME COURT OF NEW SOUTH WALES IN CAUSES

CORAM: FERGUSON J. and a jury of four.

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Thursday 15th November 1956.

ASHFORD SHIRE COUNCIL

- v -

DEPENDABLE MOTORS PTY. LTD.

MR. MEARES: Your Honor, my friend and I have had discussions concerning the mode of trial and we think that this case is going to last quite some time. This case involves matters of substantial

technicalities - nothing we say is said derogatorily of the members of the jury - but we think, at the very least, there would be a very substantial saving of their time if the jury were to be dispensed with. That would result in a saving of expense. We would make that application to Your Honor.

In the Supreme
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South Wales

No.4

Judge's Order
Discharging
Jury and on
Discovery

15th November
1956
continued

10

HIS HONOR: In the circumstances, gentlemen, I am quite certain you will be very happy with the suggestion. I can now discharge you altogether.

(Jury discharged)

20

MR. REYNOLDS: Before proceeding, Your Honor, it may be as well to determine in principle the question of documents produced on subpoena duces tecum. I have gone through the documents overnight and segregated those I object. Perhaps, Your Honor, I might indicate the type of document which I object. Your Honor has heard of the tractor being made in Italy by the Breda Company. The firm concerned in this country is Hedeson & Company. The document refers to all tractors dealt with by that firm and I submit such documents would not be discoverable as they would not be relevant to the issue between the parties. I do not object to documents where they relate to this particular tractor.

(Argued).

30

MR. REYNOLDS: I would ask that the documents produced on subpoena duces tecum be released to my instructing solicitor so that a list can be made and the segregation done. I would not object to this invoice book being seen by my friend - carbon copy of invoices which deals with the sale of Breda tractors.

(Mr. Reynolds called for certain minutes asked for on subpoena duces tecum.
Produced.)

In the Supreme
Court of New
South Wales

EVIDENCE OF F.E.BOWMAN
Continued

Plaintiff's
Evidence

EVIDENCE OF FREDERICK ERNEST BOWMAN

Examination resumed:

No.5

F.E.Bowman
Examination
continued

MR. MEARES: Q: I think you were telling me that during the first few days of this tractor being put into operation it was working on the Wallengra-Coolatai Road? A: That is correct.

Q: You have already described what type of road it was? A: Yes. 10

Q: Did you go out on the first day when the tractor started in company with Mr. Bourke? A: I went out and saw the tractor on the first day of its operation but I am not clear whether Mr. Bourke was with me when I was going out. He was certainly out there.

Q: Were you out there for very long that day? A: It would be at least an hour.

Q: Was the tractor then bulldozing? A: That is correct. 20

Q: Was it difficult bulldozing work, easy or moderate? A: The soil was black and there had been some rain previously. Black soil has a tendency to stick to anything that comes into contact with it. The sections of the tracks between the grips became clogged with black soil.

Q: When you were out there for an hour did you see anything in any way to suggest the tractor was incompetent? A: Not at that stage.

Q: Are you able to tell us, approximately, when it was after that date that you first had trouble with the tractor? A: Roughly it would be a week after the tractor commenced working. A bearing failed. 30

Q: Had you seen the tractor working between the first day when you went out and when the bearing failed? A: Yes. At least once.

Q: What was the tractor's performance on that occasion? A: It was reasonably good.

In the Supreme
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Q: Was it still working on the Wallengra - Coolatai Road? A: Yes.

Plaintiff's
Evidence

Q: What happened to the tractor? A: If I remember correctly it was brought back to the workshop in Ashford. It was. Mr. Bourke, of Dependable Motors - I remember he was working underneath it.

No.5
F.E.Bowman
Examination
continued

10 Q: After the bearing went did you contact Mr. Bourke? A: Somebody from the office did. I would not be certain whether I did or not. Somebody contacted them and asked Mr. Bourke to come up and bring a bearing with him, which he subsequently did.

20 Q: What is a bearing? A: The bearing referred to is a thin slip of metal, as it is called, between the crankshaft and the big end of the piston rod. There are two types of bearing on the tractor. One set of bearings is known as the main bearings and the other set is known as the big-end. The particular bearing to fail in this case was the big-end bearing.

Q: Can you give us any idea of what they look like? A: It is a fairly thin piece of metal.

MR: REYNOLDS: This might be an example.

WITNESS: That is the type of bearing that would be used in many motors. Whether that is the particular one I am not prepared to say.

30 MR. MEARES: Q: When you say they "gave" what do you mean by that? A: The metal on the surface was torn away. The contact surface of the bearing was damaged in some way by other metal or something dislodged and being carried round and the surface of the bearing becoming scored.

(Sample bearing tendered and marked Exhibit C.)

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Examination
continued

Q: When Mr. Bourke came up - can you give us an approximate idea of the date when he arrived there?

A: Approximately one week after, -

MR. MEARS: Is my friend prepared to say that, so we can get it on the record?

MR. REYNOLDS: I believe it to have been about 24th May. The bearings are shown as having been supplied on 24th May. I believe it went to Inverell on 3rd May and he shows that he went out on Sunday morning - about 24th May.

10

MR. MEARES: Do you agree it was somewhere towards the end of May? A: That would be correct.

Q: When Mr. Bourke was up there on that visit did you discuss with him any matter concerning the tractor at all? A: Yes, I did.

Q: Had you observed anything wrong with the tractor? A: There was nothing terribly wrong with it. The tracks did continue to slip.

Q: You have not told us when they started to slip? A: On the first day of operation - I have told you that the tracks became clogged with black soil. That caused the tractor to lose its adhesion to the ground or its -

20

MR. REYNOLDS: Tractive resistance?

WITNESS: That is the word. It caused the tractor to lose its tractive resistance and the tracks spun round - without the tractor moving. That was not so all the time. When the tractor was loaded - the blade loaded with earth - this happened. At the time of the first day's operation I did not attach very much importance to that fact because the ground was wet, or moist, and apart from that there was another tractor working on the same job. It had some of the trouble but nothing very serious. That slipping of the tracks continued - even when the ground had dried out somewhat - and I became slightly concerned about it, but not terribly concerned. It seemed to me - (Objected to).

30

MR. MEARES: Q: Did you observe anything about the tractor? A: I think that is about all I can say.

40

Q: You noticed that the tracks continued to slip even when the wetness had gone? A: That is correct.

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South Wales

Q: Did you or did you not mention that matter to Mr. Bourke when he came up to fix the bearing?
A: I did mention that to him. We had a short discussion on the matter really. I believe he said to me -----

Plaintiff's
Evidence

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10 Q: It is no use your believing or conjecturing. What you must give us to the best of your recollection what the conversation was - (Objected to; pressed; withdrawn).

F.E.Bowman
Examination
continued

Q: At any rate he came up and he assisted in fitting the bearing? A: That is correct.

Q: At the same, time, I think, the "P.C." unit? A: The power control unit.

Q: Had it given some trouble? A: Yes.

20 Q: Had the power control unit been fitted by Wilkin's? A: Yes.

Q: It was not part of the subject matter of the sale? A: No.

Q: During the time when the tractor was in the workshop on that occasion quite a considerable amount of time was being spent on fixing up the power control unit in addition to fixing up the bearings? A: That is correct.

30 Q: I want you to assume that the tractor went back to work on the 15th June - on the drainage job on the Wallengra-Ashford Road for one day?

Q: And then it was on the Wallengra-Iverell Road for 2 days. On the 20th June it went back to the Wallengra-Coolatai Road? A: Yes.

10 Q: When, to the best of your recollection, did you next observe it and what, if anything, did you notice about it? A: I do not recollect seeing the tractor working on the Ashford-Wallengra Road that day. I am not sure about the couple of days spent on the Wallengra-Inverell Road. I do recollect seeing it working on the

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Plaintiff's
Evidence

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F.E.Bowman
Examination
continued

Wallengra-Coolatai Road. The tracks, as I told you before, spun on the ground when the tractor was under load - doing bulldozing work. When the tractor was turning - the operation of a tractor - it turns on clutches to some extent the turning mechanism works through the clutches. When a tractor is being turned one track is caused to spin by manipulation of the clutch at the side of the tractor and the other track continues to operate and swings round - and so the tractor is turned. On occasions when this is happening the sprockets - the driving sprockets which are at the big-end of the tractor, on some occasions, jumped out of the track and slipped one or two.

10

Q: Did that happen quite often? A: Not every time but enough to make me apprehensive about it.

Q: (Document handed to witness): Would you look at this figure (1) in the Agricultural Tractor Manual issued by Breda Motors?

(Figure 1 and Wall Diagram produced by Mr. Reynolds described in detail to His Honor.)

20

Q: When you went out to the Coolatai-Wallengra Road was that trouble something that was only occurring once every hour or so or was it occurring fairly frequently? A: It was occurring more frequently than every hour or so. I would say that during operations it would occur, perhaps, - if depending on the work to a large extent. It is difficult to say that it occurred every 10 minutes, but it did occur sufficiently for me to become apprehensive about it.

30

Q: On the occasion when you noticed it doing that was the tractor being engaged on very heavy work, very easy work or what was the type of work? A: It was moderately heavy work - not very heavy work. It was what you would call average to moderately heavy work.

Q: Are there not two steering clutches in the mechanism? A: That is so.

40

Q: Is there not a third clutch, which is the main clutch? A: The master clutch.

Q: What do the two steering clutches do? A: They

enable the driver to steer the tractor.

Q: What does the master clutch do? A: That enables the gears in the forward or backward movement of the tractor to be operated. It is on the same principle, roughly, as with a motor car.

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Evidence

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F.E.Bowman
Examination
continued

Q: What do the steering clutches do - they start working or stop the working of one wheel - one track? A: Yes. There is one for each track.

10 Q: And the master clutch - does that look after the engine? A: The driving part of it.

Q: So we get this - supposing you wanted to stop the tractor and there was something the matter with your master clutch - jammed or something - could you stop it with the steering clutches? A: No.

20 HIS HONOR: Q: It would stop the movement? A: You would not stop the engine and you would not stop, the movement between the engine and the mechanism. I am not in a position to say what would happen then. I do not know.

30 MR. MEARES: Q: Did you observe anything else after the bearing trouble - concerning the tractor? A: Yes. When the tractor is being reversed - put into reverse to go backwards - bulldozing is an operation which entails forward movement and backward movement all the time. There is quite a lot of work on the master clutch. When bulldozing work was in progress and the tractor was being reversed the same jumping of sprockets, as I have termed it, occurred. That is bound up with spring tension and so on.

40 Q: Was anything done in an endeavour to cure the trouble? A: Yes. As a matter of fact, one of the normal maintenance jobs on any tractor is to keep the track tension correct so that the jumping of the tracks does not occur - the sprockets. One indication that tracks need attention - the first conclusion we came to when the tracks started to jump - the springs were too loose and they were tightened. When that is done, of course, it reduces the jumping of the sprockets to some extent. It reduced the frequency of jumping of sprockets to some extent

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F.E.Bowman
Examination
continued

but it was not acting at all as it should have been. As the work continued this jumping of sprockets also continued. It was with the machine all the time. It did not cease.

MR. REYNOLDS: I take it that the witness is speaking about something he saw and not something he was told.

WITNESS: Exactly, Your Honor. I want to make myself quite clear. I visited the job regularly and I did observe these things regularly. I did not observe every occasion, naturally.

10

MR. MEARES: Q: Apart from that, as far as tightening the spring tension was concerned, you say that it got a bit better. Did that improvement continue for long? A: No.

Q: What happened? A: The improvement was very short-lived actually.

Q: What did you have to do then? A: Tighten the track again.

Q: What eventually happened about the tightening? A: We tightened it so many times in such a short period of operation that we became very apprehensive (Objected to).

20

Q: As an engineer, what view did you take? A: I was worried about it.

Q: What was the view you took about further tension? A: The view I took was that it should not have been necessary to tighten the tracks as frequently as we had been doing it.

Q: What view did you take as to the future, in regard to repairing the track by tightening? A: I took the view that it was a serious matter and that I would have to do something about it by way of getting into communication with the suppliers.

30

Q: Is there or is there not a time when you can do no more tightening? A: Yes. The springs are of a certain length and once that tightening has taken place - it will reach the extent that the spring becomes one solid mass of steel - the coil - once the coil is completely closed, or the spring - you cannot tighten it any further.

40

Q: To what stage were you getting in that connection? (Objected to; pressed).

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HIS HONOR: Q: Is it a coil spring? A. It is a very large coil spring.

Plaintiff's
Evidence

Q: Extending along - A: Between the two main wheels actually.

No.5

10

Q: Extending along the tracks in any way? A. Between the tracks. The tracks are run along the ground and up over the main wheel and over the front wheel. The spring is anchored at one end the other end is forced against the idling sprocket- at the front end of the track. To tension the spring there is a large bolt which is screwed. That affects the tension of the spring.

F.E.Bowman
Examination
continued

Q: That means, you wind it up? A: That is right.

20

MR. MEARES: Q: So far as the tightening up that was necessary - to what extent did you get in the short time it was working - how far did it go towards full tightening up? A: I cannot truthfully say what was the proportion of tightening up that had taken place at that stage.

HIS HONOR: Q: Can it be completely tightened? A: What do you exactly mean, Your Honor?

Q: That is what I want to know? A: You tighten the thing up until such time as the spring has no further flexibility. You compress the spring. You do not stretch it.

30

MR. MEARES: Q: You are not able to say from your recollection the degree to which the spring had been tightened up because of the various adjustments? A: No.

Q: Nor at any other stage? A. No. I cannot say.

Q: I think, approximately, the tractor was "grounded" on or about 10th August? A: That would require some thought on my part.

40

Q: Do you recall an occasion when you took the Shire President, Mr.Black, out to see the tractor? A: Yes. That was just before a council meeting. That would be either the July meeting or the August meeting. I think it was the July meeting.

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Plaintiff's
Evidence

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F.E.Bowman
Examination
continued

Q: Was it on a Thursday, 12th July? A: It could have been that. The meeting was held on the second Friday in that month.

Q: Prior to that - do you recall a mishap to the radiator of the tractor? A: I recall a mishap to the radiator during clearing operations.

Q: Can you recall whether that was prior to your taking the Shire President out or not? A: Not definitely. I cannot.

Q: In connection with the radiator mishap, was a portion of the radiator core punctured? A: That is right. 10

Q: Is the radiator core made up in six pieces?
A: There is quite a number of units.

Q: Did you have a conversation with Mr. Bourke over the telephone concerning a new radiator core?
A: Yes.

Q: Did you also have a conversation with him as to the question of continuing to run the tractor with one of those six sections of the radiator core not working? A: That is so. I did. 20

Q: What was that conversation? A: I rang Mr. Bourke of Dependable Motors and I told him about the accident, actually, a root from a tree had been pushed through it.

Q. You told him the core had been broken? A: Yes. I asked him if he would have another one sent up to us. "We, unfortunately, do not have another one in stock", he said. He said, "I will have one sent out from Italy for you". I made some remark regarding the time it would take - I cannot recall what it was - and he said something to the effect that he did not think the running of the tractor without the one section of the core, which was a sixth of the area of the radiator, would affect the performance of the motor and it being winter time he did not think that the tractor would be damaged by running it without the sixth portion of the core. 30

Q: Did you issue instructions for the tractor to be worked without the sixth section of the core working? A: Yes. 40

Q: From then until the tractor was grounded did a new radiator core arrive? A: It did arrive, but I cannot say when.

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Q: Was it months after or weeks after? A: It was some weeks.

Plaintiff's
Evidence

Q: As far as working the tractor without the radiator core was concerned, may I take it - the radiator, of course, deals with the heat?
A: Yes.

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F.E.Bowman
Examination
continued

10 Q: In your experience was there ever any suggestion that there was overheating because you had a sixth portion of the radiator core missing?
A: No, none whatever.

Q: There was no trouble in that connection at all? A: None at all.

Q: You were telling us you remembered going out with the Shire President on 12th July - particularly taking him out to see it? A: Yes. I became worried about ---- (Objected to).

20 Q: You cannot say you were worried but you can say what your views as an engineer were. What was your opinion about the tractor - about its performance? A: My opinion was it was not performing as it should be performing. As the council meeting was coming up the following day I wanted to report something about the tractor.

Q: You took him out. Where was the tractor working at that time? A: It was working on the Wallengra-Inverell Road.

30 Q: From the time when the tractor commenced working until it was grounded, who was driving it? A: Mr.Kramer.

Q: You saw Mr. Kramer driving it? A: Yes.

Q: On that occasion, when you took the Shire President out on the 12th, did you observe the performance of the tractor? A: Yes. The tractor was scooping gravel then.

Q: Was that being done with the 6-8 Le Tourneau scoop? A: Yes.

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Evidence

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F.E.Bowman
Examination
continued

Q: Was that a new scoop which had not been used previous to when the tractor was supplied? A: To the best of my knowledge that is correct.

Q: Was it fitted to the tractor. When it used a scoop was that the only scoop it used? A: That is right.

Q: What was the position? A: It handled the scoop reasonably well. The tracks did spin, as distinct from the jumping of sprockets, of course. In my opinion the tractor was slightly overloaded by the scoop. 10

Q: When you refer to the 6-8 yard scoop; I think that means you take 6 yards of material when it is level-loaded and 8 yards when the scoop is heaped?
A: That is so.

MR. REYNOLDS: That is shown in Exhibit A.

MR. MEARES: Q: When you say it was overloaded - what gave you that impression? A: When scooping material with a carry-all scoop like that the tractor exerts all the force necessary to drag the scoop along and to fill the scoop with earth. The scoop remains stationary unless there is enough force to move it forward. In moving it forward the tractor, if it has ample weight and ample horse power, proceeds along a straight line and the movement of the scoop is steady. If, on the other hand, the tractor has any deficiency in weight or power the tractor waves about somewhat from side to side. The tracks evidently follow the line of least resistance on the ground and the movement of the tractor is somewhat jerky. When that occurs under normal circumstances the driver changes to lower gear and the movement of the unit is somewhat slower. The ground on which this plant was operating at the time consisted of decomposed granite - rather stony granite with no big boulders to speak of - no big boulders that could not be avoided, in any case - I should say the maximum size - 3" or 4" in diameter. 20 30

Q: Was the ground itself very easy ground? A: It was average ground I would say. 40

Q: Go on? A: After observing the tractor working for some time we stopped the tractor - pulled it across to the side of the road.

Q: Before stopping it, did you observe it had some difficulty in handling the yardage? A: That is so.

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MR. REYNOLDS: Q: He said it was slightly overloaded by the scoop.

Plaintiff's
Evidence

MR. MEARES: Q: Then you went on to describe how, normally speaking, people get over that by changing gear? A: That is right.

No.5

10 Q: What did you notice about the difficulty with this tractor in taking a fully heaped scoop?
A: The tractor weaved from side to side.

F.E.Bowman
Examination
continued

HIS HONOR: Q: After the gear was changed? A: At all times, Your Honor, but not to the same extent after the gear was changed.

20 MR. MEARES: Q: It had difficulty. That weaving - would it not indicate that to you? A: The characteristic weaving - it indicated to me that either the tractor was not heavy enough or had not sufficient power.

Q: And that weaving - did you notice it happening when he was in his lowest gear? A: Yes. I cannot say definitely what gear he was in but while he was working that weaving took place.

30 Q: Did you see anything being done at that time in regard to lifting the load or lightening the load on it? A: Yes. The operation of filling the scoop depends very largely on the depth to which the blade is lowered into the ground. The load on the tractor can be lessened by lifting the cutting-edge and thereby taking a finer bite of the ground.

Q: What was the operator doing? A: He was easing the tractor up - easing the scoop up - doing just that.

Q: Was the tractor handling the heaped scoop then, or was it less? A: It is the operation of filling the scoop -----

40 Q: Was he moving to take a full scoop or was he easing it off? A: He was trying to get a full scoop, but doing it very slowly.

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Plaintiff's
Evidence

No.5

F.E.Bowman
Examination
continued

HIS HONOR: Q: By reducing the bite of the scoop?
A: Yes, and he would take longer to fill it.

MR. MEARES: Q: Then you stopped the tractor?
A: That is right.

Q: What did you inspect then? A: The President himself inspected the tractor. I had told him previously - (Objected to). We inspected the tracks for one thing. The tracks of the tractor the parts which come in contact with the ground - were showing considerable signs of wear. 10

Q: When you say "considerable signs of wear" what was the degree of wear compared with the tracks of other tractors which you had experience with? A: It was much more pronounced than was the case with any other tractor I had dealt with. I remember taking a small file and filing the edge of the grips on the tracks. The metal filed off quite easily.

Q: What did that indicate to you? A: That indicated that the metal in the track was soft - relatively soft. Also, a number of plates forming the track were split from the edge inwards. Some of the plates were bent to some extent. The edges of the plates were distorted and bent about in some instances. There was a chip off one corner that I recall seeing - off one of the plates. I think that is all. 20

Q: Bearing that in mind and with your experience with tractors, remembering the time that the tractor had worked - what did you think about the ability of the tracks to last for any reasonable length of time? A: I think that the tracks were very unsatisfactory. That was the main reason for my taking the President to the site. 30

Q: Did you think they needed replacing again?
A: I thought something should be done about them, that they would not stand up to wear for any reasonable length of time.

Q: On that occasion, when the tractor was working did you observe anything concerning the sprocket jumping - which you have already referred His Honor to? A: Yes, that happened on occasions. 40

Q: Was it any different to what you have already

described? A: There was no difference whatever, except that when using the scoop the driver did not reverse and the jumping of the sprocket did not occur.

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Q: Because it did not reverse? A: That is correct.

Plaintiff's Evidence

Q: That means, of course, a loss of driving power? A: Yes, to some extent. The main concern there was the fact that it might cause damage to the tracks or sprockets, by reason of the impact of the metal.

No.5

F.E.Bowman Examination continued

10

Q: The council meeting was held on the 13th July, was it not? A: I think that is right. It would be the second Friday in the month.

Q: Was the tractor then, after another day or two and on the council's directions, grounded? A: That is so.

20

Q: Did you make a verbal report to the council at its meeting on the 13th July? A: I made a report to the council.

Q: Was it a verbal report - to the best of your recollection. You may take it, we have not got a written report? A: I did report to the council anyway.

Q: Were any steps taken to contact the defendant about the tractor? A: Yes. Council did consider the matter, and if my memory serves me correctly a letter was written to the defendant at that stage.

30

Q: Did you observe anything about the oil consumption? A: The oil consumption was excessive.

Q: What do you mean by that? A: A new tractor or motor should not use a great quantity of oil while working. This tractor used more than I thought was necessary, quite a lot more - two or three times more than it should have.

Q: Was that something that had existed, substantially speaking, from the time when it first started working? A: Yes.

(Short adjournment)

40

(Diagram of tracks tendered and marked Exhibit D.)

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Plaintiff's
Evidence

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F.E.Bowman
Examination
continued

Q: You told us you had observed something the matter with the oil consumption, and did you write, or cause to be written a letter to the defendant dated 4th July? A: I believe I drafted that letter.

Q: Do you see the word "oil" written in ink?
A: That is not my note.

Q: But your recollection is you drafted it?
A. Yes.

(Letter from plaintiff to defendant dated 4/7/51 tendered and marked Exhibit E.)

10

Q: "Although the power output appears adequate for the weight of the machine" - what do you mean by that? A: Well, the fact that the tracks would spin on the ground or move on the ground under load indicated that there was enough force generated by the motor to do just that; that indicates that the weight of the tractor is not sufficient to stop the spinning, thereby giving the tractor motion.

20

Q: "It is using", you went on, "2 gallons of oil for every 8 hours work. This must be considered excessive. Every endeavour has been made to ascertain the reason but to date no leaks have been detected.....apparent". would be pleased if you would give this matter early attention and reply next day". Did you write that letter?
A: I believe I drafted it.

Q: There is no mention about this sprocket jumping and track spinning you described to His Honor. Did you have any reason for not mentioning that in that letter? A: I think that was mentioned to Mr. Bourke previously.

30

Q: Then did you receive a letter in answer to that dated 10th July, 1951? A: Yes.

Q: Well now, that letter states that they were sending Mr. Wilkins to investigate the matter (read from letter). Are you able to tell us of your own knowledge whether or not Mr. Wilkins did come? A: I cannot remember him coming at all; I can't remember him coming.

40

Q: On the 13th July, 1951, the council meeting

was held and this tractor and its performance was discussed at the council meeting? A: That is so.

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Q: And then, do you recall a letter dated 16th July, 1951, being sent by the Clerk of the Ashford Shire Council, from the plaintiff to the defendant? A: Yes.

Plaintiff's
Evidence

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10 Q: Following on that letter of 16th July, did you then receive a letter from the defendant of 20th July, "We are in receipt of your letter of 16th...this machine". A: Yes, I remember that letter.

F.E.Bowman
Examination
continued

Q: Well now, did Mr. Bourke come up? A: Yes, he arrived towards the end of the month, I think it was.

Q: July, 1951? A: Yes.

Q: And did you discuss with him the various troubles with the tractor? A: Yes.

20 Q: Now, at this stage, had there or had there not been any trouble concerning the clutch? A: That is rather difficult to answer correctly? The clutch trouble did develop; you were speaking of the master clutch?

Q: Yes? A: There was some trouble with the clutch slipping when the tractor was under load, but it had not reached what you would say drastic proportions; the trouble was there but it was not of such a nature as to cause us very great concern at that stage.

30 Q: When you say the tractor was slipping, the clutch was slipping under load, what was the effect of that? A: The effect was the tractor just didn't pull or push the load.

40 Q: And how was that got over? A: Well, the clutch is operated by, actuated by, the engine, of course, the operation of the clutch is friction plates which come into contact and one causes the other to rotate, now, by adjusting the clutch these plates are adjusted so that the slipping does not occur. Adjustment of the clutch had been necessary before that time; I cannot recall how many times it was adjusted but

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F.E.Bowman
Examination
continued

in my experience in that short time it should not have had to be adjusted.

Q: And did the adjustment seem to cure the trouble, or did the trouble continue? A: The adjustment did cure the trouble for a while but it came up again later.

Q: Well, then, did you have a discussion with Mr. Bourke when he came up concerning the tractor?

A: Oh yes.

Q: Well now, could you tell me in direct speech and as accurately as possible what that conversation was? A: In the first place the tractor was working out at Wallengra-Inverell Road with the scoop attached to it - no, I correct that - we had grounded it and were waiting on Bourke to come up, and it was out on that road; that is where it was. I believe I drove Mr. Bourke out to the job, about 15 miles, and he inspected the tractor, and after some conversation that I cannot remember I said to him, "Look, Mr. Bourke, we are not satisfied with this tractor; we are very concerned about it and we want to get the right thing done with it - (Objected to; pressed; allowed).

10

20

Q: First of all, you had got us out on to that road there? A: Yes, on to the Wallengra-Inverell Road, Kramer, the tractor driver, was there at the time and Mr. Bourke. I cannot think of the words he used, but he requested me to have the motor started and to work the tractor for some hours so he could make a thorough check on oil consumption particularly. Before doing this the oil was drained from the machine and fresh oil put into it. At that time or thereabouts I said to Mr. Bourke something to this effect, "In your opinion do you think this tractor has received proper maintenance?"

30

Q: Don't say that? A: Well, the tractor was then put to work after the fresh oil was put into it and worked. I cannot recall exactly, but it was somewhere in the vicinity of 5 or 6 hours, if I remember correctly, and the quantity of oil used was in the vicinity of 3 quarts in that time.

40

Q: What would be a normal consumption of oil in 8 hours? A: It varies with the type of tractor make and so on, but under normal circumstances and doing normal work a tractor of that size, in my

opinion, should not use any more than one pint or a quart at the most.

Q: In 8 hours? A: In 8 hours work, that is if the engine is in first-class order.

Q: Go on? A: And it used round about 3 quarts of oil, and ~~Mr. Burke told me that that consumption was excessive.~~

HIS HONOR: Strike that out.

10 MR. HEARES: Q: What did he do? A: He made adjustments to, I believe, the breather tube in the sump of the engine which relieves the air pressure and so on; underneath the motor he made certain adjustments there, opened some ports in that tube. Well, the tractor was in operation.....

20 Q: Apart from that, did he make any other adjustments that you recall? A: Oh yes, he made some other adjustments; while the tractor was in operation he observed certain things about the tractor.

30 Q: What was he doing? A: These were technical observations of which I had no knowledge, and he made adjustments to the injector nozzles, he said that in his opinion the injectors were set at an incorrect pressure and that he would endeavour to have a new set sent up to us for substitution in the machine. He thought that would improve the performance. He said that the performance of the machine was not as it should be.

Q: Was anything done about the fuel pump and the valve setting? A: Yes, I believe he did take the cover off the top of the motor and adjust the valve setting of the motor and I think he made some adjustments to the fuel pump.

Q: Well then, after all this was done, how was the machine working? A: After that?

40 Q: Yes? A: Well now, it didn't go back - wait a minute now. It was put back to work after that and the clutch trouble was very much accentuated; after that it became very serious and the oil consumption.

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Examination
continued

Q: We are still out on the road; I am asking you how it worked out on the road; what was observable when Mr. Bourke was there? A: The thing was working for 5½ to 6 hours on that particular day. Mr. Bourke made his adjustments and the thing was not worked any length of time after that, I do not think.

Q: How was it working when Mr. Bourke was there, that was the question? A: Reasonably satisfactory, reasonably so; it was using the scoop at the time, not the dozer, and it was performing in exactly the same way I described earlier this morning, about the weaving and so on, that point induced Mr. Bourke - (Objected to).

10

Q: Tell us what was said? A: I can't remember what was said, but following his observation of the work he made those adjustments

Q: Well now, how did it work after that? A: The improvement in the performance of the machine was not very noticeable; I would not say there was no difference, but it was not very noticeable.

20

Q: Was there any sprocket jumping or track spinning? A: Yes, there was in that time.

Q: Was it about the same as you had previously described? A: About the same; nothing outstanding about it, about the same.

Q: Did you call Mr. Bourke's attention to the tracks? A: Yes.

Q: And the trouble with the spring tension?
A: Yes.

30

Q: And did he make any offer concerning the tracks? A: Yes, he did; as a matter of fact he examined the tracks very closely with me and he said the tracks appeared to be unsatisfactory and that he would endeavour to have a new set of tracks over for us. He requested me to make a full report of all our complaints and have it sent down to Sydney for transmission to the Breda Company, and he also told me he was going to make a report to his company on what he found.

40

Q: Well then, did you discuss anything with him; did he give you any advice concerning the clutch?

A: Yes, I believe he did. He mentioned something about more grease. There is a grease nipple, I believe, in the vicinity of that clutch, and he said by the application of more grease the clutch trouble would probably be eliminated; that clutch trouble was the jamming of the clutch; that is distinctly different from the slipping of the clutch.

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F.E.Bowman
Examination
continued

10 Q: As far as the slipping was concerned, did he give you any advice that you recall? A: Not that I can recall.

20 Q: As far as the jamming of the clutch was concerned, what was that trouble? A: That was a thing that I do not know exactly when it developed, but round about that time, it had been in operation for some time before that developed. I think the two clutch troubles were related insofar as slipping of the clutch caused heat to be generated, and when that heat became excessive the shaft and some of the mechanism round about there became overheated which caused the jamming. The jamming took place this way, that when moving along, in gear, of course, and the driver wanted to stop the machine for some reason or other, he just kept going; he pressed the clutch pedal down but the clutch was not released; nothing happened. In other words, the clutch mechanism inside was jammed tight on the shaft and the clutch itself could not operate or be released and it was relative to that that Mr. Bourke suggested that we use more grease.

30

Q: Did you see that happen? A: Of yes, I saw that happen.

Q: On a number of occasions? A: On at least one occasion.

40

Q: And now we have got the clutch jammed, what was the cure for it then? A: The cause of the thing was heat, so the cure was to let the thing cool off, so that the tractor was stood down for a quarter of an hour or half an hour until the clutch became free again.

Q: And then it was started working again and you could disengage the clutch? A: That fault

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continued

was most pronounced with dozing, because it is in that operation the clutch is used quite a lot.

Q: Now, as far as that was concerned, he suggested, did he, that you pack it more with grease?

A: Not actually packing, it was a case of forcing more grease in.

Q: And did he tell you he thought the oil trouble would improve? A: He told me that he thought the oil trouble would diminish with use. Actually it is quite a common fault with new tractors, they use a bit more than normal amount of oil; it does not always occur, sometimes it does, and he thought that was the cause there and the oil trouble would gradually become normal.

10

Q: Had you, in your experience, ever known tractors of this size to have such a high consumption?

A: No.

Q: He asked you to send down a report? A: That is correct.

Q: And then, on the 14th August - (Letter dated 14th August called for, together with report - produced) - You complained in that letter about two things that you have not mentioned. I think the first is the absence of any operating instructions or spare parts list? A: That is so, they did not arrive with the tractor when it was delivered, and we complained because we thought they were necessary and they should always accompany any machine. (Objected to).

20

Q: They were not there. Did you ever get them?

30

A: I believe we got a Manual of some sort in Italian to start with, and we asked for a translation of that. I am a bit hazy on that point. I know we did receive something very late, or very soon before I left.

Q: At any rate, up to the end of 1951, did you have any Manual? A: Not that I know of.

(Objected to - not in particulars).

MR. MEARES: I ask leave to tender amended copy of the declaration and to make these amendments in accordance with the document.

40

MR. REYNOLDS: I have no objection provided the

plaintiff pays any costs occasioned by the amendments.

(Amended declaration tendered)

HIS HONOR: I grant leave to amend.

MR. REYNOLDS: There will be some consequential amendments to the pleas.

HIS HONOR: It would probably be advisable to file amended issues.

MR. MEARES: That will be done.

10 MR. REYNOLDS: I would ask Your Honor to deal with the costs specifically.

HIS HONOR: The plaintiff is to pay the costs occasioned by the amendment.

(Called for letters dated 22nd November, 1954 from plaintiff's solicitors to defendant's solicitors, also letters dated 13th November, 1956, 11th October, 1956 30th October, 1956 - produced).

20 (Bundle of letters dealing with particulars tendered and marked Exhibit F.)

30 MR. MEARES: I ask leave to amend the particulars, the letter of 22nd November, 1954, under G.6 to "Overheating, slipping and seizing of the clutch" adding the word "Slipping", and to add a further particular. I think we will be submitting that the clutch was of unsuitable design; I think that is covered; I would allege there is a further particular that there was not forwarded with the goods, or a reasonable time thereafter, any proper or adequate instruction manual or spare parts list. (Discussion ensued).

HIS HONOR: I will not allow that one.

MR. MEARES: Q: You might tell me this, after Mr. Bourke had come up and made those adjustments which you have described, and you had had a discussion, as you described, was the machine then put back to work? A: Yes.

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continued

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continued

Q: And did it work until some time round about the 10th or 12th August, 1951? A: That is so.

Q: And during that time, after Mr. Bourke came up and until the machine was actually grounded, how did it perform? A: Much the same as before, with the exception that the slipping or jamming of the clutch, which I referred to earlier, became much more pronounced.

Q: And to what extent was it affecting the efficiency of the machine? A: To the extent that, when dozing particularly; when the clutch is used more than with the scoop, it affected the time taken to do a certain amount of work, affected the efficiency of the work done or the amount of work done in the day, due to the fact that when the clutch heated, as I described earlier, the tractor had to stop work until it cooled off sufficiently to start work again.

10

Q: And this clutch trouble, was that towards the end or was that all over? A: When dozing.

20

Q: It was quite frequent? A: Quite frequent.

Q: Well, you went down to Sydney and you took down a report with you, didn't you? A: That is so.

Q: On or about the 15th August? A: Yes.

Q: And did you see Mr. Corney? A: I did.

Q: And did you show Mr. Corney your report of 15th August, 1951? A: That is right.

Q: And did he read it? A: Yes, he read the report.

30

Q: And did you discuss it with him? A: Yes, I discussed it with him.

Q: Do you remember what was said about it?
A: No, I really cannot remember exactly what was said at all.

Q: Might I ask you this then; Can you recall whether or not he ever said anything to you concerning this report, to the effect that there was no substance in any of your claims, or they were

false or exaggerated, or anything of that sort?

A: Nothing of that sort, no.

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Q: Did he make any suggestion to you as to what you and he should do? A: Oh, yes; he suggested that I go with him down to see a Dr. Heger who he introduced to me as an import agent concerning these tractors.

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Q: And Mr. Corney was there? A: Yes.

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Examination
continued

10 Q: And did you have a conversation with Dr. Heger concerning the troubles that you had been experiencing? A: Yes, Dr. Heger read the report and he suggested to me.....

Q: Was Mr. Corney there? A: Yes, and Dr. Heger suggested to me....

MR. REYNOLDS: Q: Can we have his words? A: I cannot recall his exact words.

20 MR. MEARES: Q: Give us to the best of your recollection? A: In effect he said to me, "I would like you to make a full report of this matter substantially as you have there, or if that is your report, send that down to me and I will send that on to the Breda Company in Italy with a translated copy in Italian and also with a covering letter from myself", and he did say also something to the effect he was sure that the Breda Company would meet our reasonable demands.

(Luncheon adjournment).

AT 2.10 p.m.

30 Q: I think I asked you, prior to the adjournment, concerning the clutch slipping, and you described it. Did you have occasion to observe that on many occasions? A: Quite a number of occasions really. It was my custom to visit all work periodically, as often as I could, and approximately twice a week, I think, I would say, I visited the job that this tractor was concerned with, and on every occasion slipping of the clutch was in evidence.

40 Q: How was that affecting its performance?
A: It retarded the tip by reason of the fact

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Examination
continued

that the tractor couldn't pull its proper load or push its proper load.

Q: And now, I do not know whether you said this, but you were telling us you went to see Dr. Heger, and previously to that you had been to see Mr. Corney and you had shown him particulars of your complaints and you said he had read them?

A: That is right.

Q: And prior to you going to Dr. Heger did he, or did he not make any mention of taking the matter up with Breda? A: Yes, Mr. Corney said to me something to the effect that we should take the matter up with the Breda Company and he thought that they would help us.

10

Q: And then you subsequently went across to Dr. Heger? A: That is correct.

Q: And you discussed these various performances with Dr. Heger and I think it is fair to say Dr. Heger himself is not a technical man at all?

A: I understand not.

Q: And then you have told us it was suggested there by Dr. Heger that he would transmit this letter of complaints to the Breda Company.

20

Q: Yes.

Q: Well, did you then send a letter to the Breda Company? A: Yes, when I got back to Ashford a letter was duly sent. One to Dr. Heger for transmission to the Breda Company and another copy was sent to the Italian Legation for transmission to the Company.

Q: And did you subsequently receive a reply from the Breda Company to your letter of complaints?

30

A: Yes, we did.

(Copy of letter forwarded to the defendant called for - produced.)

Q: Would you have a look at that document and tell me whether that is the letter the plaintiff sent to the Breda Company, together with the attachment? A: Yes, that is the letter.

MR. MEARES: I will tender copy of that letter and

copy of the reply forwarded by Hedesan & Company as produced by Mr. Reynolds.

(Mr. Reynolds objected to tender of reply pressed - discussion ensued.)

MR. MEARES: I call for any reply or any letter written by the defendant to the Breda Company or Hedesan & Co. in answer to this particular letter ---

MR. REYNOLDS: Not produced.

10 MR. MEARES: Then I press the tender, Your Honor.

(Further argued)

I have called for its production under subpoena.

MR. REYNOLDS: The documents under subpoena have been handed to my friend. (Further argued.)

MR. MEARES: I state now, Your Honor, that document is not produced on subpoena.

20 Now I produce a letter from Hedesan & Co. to Dependable Motors, dated 18th October, 1951.

MR. REYNOLDS: I object to tendering of letter dated 18th October, 1951.

HIS HONOR: Are you tendering this in order to show that the reply from the Breda Company was sent?

MR. MEARES: There is also the last paragraph - "We request that you contact them" (Further argued).

30 HIS HONOR: On the question of damages - as to reasonableness - it might be admissible.

MR. REYNOLDS: It is my submission, Your Honor, that it may be admissible in reply, but not at this stage.

MR. MEARES: I would concede that the proper time, on that basis, is in reply.

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F.E. Bowman Examination continued

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(Letter dated 4th September, 1951, from
plaintiff to Breda Company, tendered and
marked Exhibit G.)

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Evidence

(Other documents marked for identification).

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F.E.Bowman
Examination
continued

MR. MEARES: Q: You have told us that you have
had experience with the operation of tractors
elsewhere? A: That is right.

Q: Did that experience extend to road work in
various shires throughout the State? A: Yes.

Q: And to the use of graders, both with scoop
and with blade attached? A: That is right. 10

Q: And in road work involving clearing and grad-
ing, and construction and re-forming of roads?
A: That is right.

Q: In that connection have you had any oppor-
tunity of seeing numerous types of graders in op-
eration from time to time? A: Tractors, yes.
I have seen quite a variety of tractors in use.

Q: You have also mentioned your qualifications
as an engineer? A: That is correct. 20

Q: Having in mind the trouble you had with this
grader and what you observed as to its faults, in
your opinion was it capable of carrying out road
construction work with the 6-8 yard scoop or with
the dozer blade provided? A: That is rather a
difficult question to answer yes or no to. It
was capable of operating satisfactorily when we
first got the machine but, in my judgment, the
machine was not capable of operating satisfactor-
ily for a reasonable time - for a reasonable
working life. 30

Q: What do you mean by "reasonable working life"?
A: The working life that would be expected from
a machine bought for such a purpose.

MR. RENOLDS: I object to the last part, Your
Honor.

MR. MEARES: Q: Was it satisfactory for the pur-
pose I have mentioned to you when it was being

used by the council? A: No, certainly not.

Q: Bearing in mind its performance whilst it was being operated for the council, what did you think as to its future? A: My opinion was that it had very little future life.

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CROSS-EXAMINATION

F.E.Bowman Examination continued

10 MR. REYNOLDS: Q: On what date did your appointment as Shire Engineer to the Ashford Shire become effective? A: That would be the day when I commenced duty with the Ashford Shire?

Cross-examination

Q: That is right? A: It was early in April, 1951.

Q: Does that mean, clearly enough, that you were not a servant of the council on this date - on the 12/13 March - when you interviewed Mr. Corney? A: That would be correct.

Q: Indeed, I suppose you were employed by the Glen Innes Shire? A: The Glen Innes Municipality.

20 Q: You were its servant and you were being paid by that municipality? A: That is correct.

Q: I gather you had an interview with the Mayor of the Ashford Shire Council prior to this date - prior to the day when you went to see Mr. Corney? A: I would not be certain of that. I went out to the Ashford Shire and I spoke to the then Engineer but I am not sure whether I met the President or not.

30 Q: Have you not a clear recollection whether you were interviewed by the President when appointed to this post? A: After my appointment I visited Ashford a second time.

Q: I am asking whether you have any recollection of being interviewed by the President of the shire before you were appointed to the post of Shire Engineer in the Ashford Shire? A: I am not quite certain of that. I spoke to the

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F.E.Bowman Cross-examination continued

President but I am not sure whether it was some time prior to or immediately after my appointment.

Q: It would follow from that that you would not have the faintest recollection of one sentence of any conversation you had with the President?

A: That is right.

Q: And that interview, if it did take place, would have taken place in the month of March, 1951?

A: Yes. That would be right.

Q: I suppose you made a written application for the position? A: Yes.

10

Q: I suppose that in your application you set out your experience as an engineer? A: Yes.

Q: And amongst other things did you state you had had long experience with earth-moving equipment? A: Yes; not particularly long, but sufficient.

Q: It would be quite a large part of a shire engineer's duty to supervise and to be familiar with earth-moving plant? A: Yes.

20

Q: That is so particularly in country districts where new roads are being constructed and opened up? A: Yes.

Q: Is that where your experience had been? A: Yes.

Q: May we take it that by the 12th March the officers of the plaintiff council would know of your experience in respect of earth-moving machinery - (Objected to; disallowed).

Q: There would be in the possession of the council the application which you had made? A: Yes.

30

HIS HONOR: Q: That would be before the 12th March? A: Yes.

MR. REYNOLDS: Q: Do you say that Mr. Heyward rang you up? A: Yes.

Q: Where did he ring you at? A: I believe I was staying with my mother-in-law in Penshurst.

Q: You were living somewhere in Sydney at the time? A: Yes.

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Q: What did he say to you? A: He told me the council was interested in purchasing a tractor and he gave me the name---

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Q: Would you give us the words as far as you can? A: He said to me that the shire was interested in purchasing a tractor.

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10 Q: A bredda tractor? A: Yes. I believe he did mention the name of it. He asked whether I would be so kind as to go and have a look at the tractor it could be seen at Dependable Motors, Parramatta Rd. - and I said, "Yes. I will probably go and see them tomorrow." It was some time during the week anyway.

F.E.Bowman
Cross-
examination
continued

Q: Was that the whole of the conversation? A: There was nothing else said besides a few pleasantries.

20 Q: Had you been to Ashford previously? A: Yes. That is so.

Q: Have you some recollection of having a conversation with the shire engineer when you were up there? A: Yes. I spent some time with the engineer.

Q: Of course, nothing was said about a new tractor then? A: I am not sure about that.

Q: Is there anything you can recollect? A: Nothing precisely. There was some mention made about a new scoop.

30 Q: Did you see it? A: I am not sure of that at all.

Q: Just to remind you - I suppose the Clerk told you they already had a P.C.U. up there and - A: There was some mention of that, but I do not know whether the Clerk told me or not. I knew when I went to Dependable Motors that we did not want a P.C.U.

40 Q: May not that have been a piece of information which you had obtained when you were up there earlier? A: It may have been.

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F.E.Bowman
Cross-
examination
continued

Q: You cannot remember whether the Clerk mentioned that to you or not? A: I cannot remember whether then or during the conversation over the telephone.

Q: How long did you spend out at Dependable Motors on this day in March? A: It would be at least a half hour. It may have been more than that.

Q: Was it not a lot more than that? A: It might have been an hour. 10

Q: It might have been 2 hours? A: No.

Q: What is the best of your recollection now as to how long you were there? A: It would be somewhere between a half hour and an hour, I would say.

Q: Was Mr. Corney with you the whole time? A: Yes; excepting before I asked for him.

Q: You had never met him before? A: No.

Q: How many tractors did you see in the place on that occasion? A: I am not sure. I saw the particular tractor that was in mind. 20

Q: Did you see any other tractor? A: I really cannot be sure of that. I have a hazy recollection of seeing another machine - a smaller machine. I could not be sure as to the number of tractors there were.

Q: Did not you, yesterday, give us some details of the conversation you had with Mr. Corney? A: As far as I could remember.

Q: And you appreciated, of course, that it is now 5 years and 8 months ago? A: Yes. 30

Q: Have you sought to reconstruct that conversation as to what took place or have you a clear recollection of the matter? A: I have a clear recollection of some of the conversation. I cannot recall the whole of the conversation.

Q: When you came into court yesterday were you or were you not conscious of the importance of it

being established that you made it clear to Mr. Corney exactly what you wanted the tractor for?
 A: I was quite conscious of that.

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Q: I suppose that that had been discussed with the council's legal advisers? (Objected to; disallowed).

Plaintiff's
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Q: But you were fully conscious of the importance of that? A: Yes, quite.

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F.E.Bowman
 Cross-
 examination
 continued

10 Q: You purported to recollect exactly the conversation which led up to this statement, did you not? A: Which statement do you refer to?

Q: I refer to your statement that the council required a tractor for particular work? A: Yes.

Q: Is that a reconstruction or your recollection precisely? A: As I have said before, I cannot recollect the precise words.

Q: Did Mr. Corney hand to you a brochure of that nature (Indicating document)? A: I do not think so. I do not recall it.

20 Q: Do you deny it? A: Not positively - I could not. I am not sure in my mind whether he gave me a brochure like that or not. I do not think so.

Q: Did you ask him if there were any brochures or literature on the subject? A: I have a hazy recollection of asking him for something and also of him saying that the Ashford Shire Council had something along the lines of that literature.

30 Q: Did you say, "Well, cannot I have a look at it? I am here to inspect the tractor"? A: The tractor was there for me to inspect.

Q: You were not interested in seeing any literature on it. Is that what you mean? A: Not exactly I am not clear whether he gave me any literature or not.

Q: Are you or are you not clear whether you asked him for some literature? A: I could not swear to that.

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F.E.Bowman
Cross-
examination
continued

Q: Let me show you this. (Document handed to witness): Would you see if you do not recollect it? A: I believe I have seen this before.

Q: Did not you see it and did not you have a copy that day in March? A: That is what I cannot say.

Q: You may have had it, but you cannot recollect now? A: That is the position.

Q: You do not know whether Mr. Corney was a sales manager or what he was. You thought he was the sales manager? A: Not precisely. I was told that Mr. Corney was the man to see.

10

Q: You had no idea whether he had any knowledge or experience as to the operation of tractors at all? A: No.

Q: As far as you were concerned he might not know anything about the operation of a crawler tractor? A: He might not.

Q: You, on the other hand, had had quite a long experience with such equipment? A: Yes.

20

Q: This one differed from those you had known in that it was a Continental tractor and most of the tractors used in this country are American? A: There are some British tractors.

Q: Most American and some British? A: Some British.

Q: At this point of time, at the beginning of 1951, it was impossible to procure an American tractor except on 2-years delivery? A: I know there was a very long delivery period with American tractors.

30

Q: I think you would agree that, from your experience, the really good tractors are the T.D. series International and the Caterpillar D series? A: Yes. They are two good ones.

Q: Are they not the really good ones? A: There are others. Those two are good.

Q: If you can get those you do not go past them? A: It all depends on your purpose.

Q: For your purpose - used in the construction of roads? A: Price has some influence, of course. There are other makes, such as the "Oliver" - a couple of English tractors.

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Q: And they were unprocurable in the early part of 1951? A: That is so. All tractors were at a premium then.

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Q: Unprocurable? A: They were at a premium.

F.E.Bowman
Cross-examination
continued

10 Q: They were available in this city some Continental tractors? A: That is right.

Q: Including the Breda tractor? A: That is right.

Q: Were you not told by Mr. Heyward that the Shire Council desperately needed a tractor at that point of time? A: I do not think the word "desperately" was used, but I know they needed a tractor. I cannot recall anything along the lines of being led to believe that they wanted it desperately. They did need a tractor.

20 Q: They needed it because they had acquired a power-control unit and a Le Torneau Scoop and they did not have the equipment to use them with? A: That is right.

Q: And that is where you were asked to go and inspect the tractor? A: That is correct.

30 Q: Going back now to the day when you were in Mr. Corney's showroom - do you recollect saying this clearly - "Tell me something about it. What are its capabilities. What is its horse power? A: There were words to that effect.

Q: Are you quite sure you used those words. I do not mean to the finest detail? A: Words to that effect - the meaning that those words convey.

Q: Did not he tell you the horse power rating? A: Yes.

Q: Was it not 85 h.p.? A: That is right.

Q: Did you accept that figure? A: Yes, I did.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: What horse power rating did you accept that as - the maximum horse power rating, the "load" horse power; the drawbar horse power; or the belt horse power, or what? A: I cannot quite say.

Q: You have told me you accepted it. What did you accept it as? A: Having in mind the capacity of the scoop I would say that at the time I would have accepted that as the maximum horse power.

Q: What had the capacity of the scoop to do with it? A: It had quite a lot to do with it because the capacity of a scoop determines the force required to drag it. 10

Q: So you accepted that as the maximum horse power? A: Yes.

Q: That means the horse power which the motor is capable of developing? A: Yes.

Q: At how many revolutions did you accept that as being the maximum horse power? A: I cannot remember. 20

Q: Revolutions were mentioned? A: Yes, I think so.

Q: By whom was that mentioned? A: I cannot remember who mentioned that.

Q: Am I right in suggesting that that is just one scrap of the conversation which you remember, - apart from its general context? A: Yes, I think so.

Q: Did you ask Mr. Corney about its weight? A: That is so. 30

Q: Do you recollect whether you looked at it - at the special pamphlet with the specifications, where the weight was stated as being 15,900 lbs.? A: No. I cannot recollect that.

Q: Is it your recollection that Mr. Corney told you "7 tons"? A: That is so.

Q: That is, approximately, the correct weight of the tractor so far as you know, is it not? A: Well, to be quite honest, I have never weighed the tractor or had it over a weighbridge. 40

Q: Before coming to the next matter, in determining the capacity of a crawler tractor, are there not two basic factors - the horse power output and the weight of the tractor. Putting it simply, if you have a light tractor is not there a complete waste if you have a very high horse power motor? A: That is so.

10 A: And, of course, it is a matter of getting a balance between the horse power capacity and the weight? A: That is so.

Q: When you inspected this tractor you accepted the position that it weighed 7 tons approximately? A: That is right.

Q: Today you are not prepared to say that that is anything but correct? A: I do not know whether correct or not.

Q: You do not suggest it is incorrect" A: I do not know.

20 Q: When you were told 7 tons, it was your view then that there was an imbalance or lack of balance between the maximum horse power and the weight? A: Slightly, yes. I thought it was a bit low for the power.

Q: Putting that another way, that means there would be a good deal of horse power in reserve which, of necessity, would be wasted? A: I would not know what proportion.

Q: Putting it this way, say "A deal?" A: Some.

30 Q: Is it not the position that when there is a lack of balance between the power which is being put out at any given moment from a tractor, and its weight, the tracks slip? A: That is right.

Q: And in one sense that slipping of the tracks is a safety valve - in one sense? A: It could be so.

Q: Is it not so? A: Yes. I would think so. That is right.

40 Q: Does it not prevent an undue strain being put on the machine by the greater power of the motor? A: An undue strain on what?

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5
F.E.Bowman
Cross-
examination
continued

Q: On the tracks or any of the transmission components? A: It is not so with the tracks.

Q: Well, the transmitting components? A: Not entirely. I take the view it is a safety valve on the motor.

Q: You remember that there was clearly in your mind on that day a question as to whether this tractor was heavy enough for your purpose?

A: That is so.

Q: And you tell His Honor that, having that doubt you then put yourself into the hands of Mr. Corney to rely on his skill and judgment as to whether it would do the job? A: That is so.

10

Q: What was your knowledge at that point of time as to what he knew about crawler tractors? A: I had no knowledge whatever of his knowledge of crawler tractors.

Q: You told us yesterday that you had this knowledge; that he said "There are 7 or 8 others of this particular make of tractor in operation at the moment? A: That is so.

20

Q: Will you swear he said that? A: To the best of my knowledge that is what he did say.

Q: Putting it fairly, are you sure you are not reading back into the conversation something which you did not know until afterwards? A: No. That is right.

Q: Did you say that he went on to say - that he mentioned one up the North Coast - "I think he" mentioned Casino. I am not sure of that point". Kyogle was it? Moore Bros. of Kyogle. Is that your recollection? A: It may have been.

30

Q: Anyway, it was up the North Coast? A: It was on the North Coast area.

Q: On your recollection it was Casino, but you are not sure? A: I am not sure.

Q: I suggest that at some stage you knew that Dependable Motors had sold a tractor to a man at Kyogle? A: I did know that, but not until some time later.

40

Q: And then you said he told you there was another one up round Tamworth, I think, and that he said they were giving good service?

A: That is correct.

Q; Will you swear that was said on 12th March, 1951? A: I will swear that Mr. Corney said that the tractors in operation had given good service.

10 Q: Will you swear that he told you on the 12th March, 1951, that there was another one "up round Tamworth somewhere, I think, giving good service? A: You put me in a very difficult position. I cannot swear to something which I do not really recollect at this time.

Q: You swore it yesterday as having been said?

A: To the best of my knowledge, yes.

Q: What do you say now, was it said, not said, or is it that you do not know? A: Well, I believe it was said.

20 Q: You found out subsequently that Dependable Motors had sold a tractor to Armstrong Bros. at Tamworth? A: No. No.

Q: What is that? A: I did not. I did not know there was one at Tamworth. I knew there was one at Gunnedah, but not at Tamworth.

Q: I put it to you that the tractor eventually sold by Dependable Motors to Tamworth buyer was not sold until 2 months after the date I have given. (Objected to).

30 Q: I want you to assume, if you will, that it will be established that only one tractor had been sold in the Tamworth district; that it was sold to Armstrong Bros. and that it was not sold until the month of May, 1951. Would you just assume that? A: Yes.

40 Q: Now I ask you, might it not be that you are reading back into the conversation of 12th March something which you did not know until afterwards - (Objected to; allowed) A: I did not know that Armstrong Bros. at Tamworth had bought a Breda motor until shortly before I left Ashford.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: Is that the first time you knew? A: That is the first time I knew.

Q: Was it not discussed when you came down to Sydney in August? A: I had no knowledge of it then.

Q: What do you say as to when you first knew, if you did; about one being sold to Moore Bros., to anybody, at Kyogle? A: The first recollection I have of any other sale of Breda tractor was some reference on the telephone one night at Ashford.

10

Q: When, if ever, did you know about the sale of a tractor to Moore Bros.. or anybody at Kyogle? A: I did not know the name of the man or the name of the company at Kyogle at all - never.

Q: Nobody? A: At Gunnedah there was a man by the name of ----

Q: I am not asking about that. I am asking you when? A: Quite a long time after I went to the Ashford Shire Council - probably a year. It may have been longer.

20

Q: What is your recollection about the North Coast - what he did or did not say to you with reference to there being one up at Casino or somewhere near there on the North Coast - and that it was giving good service - on the 12th March, 1951? A: Will you repeat that again?

Q: What is your recollection now as to whether Mr. Corney mentioned to you on the 12th March, 1951, that there was a tractor on the North Coast, say in the Casino district, giving good service? A: He mentioned to me that there was a tractor in service on the North Coast. I thought it was Casino, but it may have been Kyogle. But he did say that it was giving good service.

30

Q: Did you ask him? A: He mentioned that some of the tractors were doing clearing and some were engaged on dam sinking. Which one - that first operation - I do not know.

Q: Mr. Heyward was the Shire Clerk at that time? A: That is right.

40

Q: Is he still the Shire Clerk? A: As far as I know, yes.

Q: Have you seen him recently? A: Yes.

Q: Is he in court? A: That is right.

In the Supreme Court of New South Wales

Plaintiff's Evidence

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(Further hearing adjourned until 10 a.m. Friday, 16th November, 1956.)

F.E.Bowman
Cross-examination continued

No.5

EVIDENCE OF FREDERICK ERNEST BOWMAN

Cross-examination continued

10

IN THE SUPREME COURT }

OF NEW SOUTH WALES }

IN CAUSES }

CORAM: FERGUSON J.

ASHFORD SHIRE COUNCIL

- v -

DEPENDABLE MOTORS PTY. LTD.

THIRD DAY: FRIDAY, 16TH NOVEMBER, 1956.

FREDERICK ERNEST BOWMAN

Further cross-examined:

20

MR. REYNOLDS: Q: Do you remember telling me yesterday when I asked you "You found out subsequently that Dependable Motors had sold a tractor to Armstrong Bros. at Tamworth". Do you remember answering "No"? A: Yes.

Q: Was not that wrong? I will read my question again (Question referred to repeated). Do you remember that? A: I do not remember the answer.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

I remember your asking me that question. What I do remember was saying that -

Q: Just a moment. First of all, do you deny that was the answer you gave - "No"? (Objected to).

Q: Do you remember giving that answer - "No?"
A: Honestly, I cannot.

Q: Let me give you the next question. I asked you, "What is that?" and did you then say - you cannot remember saying "No". Is that what you tell us? A: That is a fact. I cannot remember saying "No" in answer to that question.

10

Q: The next question asked - (p.39 of the transcript) - I asked you "What is that?" and you answered "I did not...." Do you remember that answer?
A: I would like you to finish the lot.

Q: You went on to reply, "I did not know there was one at Tamworth. I knew there was one at Gunnedah but not at Tamworth"? A: At that time.

Q: Let me get back to my question again. Listen to this question - you were asked, "You found out subsequently that Dependable Motors had sold a tractor to Armstrong Bros. at Tamworth". Do you remember that question being asked? A: Yes.

20

Q: Did you understand the question? A: Yes.

Q: If your answer was "No", was that answer true or false? A: It was true.

Q: That you did not find out subsequently that Dependable Motors had sold a tractor to Armstrong Bros - (Objected to).

30

Q: Did you understand that question when it was asked of you? A: I think so.

Q: If you answered "No" - was the answer true or untrue? A: Well, Mr. Reynolds -

Q: Can you answer that? A: I would say that the answer was incorrect because I did not -

Q: You were then challenged on it by me by this expression, I suggest, "What is that?" You

repeated that answer, did not you - "I did not"?
 A: I think I qualified that.

In the Supreme
 Court of New
 South Wales

Q: "I did not know there was one at Tamworth".
 Was that true? You did not know there was one
 at Tamworth? A: At the time of the purchase
 of the tractor -

Plaintiff's
 Evidence

No.5

Q: I was asking about subsequently? A: Yes.

F.E.Bowman
 Cross-
 examination
 continued

10

Q: You know nothing about whether any tractor
 was, at the time, purchased? A: No, except-
 ing what Mr. Corney told me.

Q: Do you say that you thought I was referring
 then to the time of the conversation with Mr.
 Corney on the 12th March 1951. Is that what
 you now tell His Honor? A: Yes.

Q: Did not you hear the word "subsequently"?
 A: I do not recall.

20

Q: Do not you appreciate that I was putting to
 you that you were reconstructing a conversation
 in March by reason of facts which you had found
 after the 12th March? A: Yes. I remember
 that.

Q: Did not you understand the point of my ques-
 tion, that you subsequently ascertained that Arm-
 strong Bros. of Tamworth had acquired a Breda
 tractor from Dependable Motors. Did not you un-
 derstand that? A: If I said no in reply to
 that question -

30

Q: Did you understand that that was what I was
 putting to you? A: Well, yes. I understood
 the word "subsequently"? but I cannot recall
 having taken the meaning of the word into my
 mind.

Q: Do you now say that the first statement -
 that the first time you knew that there was a
 Breda tractor at Tamworth was just before you
 left the Ashford Shire in the year 1953?
 A: That would be right.

40

Q: Do you not know that there was a letter
 written by your council to Armstrong Bros. at
 Tamworth? A: I do not remember that.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: Was there not a letter written relating to a Breda tractor? A: I cannot remember that.

Q: I will show you the minute book. See if that refreshed your recollection. Look at the folio at which the book is open. Under the heading "Armstrong Bros". - have you read that? A: Yes.

Q: Does that bring anything back to your mind? A: Very vaguely.

Q: Does it vaguely bring back to your mind that you knew in February 1952 about Dependable Motors having sold a tractor to Armstrong Bros. at Tamworth? A: I cannot remember that. 10

Q: Would you have been consulted about that letter - the context of it? A: No.

Q: Do you remember that you were not? A: I cannot remember having seen the letter.

Q: After looking at it now - is it not a fact that you must have known in February 1952 that there was a Breda tractor which had been sold to Armstrong Bros. at Tamworth - having read that minute? (Objected to). 20

Q: My question was, "Having looked at that minute would not you agree that you must have known by February 1952 that there was a Breda tractor in the possession of Armstrong Bros. at Tamworth?" A: That is so.

Q: When you said yesterday that you did not know that Armstrong Bros. of Tamworth had bought a Breda tractor until shortly before you left the Ashford Shire that was not right either? A: In time, it was not right. 30

Q: Time was the only factor we were concerned with, was it not? A: Time - as to length. I think I made myself quite clear that at the time of the purchase of the Breda tractor I did not know.

Q: I was asking you yesterday when you first knew and you said it was shortly before you left the Ashford Shire? A: That is correct.

Q: Did not you intend to convey to His Honor 40

then that it was late in 1953? A: To the best of my knowledge up till yesterday, when you proved that to be incorrect, the first I knew of the Breda tractor at Tamworth was shortly before I left Ashford when I was asked to visit the solicitor's office in Inverell.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: All I am putting to you is that your memory was clearly at fault? A: That is right - as to the time.

10 Q: How many, if any, written reports did you make to the Shire Council about this Breda tractor? A: I would not be certain of that. At least two, probably three.

Q: When you say at least two do you include in that number the one we have seen bearing the date 14th August, which was produced at the request, you say, of Mr. Bourke? A: Yes.

Q: Was that the first written report you had made about that tractor? A: I cannot recall.

20 Q: Is it not the truth that you believe you made a report shortly before the 12th July 1951 in writing? Do you believe you made a report in writing shortly prior to the Council meeting which was held on July 13th 1951? A: No. I do not remember that. It may be so, but I do not remember.

Q: You said, when asked about it - do you remember what you said about it? A: No.

30 Q: At p.20 of the transcript is reported this question by Mr. Meares - "Did you make a verbal report to the Council at its meeting on the 13th July?" and your answer, "I made a report to the Council."? A: Yes.

Q: Did you answer that question with care? A: Yes, I think so.

Q: You took care because you were not satisfied the report you made was a verbal one?

A: I was not sure whether the report was a verbal report or a written report.

40 Q: And then Mr. Meares assured you they had got such a report? A: Yes.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: Did you know the terms of the letter dated 16th July? Do you remember the letter? (Document handed to witness). Would you take this letter of 16th July and look at it. I particularly want to draw your attention to the first paragraph. Did you have that in mind when you had a doubt as to whether it was a verbal report or a written report? A: No.

Q: Had you seen a copy of that letter or that letter? A: Quite obviously I had seen it before leaving Ashford. I have not seen it since then.

10

Q: Do you tell us, to the best of your recollection it was only a verbal report? A: I said yesterday I did not know whether it was a verbal report or a written report. I reported to the Council - according to the record it must have been written.

Q: Is it not a fact that at no time had you reported to the Council, in writing, of what had passed between you and Mr. Corney? A: That is rather a difficult question to answer yes or no. There are several reports there. I have a recollection that I mentioned it in one of those reports - discussing certain things with Mr. Corney.

20

Q: I was asking about reporting, I want to make it quite clear, in writing as to what took place between you and Mr. Corney on the 12th March 1951? A: I do not recall reporting to the Council in writing about that.

Q: Would you agree that no correspondence which you saw or which you drafted ever referred to any assurance given to you by Mr. Corney? A: As to the purchase of the tractor?

30

Q: That is right? A: Will you say that again?

Q: That no correspondence between the Council and Dependable Motors ever referred - correspondence which you saw or which you drafted - to any assurance given to you by Mr. Corney on the first day? A: No; not that I can remember.

40

Q: When were you first asked to give an account in detail of the conversation which you had had

with Mr. Corney on the 12th March 1951? A: In the solicitor's office at Inverell.

In the Supreme Court of New South Wales

Q: In what year was that? A: It would be shortly before I left Ashford.

Plaintiff's Evidence

Q: Would it be fair to describe it as having been late in 1953? A: I think so. I made several visits to that office and I am not sure whether it was at the end of 1952 or 1953, but it was not very long before I left there.

No.5

F.E.Bowman
Cross-examination
continued

10 Q: Round about two and a half years after the conversation in question. Is that it? A: That would be so.

Q: Did you not give us some detailed account yesterday of what had taken place between Mr. Bourke and you on the 30th July 1951? A: Was that the time when Mr. Bourke came up there?

Q: When you ran the tractor for five and half hours and he made certain adjustments? A: That is right.

20 Q: Was there a report in detail made on that occasion? A: Yes. Mr. Bourke asked me for a report, and that report was duly given.

Q: I do not mean that report. I am referring to a report from you to the Council as to precisely what happened on that day. Did not you know that? A: To be quite honest, there are quite a number of reports on this matter and it is quite probable I did make a report.

30 Q: I am suggesting to you that you had an opportunity of refreshing your recollection in details as to the events of that day by reading a report which you made at that time? A: I have not seen it since it was written

Q: You have not seen a copy of it? A: There was never a copy of that report made to my knowledge, except in the office.

Q: Is not this report to which I am referring - dated 10th August 1951 - A: That would be the council meeting day.

40 Q: (Exhibit - minute book - handed to witness):
A: Yes.

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South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: The contents of that report have been drawn to your attention within the last few days?

A: That is right.

Q: And that has enabled you, with some confidence to refresh your recollection as to what took place on the 30th July? A: No sir. That report was never mentioned to me.

Q: But, have not the contents of it been gone through with you in the last few days? A: That is so.

Q: Did not you tell us yesterday that you had put yourself into the hands of Mr. Corney? You told us you did not know his experience - what his experience was? A: That is right.

Q: And, indeed, he was a man who did not know, according to you, what was involved in the carrying out of roadwork? A: I do not think I said that.

Q: Let us see what you did say? A: I did not know whether he knew of any road work or not.

Q: But he asked you what roadwork was and what it entailed. At p.4. of the transcript you said, "I said it will be engaged entirely on road construction work"? A: Yes.

Q: What did he say to that? A: He said something to the effect - I cannot recall his words but he inquired as to what that would entail.

Q: "What does that entail" - was the answer you gave? A: Yes.

Q: Was it not apparent to you, from that answer, that here was a man who did not know what was involved in road construction work? A: Not exactly.

Q: Did you think he was not telling the truth when he asked that question? A: No. He was seeking -

Q: You were, of course, an experienced engineer in road construction work? A: Yes.

Q: And he was a man who was asking you what road construction was? A: He was asking me.

10

20

30

40

Q: The answer, yes or no - he was asking you what road construction work entailed? A: Not exactly that. He was asking me exactly what work this tractor would be engaged upon.

In the Supreme
Court of New
South Wales

Q: Is this right or wrong - the evidence given by you? A: Yes.

Plaintiff's
Evidence

No.5

Q: Listen to this. He said to you, "What do you expect it to do?" and you said, "It will be engaged entirely on road construction work"; He then said, "What does that entail?" A: Yes, that is right.

F.E.Bowman
Cross-
examination
continued

Q: I suppose to one who is familiar with councils' work and the use of earth moving equipment in road construction there is nothing ambiguous about road construction work? A: No.

Q: And Mr. Corney asked you what that entailed. Did not you take from that that he was a man who had no particular knowledge of this work?

A: Well, I would say that his knowledge was very limited.

Q: Do you seriously tell His Honor that you put yourself, an engineer, into his hands as to what this tractor might be expected to do in respect of that work - (Objected to - pressed.)

Q: I put that expression to you yesterday and you agreed with it? A: I remember that.

Q: You understand the expression? A: I do. I understand it.

Q: Do you think that the expression is unfair in any way? A: I do not think so.

Q: I repeat the previous question - "Do you seriously tell His Honor that you put yourself, an engineer, into his hands as to what this tractor might be expected to do in respect of that work". Do you say that? A: Yes.

Q: Quite seriously? A: With certain limitations. You see, the point is this - this tractor was required to do certain work. Now, any tractor is designed to do work. The point is that I relied on Mr. Corney's word as to its capabilities to do certain work and to stand up to certain work.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: Although you did not know - you have already agreed with me that you did not know - of any particular skill that he had in the matter? A: I did not consider that was necessary.

Q: I think we placed it yesterday that Mr. Bourke came up there subsequent to the delivery of the tractor - about the 24th May? A: That would be the time that the bearing came. I am not sure of the date. The thing was delivered early in May.

Q: Early in May or in the middle of May? A: It would be about the 12th of May. Something like that. 10

Q: The 24th May - I think we agreed from some records yesterday that he was up there and that was, I suggest, to fix up some bearings that had failed?

A: That is correct.

Q: He next came up, according to the report, on the 27th July? A: That would be it.

Q: Was that the time when certain adjustments were made? A: That is so. 20

Q: Between those two dates - a period of approximately two months intervening - say from 24th May to 27th July - do you say that you had a telephone conversation with him? A: With Mr. Bourke?

Q: First of all, did you? A: I could have.

Q: I know you could have, but did you? A: I think I did.

Q: What was it about? A: I am sorry, but I cannot recall it now.

Q: Was it about a radiator core? A: Yes. The root of a tree had broken it. 30

Q: Did you talk to Mr. Bourke at any other time on the telephone? A: I could have.

Q: What is your recollection of the matter?
A: I cannot be certain of whether I did or did not.

Q: Mr. Bourke went up there three times? A: Yes.

Q: On 24th May the bearings were delivered and at the end of July when you gave the running test? A: That is right.

In the Supreme Court of New South Wales

Q: And you have never seen him again? A: No.
Q: Because, from what you tell us, the tractor was grounded round about 10 days, say round about a fortnight, after his final visit. Mr. Meares has suggested the 10th or 12th August.
A: Yes. The records will disclose that. I cannot remember the date.

Plaintiff's Evidence

No.5

F.E.Bowman
Cross-examination continued

10

Q: Do you know when it was grounded? Was it grounded on your instructions? A: It was grounded on Council's instructions.

Q: Was it grounded on your recommendation? A: Yes.

Q: In writing? A: No. I do not think so. I think it was discussed.

20

Q: May I take it that there was no written recommendation to you from your knowledge that the tractor should be grounded? A: When?

Q: At that time - before it was grounded?
A: There was no written recommendation that I can recall. To the best of my knowledge I discussed that with the Shire President.

Q: I am only asking whether there is a written recommendation. You say that there is none as far as you know? A: I do not think so.

30

Q: When Mr. Bourke was up there the first time, in May, the tractor was running reasonably satisfactorily? A: That is right.

Q: When he was up there on the 24th May the bearings were replaced and when he left it was running reasonably satisfactorily? A: That is so.

Q: And when he left at the end of July it was again running reasonably satisfactorily? A: Yes. It was running reasonably satisfactorily.

HIS HONOR: In July?

40

MR. REYNOLDS: Q: At the end of July? A: That is when he made the test?

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.5

F.E.Bowman
Cross-
examination
continued

Q: That is so? A: Right.

Q: Is not this what you in fact reported - this is the report of 10th August - the one I showed you this morning - "While the abovementioned work was proceeding the machine was carefully watched. It performed fairly satisfactory, except that when pulling heavily the engine overcame the weight and the machine tracks spun." A: That is so.

Q: Was that a fair statement of the performance of that tractor that day? A: Yes.

10

Q. It was watched for over 5½ hours on that occasion? A: That is right.

Q: It was scooping? A: That is right.

Q: It was not bulldozing? A: It was not bulldozing.

Q: Do you say that within a fortnight of that time the tractor was, to all intents and purposes, grounded and given up as useless? A: That is right.

Q: And on an oral recommendation from you to the Shire President? A: And discussions. That is right.

20

Q: Round about that time did you know of a reconditioned T.D.14 tractor being available to the Council? A: Yes.

Q: The Council then learned that it could buy a reconditioned International tractor? A: Yes.

Q: Did not the Council particularly want that tractor? A: It wanted a tractor.

Q: That one? A: The Council wanted a tractor to do certain work with.

30

Q: Was it not, to your knowledge, decided that if Council could get the purchase price of the Breda tractor refunded it would buy the reconditioned T.D.14 tractor? A: That is not right.

Q: What is wrong about it? A: The Council wanted another tractor besides the Breda.

Q: Listen to the question and see if you still disagree with it. I suggest it was decided, and formally recorded, that the Council if it could get a refund of the purchase price of the Breda tractor, would buy the reconditioned T.D.14 tractor - (Objected to).

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Plaintiff's
Evidence

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F.E.Bowman
Cross-
examination
continued

10

Q: Will you agree that you were a party to discussions that the Council should attempt to get a refund of the purchase money paid on the Breda tractor and thereupon to buy the reconditioned T.D.14 tractor? A: I cannot recall discussing that at all.

Q: You have told us in detail of what took place in the showroom in March? A: I told you scraps of conversation; not the full conversation.

Q: Have you a good memory? A: It is reasonably good.

20

Q: You were the Shire Engineer? A: That is so.

Q: You inspected the T.D.14 tractor? A: Before it was purchased - no.

Q: Were you consulted about whether the reconditioned T.D.14 tractor would be suitable for Council's purposes? A: Yes, I was.

Q: I suppose that you, as a Council officer, gave consideration as to whether Council - in discussions could afford to buy it? A: That is so.

30

Q: Do you remember that? A: I remember discussing the purchase of the T.D.14 tractor and the finances and inspection, and so on.

Q: Do you remember it being suggested to you at any stage that it should be bought if and when the Shire Council got a refund of the purchase money on the Breda tractor? A: I cannot say that I remember that particular section at all. It may be so. I cannot recall.

40

Q: Did you attend meetings of the finance committee at all? A: Yes, always.

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Plaintiff's
Evidence

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F.E.Bowman
Cross-
examination
continued

Q: Do you say that you have no recollection of that decision being made - when I say that decision to seek a refund when you got the refund to buy the reconditioned T.D.14 tractor? A: No. I have no recollection of that.

Q: But this much is clear, that when the representative of Dependable Motors was last in your area - Mr. Bourke - at the end of July, the tractor was working in the way you have described in the report dated 10th August? A: Yes. 10

Q: It is suggested here that the really serious thing wrong with the Breda tractor, the thing that makes it completely useless, is the clutch. Do you agree with that? A: That is one of the things really wrong with it. There were two really serious things wrong.

Q: Which were the two serious things according to you? A: The condition of the tracks - and their deterioration - and the clutch.

Q: They were the serious ones? A: They were the very serious ones. 20

Q: I refer you to the letter of 4th July, Exhibit "E", which you told us yesterday you had drafted? A: Could I hear something of the contents?

Q: "The Breda tractor purchased from yourself by this Council some weeks ago...very serious concern"? A: That is right.

Q: At that time you had seen Mr. Bourke on the 24th May? A: Yes.

Q: That was some six weeks previously? A: That is correct. 30

Q: You had spoken to him, possibly, before that, about the radiator core - on the telephone? A: That is right.

Q: And that was the whole of the dealings you had had with him up to that point of time? A: I think so. I am not sure of that.

Q: What was your purpose in writing this letter? (Exhibit handed to witness)? A: I think that had something to do with the oil consumption. 40

Q: You say it had something to do with the oil consumption? A: That is right.

Q: Did it not have everything to do with the oil consumptions? A: That is right.

Q: The only complaint which you were making to the vendor then, on the 4th July, was that there was excessive oil consumption. Was not that the only complaint which you were making? A: Yes.

10 Q: Where else were you making any complaints? A. When Mr. Bourke came up to Ashford.

Q: When? A: At the time of the installation of the new bearings. They were verbal discussions with him.

Q: Were they complaints? A: Yes, certainly.

Q: You did not refer to that? A: Not in that letter.

20 Q: Why did you put this bit in "Although the power output appears to be adequate for the weight of the machine"? A: That is as it is.

Q: Have you changed your mind about that since then? A: If I may explain. I have not seen that tractor for some considerable time.

30 Q: Today, you have not? A: No. And the power output of the engine would be near enough, say the same as when I left Ashford. The power out-put of the engine would probably be 90 per cent efficient. I do not know, in the circumstances. It is one of those things - the power output does decrease gradually over the period of the work.

Q: Does that mean you have changed your mind or that you have not? A: I am trying to explain the exact position. The engine, as distinct from the tractor.

Q: Do you mean the power output? A: Yes.

40 Q: You mean the power output would - A. The power output at that particular time was sufficient to overcome the weight of the tractor.

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F.E, Bowman
Cross-examination
continued

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F.E.Bowman
Cross-
examination
continued

Q: Is not that so in every well designed tractor?
A: Of course it is.

Q: What was the point in saying that, then?
A: To illustrate the slipping of the tracks.

Q: You were saying to them "They are - the tractor is, in my opinion, perfectly all right." Is not that what you were saying? A: Not in fact.

Q: Why the "although"? Why do you use the word "although"? A: Would you read that again?

Q: "Although the eight hours work"? A. I would say that the word "although" would be used there to indicate that the tractor motor was not being overloaded by the weight of the tractor or by the working of the tractor. 10

Q: But there was nothing wrong with the balance between the motor and the weight of the tractor?
A: No, not that at all.

Q: Is not that what it means? A: No. I do not think so.

Q: Do you tell us now that the oil consumption was not your main complaint at all; that you had other complaints which were more serious? A: Not at that particular time. Mr. Bourke had already been contacted and spoken to regarding the other complaints. This particular letter was relative to the oil consumption only. 20

Q: Before he came up there - the Council later decided that they would not work it any further and would ask for a refund of the money. Was not that done on the 13th July? A: At the July Council meeting, I think. 30

Q: Was that done on your recommendation? A: I do not think so.

Q: Was it not rather a drastic step at that point of time? A: It was a step that was considered necessary.

Q: Whether necessary or not - you considered it necessary. Is that what you said? A: No. I did not say that at all. After discussion with the Shire President on the subject - 40

Q: Was it, in your opinion, a drastic step to do so? A: No. Well, I suppose it was a drastic step in a certain sense.

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Q: You have written to people saying it is using 2 gallons of oil for eight hours' work and they have told you that was not an important point and then you said, "Give us our money back"? A: Yes.

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10 Q: And the only complaint made in writing, at any rate, is that it was using too much oil. Is not that the truth? A: At that stage.

F.E.Bowman
Cross-
examination
continued

Q: At that stage was it known that the T.D. 14 tractor was available? A: I cannot recollect that. I cannot recollect the date when the T.D.14 tractor became available. I cannot recollect when we got it.

Q: Have not you told us in detail how Mr. Bourke came up? A: Yes.

20 Q: The tractor was put to work again on the 30th July or thereabouts? A: That is right.

Q: Then you were told that about the 10th or 12th August it was put out of operation again? A: That is right.

Q: And a letter dated 4th September was written to the Breda Company in Italy, signed by Mr. Heyward, the Shire Clerk? A: Yes.

Q: You, of course, took part in the drafting of that letter? A: That is so.

30 Q: Did you draft the whole thing? A: I think I did. I would not be certain about a few little alterations. Perhaps the substantial part - it was my draft.

Q: Is this a fair summary of it" What you said to the Breda Company was - "In May, after we got the tracks fixed up, no matter if we got the engine in good running condition, this tractor was still no good to us because of its oil consumption? A: That is right.

40 Q: You knew it weighed 7 tons when you bought it? A: Yes.

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F.E.Bowman
Cross-
examination
continued

Q: Did that letter truthfully set out the situation as at the 4th September? A: As far as I knew it, yes.

Q: Would it be unfair to suggest to you that you made a mistake in buying a tractor which was too light for the work you wanted it to do? A: Well, maybe. But I do not think I made a mistake - judging on the weight of the tractor, 7 tons, and Mr. Corney's assurance.

Q: You knew what its weight was? A: Mr. Corney told me. 10

Q: You bought a tractor which you knew weighed 7 tons? A: But did it weigh 7 tons?

Q: You do not know what it weighs, you told me yesterday? A: That is right.

Q: If you look at that letter of the 4th September, your complaint to the Breda Company, summed up - (document handed to witness) - in particular the fifth paragraph starting "It is quite apparent" read the rest of it in order to get the general context? A: Yes. 20

Q: Is not this your complaint - "Even if we get it into perfect working order it is still no good to us because it is too light". (Objected to; withdrawn).

Q: You cannot help us as to when the radiator core was broken? A: Not exactly as to the date. I think it was broken during the period between its going back to work after the bearing was fixed - during the period between then - 30

Q: After the 24th May, if that be the date when Mr. Bourke came up and fixed the bearings? A: Yes.

Q: It has got six vertical sections? A: Yes. I think they are vertical sections.

Q: Was the one towards the centre portion of the radiator portion broken out? A: I do not think so. I would not be sure, but I think it was more to one side.

Q: I suggest it was one of the two inside sections? A: I am not certain which one it was, 40

but I have a feeling it was one or the other - whether to the side or another one there I am not sure.

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Q: Do you say that you got the replacement radiator core from Dependable Motors? A: We received it eventually, whether through Dependable Motors or through somebody in Sydney. We ordered it from there.

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Q: Were you charged for it? A: I cannot recollect that.

F.E.Bowman
Cross-
examination
continued

10 Q: Is not there a document? A: I do not know.

Q: If you have one part of a radiator core missing will not that attract the air through the open space rather than through the grille of the radiator core? A: That is so.

Q: Did not you know that? A: Yes.

Q: Would not that interfere materially with the cooling apparatus? A: It could have done that. In any tractor, it would - it would interfere with the flow of the air.

20 Q: Do you say that you, an engineer, asked Mr. Bourke whether it would be all right for it to run with a broken radiator core or a missing core section? A: Yes.

Q: Did you take his advice on that? A: That is right.

Q: Was it running for many weeks without the radiator core section? A: It was some weeks.

Q: Do you know how many weeks? A: I do not know that.

30 Q: Was there any log book kept in connection with this particular tractor? A: There were records kept as to its running time.

Q: Was there any special book called a log book? A: There was not a special book if I recall correctly. We had the weekly running sheet from the driver. It constituted, in effect, a log book.

Q: Would there be an entry on those running

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F.E.Bowman
Cross-
examination
continued

sheets, in the ordinary course, as to where and when any particular damage was one? A: It could have been. There should have been.

Q: You say that there should be an entry showing when the radiator core was damaged? A: Yes.

Q. And that there should be an entry showing when it was replaced? A: That would be normally entered by the mechanic. He kept a record of all repairs.

Q: That would not go on to the driver's running record? A: Not necessarily. 10

Q: I suppose you will agree that the maintenance of a tractor such as this would be a vital matter? A: That is correct.

Q: The lack of maintenance could lead to innumerable difficulties? A: That is so.

Q: Another factor in the operation of a tractor would be the skill of the operator. That is important? A: Yes.

Q: The operator is required to know the capacity of the machine and not to overburden it? A: That is right. 20

Q: I suppose it is possible to take large scoop-fulls or small scoop-fulls? A: Yes.

Q: The operator can decide whether he will take a large amount of earth or a small amount of earth in front of the blade? A: That is right.

Q: The operator gets to know the capacity of the equipment that he is operating? A: That is right.

Q: Some operators take many years to train, I understand? A: Yes, some do. 30

Q: Other operators - they say they have an eye for dirt - some of them? A: That is so.

Q: They pick it up quickly? A: That is right.

Q: And the opinions which you expressed yesterday about the reasonable working life of the machine - do you remember saying you did not think it was reasonably fit to operate for a

reasonable working life, or words to that effect?
A: That is so.

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Q: In saying that, I suppose you have not taken into account the history of this tractor throughout - right up to the date you are speaking of?

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A: The time when I last had contact with it -

Q: When was that? A: I left the Shire at the end of 1953.

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10 Q: What was your contact with it between August 1951 and 1953? A: I was the engineer.

F.E.Bowman
Cross-
examination
continued

Q. I suppose it was in the shed? A: It was outside - covered with a tarpaulin supplied for the tractor.

Q: And there it lay for over two years to your certain knowledge? A: That is right.

Q: Have you been told that it has worked since? A: Yes, it has.

20 Q: Have you been shown the reports of what was done to it and what work was done since? A: No. I was told it was used during the floods this year.

Q: Is that all you were told? A: That is not absolutely all I was told.

Q: Were you shown the full reports by your successor? A: No.

Q: Might it not have been material for you, in order to express an opinion here, to know its subsequent history? A: I do not think that could have any bearing on the thing at all.

30 Q: You do not think that the subsequent working of the tractor, and examination of it, could modify your opinion one way or the other? A: It may. It may modify my opinion but it could not modify my opinion as to the condition of the tractor when I left Ashford.

Q: You cannot, for example, tell us how the tracks compare today with how they were when you saw them in August 1951? A: No, I could not.

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F.E.Bowman
Cross-
examination
continued

Q: You have not seen the tractor - you know it is in Sydney I suppose? A: I did hear of it being in Sydney.

Q: Was not there a letter written on the 12th November 1951? Did you take any part in the drafting of that letter? (Document handed to witness).

A: I do not think so.

Q: Have you ever seen it before? A: Not that I can recollect. I have knowledge of the matter that is in it, but I did not write it.

10

Q: Do you know it was resolved - you were present at the Council meeting when it was resolved that the defendant be asked to give you a quote for the repairing of the tractor - (Objected to; pressed, disallowed).

Q: Were you present at that time? A: I was present. I did go on holidays every now and again and maybe I was away. I know that letter was sent.

Re-examination

RE-EXAMINATION

20

MR. MEARES: Q: You left the Ashford Shire at the end of 1953? A: That is correct.

Q: From then until this case have you had any dealings at all with the Ashford Shire Council in any shape or form? A: No, none at all, except, of course, in relation to this case.

Q: You were asked whether or not the maintenance of machines and the driving of the machines was important? A: Yes.

Q: You said it was? A: That is correct.

30

Q: Who was driving the tractor? A: A chap by the name of Kramer.

Q: What was his ability as a tractor driver? A: He was a particularly good scoop operator. That involves the driving of the tractor, of course. Up till the time of his commencement of work on the Breda tractor he had been operating a dozer blade on a tractor.

Q: Do you know that of your own knowledge?

A: That is of my own knowledge.

40

Q: Have you observed him driving this particular tractor? A: Yes.

Q: Did you see how he handled it? A: That is so.

Q: Having observed him, what do you say about his ability as a tractor operator? A: Quite good.

Q: It was a new tractor which had been purchased by the Council. Did you select Mr. Kramer to drive it? A: In company with and in consultation with the Council Foreman.

Q: In making that selection did you give any instructions to the effect that it was a new and costly piece of apparatus - (Objected to).

Q: In making the selection of Mr. Kramer to drive that particular tractor did you give consideration to the fact that you were putting him on to a new and costly apparatus? (Objected to).

Q: In selecting Mr. Kramer what considerations did you have in mind? A: I had in mind his previous experience on tractors and his conscientiousness, and as to whether or not I thought he was a suitable type of man to drive a tractor, and, generally speaking, his previous record.

Q: What about the question of maintenance? Had you had any experience of Mr. Kramer's maintenance work? A: Yes, on other tractor's his maintenance was good. He was what I would describe, as far as maintenance was concerned, a meticulous kind of man. He did not miss a point in maintenance work.

Q: So far as the maintenance of vehicles is concerned, does the Council provide or offer an incentive to the operators in regard to their doing their own maintenance? A: I do not know whether you would call it incentive or not, but they were paid a half hour's overtime every day in order to carry out the routine maintenance work on their tractors or on other particular vehicles. That applied to all our vehicles.

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F.E.Bowman
Re-examination
continued

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F.E.Bowman
Re-examination
continued

Q: You were asked about a section of the radiator core being missing - as to whether or not that would affect the efficiency of the cooling system?
A: That is right.

Q: You said it would? A: Yes.

Q: At any time - from the time when that radiator core was damaged until the tractor was grounded on 10th August, did you have any knowledge at all, in any way, of the tractor - of the water-cooling system overheating? A: No. It was winter time.

10

Q: When Mr. Bourke came up there on his visits - when the radiator core was off - did Mr. Bourke ever suggest to you at all - (Objected to; withdrawn).

Q: Did Mr. Bourke - when he came up at any time was the radiator core off the machine? A: I am not quite sure when the radiator core section arrived in Ashford - whether before he came up or after he came up.

20

Q: Let me put it to you this way. Was Mr. Bourke up there after 5th July? A: Yes. He was up there.

Q: Did Mr. Bourke at any time, when he was up there, suggest to you in any way at all that the absence of one section of the radiator core was the cause or any or all of the trouble of which you were complaining? A: No. As a matter of fact I discussed the matter with him before allowing the tractor to continue operations - after the radiator core was damaged.

30

Q: And in your opinion, as an engineer, did the absence of the radiator core section have any relevance whatsoever to any trouble you have told the Court about? (Objected to; withdrawn).

Q: You were cross-examined about the purchase of a T.D. 14 tractor? A: That is right.

Q: Was the grounding of the Breda tractor, to the best of your knowledge, associated in any way with the purchase of the T.D. 14 tractor? A: No.

40

Q: When you took the President out in July to

have a look at the Breda tractor - when it was decided to ground it - was there any mention in any shape or form by the President or yourself, or at the Council meeting, of this T.D. 14 unit - in relation to the grounding? A: Oh, no.

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F.E.Bowman
Re-examination
continued

Q: Mr. Reynolds also asked you as to when Mr. Bourke came out there he was out on the road for some $5\frac{1}{2}$ hours. Was the tractor running reasonably satisfactorily? A: Yes.

10 Q: Mr. Reynolds put it to you that the tractor was watched over $5\frac{1}{2}$ hours then? A: That is right.

Q: Can you tell me, was the tractor running for that $5\frac{1}{2}$ hours or what was going on in that $5\frac{1}{2}$ hours? A: Yes, it actually did $5\frac{1}{2}$ hours work.

Q: Then, you said to Mr. Reynolds it was running? A: Yes.

20 Q: I noted there seemed to be some emphasis on "running" reasonably satisfactorily. Do you want to add anything? (Objected to; pressed; allowed). A: There is a distinction between running and operating. That is all I wanted to emphasize then.

Q: What about the operating? A: The operation of the tractor was unsatisfactory so far as the weaving and slipping of the tracks was concerned - I have spoken about that. The running of the machine itself appeared satisfactory, or reasonably unsatisfactory.

30 Q: Then you were asked about speaking to Mr. Corney in regard to the suitability of the tractor for roadwork and for the purposes to which you made reference in evidence. You were asked as to whether you knew the extent of Mr. Corney's knowledge. When you put those questions to Mr. Corney did he answer them with any hesitation at all? (Objected to; pressed; allowed). A: No. He was quite straightforward.

40 Q: There was no hesitation about his views?
A: No.

Q: Did he ever suggest to you that he did not

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Re-examination
continued

know anything about - (Objected to; pressed).

Q: Do not answer this question yet. Apart from what you have told us about Mr. Corney's answers to your questions about the tractor's ability, do you remember his saying anything else in any way that would cut down the force of those answers? (Objected to).

Q: When you had those conversations with Mr. Corney after the 12th August and with Mr. Bourke, on the various occasions which you have mentioned, did either of them ever suggest to you that your complaints were unfounded? (Objected to; disallowed).

10

A: When you took these complaints to Mr. Bourke, and also Mr. Corney, what did they say?

MR. REYNOLDS: I would ask my friend to particularise the occasions, and I would also object to the question in substance. (Allowed).

MR. MEARES: Q: When you saw Mr. Corney concerning these complaints was there ever any dispute by him? What was said? A: There again, it is very difficult for me to give you the exact words. He did tell me in fact that - I am speaking of the time when the report was taken down by myself to Mr. Corney; he did tell me that he regarded the complaints as serious.

20

Q: At the time when this machine was grounded, towards the middle of August, what were the number of running hours shown on the meter? A: It was something under 200 hours, I think.

30

MR. REYNOLDS: The report says 170 hours.

WITNESS: That would be right.

MR. MEARES: Q: You were cross-examined by Mr. Reynolds this morning as to the answer given by you yesterday concerning when it was you became aware that Armstrong Bros. at Tamworth had purchased a tractor. Had you had occasion to recall that matter from the time you left the Council's employment until the question was put to you yesterday? A: No.

40

Q: You have told Mr. Reynolds that this tractor -

that you were aware at the time that American tractors were not easily available and that tractors generally were in short supply? A: That is right.

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Q: Was the Ashford Shire Council, at the time of the purchase of the Breda tractor, in short supply in regard to tractors? A: Yes, it was.

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Evidence

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10 Q: Did that condition of affairs continue right up till the time when the Breda tractor was grounded? A: Yes.

F.E.Bowman
Re-examination
continued

Q: And thereafter? A: Yes.

(Short adjournment).

MR. MEARES: Q: You were asked before the short adjournment about the purchase of a T.D.14 tractor? A: Yes.

Q: Have you refreshed your memory during the adjournment as to when that T.D.14 tractor was purchased by the Council? A: Yes. I saw the arrival of the T.D.14.

20 Q: What was the date? A: It was the very date I started work for the Ashford Shire Council.

Q: What date was that? A: 2nd April 1951. It arrived at Ashford on the 2nd April.

Q: Was it working after that date? A: Yes.

Q: Then, you were asked about maintenance being essential and you said that that was an important matter? A: That is so.

Q: Did you discuss that with Mr.Bourke? A: Yes.

30 Q: On how many occasions? A: On two specific occasions. It may have been more. Firstly, when the bearings failed and Mr.Bourke came up to instal the new bearings. I think there were two bearings installed on that occasion. I was anxious to ascertain the cause of the bearings failing - naturally. I questioned Mr.Bourke as to his opinion on the maintenance of the machine; whether he thought there had been any lack of maintenance, and he - (Objected to).

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F.E.Bowman
Re-examination
continued

MR.REYNOLDS: Q: The T.D.14 tractor which I was asking you about was not the one that arrived on the same day as you did, but the one which the Council was going to buy if it could get the money back for the Breda tractor, which the Council did not receive until May. Did not you understand that? A: No. We only ever owned one T.D. tractor.

Q: I was asking about the T.D. 14 tractor which was going to be bought if you could get the money back for the Breda tractor? A: I misunderstood that. 10

Q: I will show you the minutes of the Council meeting of 14th September 1951 - minute No.915. Do you see that minute (indicating)? A: Yes.

Q: That is the one I was asking you about? A: I misunderstood.

Q: What did you misunderstand? A: It was not clear in my mind when that T.D. 14 arrived there.

Q: I was asking you questions about having got the tractor, the Breda tractor - about the decision which you knew about - that if the money was refunded on the Breda tractor you would get a reconditioned T.D.14 tractor. Did not you understand I was asking about that? A: We actually did buy. 20

Q: Did not you understand my question; that I was asking you? A: No, not exactly.

Q: What did you think I was asking? A: I was confused with the T.D.14 tractor. We did purchase a reconditioned T.D.14 tractor, or a second-hand one. 30

Q: Did you appreciate that it was after the Breda tractor came that I was asking you about? A: I did not appreciate the fact that you were asking questions about a tractor which we subsequently heard of.

Q: And which you did not buy because you did not get the money back. That is the one I was asking you about? A: I did not appreciate that at all. I misunderstood you, really. I got the two tractors confused. 40

Q: Do you not remember now that there was a

resolution passed that if the money was got back on the Breda tractor a reconditioned T.D. 14 tractor would be bought? Do you remember my asking that? A: Yes.

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Q: How could you misunderstand that? A: I was not sure at what time that T.D. 14 arrived at Ashford. I was not sure whether at the date of my arrival or at some subsequent date.

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10 Q: I was not asking of the arrival? A: I was not sure of it and that is why I answered the way I did.

F.E.Bowman
Re-examination
continued

Q: You remember now that there was such a resolution? A: I have seen it.

20 Q: When Mr. Meares was asking you - immediately before the short break - as to whether there was any connection between the T.D.14 tractor and the Breda tractor refund or the grounding of the Breda tractor, which T.D. 14 tractor did you have in mind when Mr. Meares was asking that question? A: The one we already had.

Q: Then, you had in mind the one that had been delivered on the day when you took up your appointment with the Ashford Shire Council?

A: Yes, but understand this. I was confused with the date of the arrival of that one.

Q: You understood Mr. Meares' question all right? A: Yes.

Q: There was no confusion there? A: No confusion there.

30 MR. MEARES: Q: I want to direct your attention, not to the T.D. 14 tractor that you had but to a minute in respect of the matter - the minute in which there is a suggestion that if you got the money back from Dependable Motors on the Breda tractor you would buy another T.D. 14 tractor? A: Yes.

40 Q: So far as any discussions which you had with the Shire President are concerned, or any consideration which you yourself gave to the grounding of the Breda tractor, was that in any way influenced by a decision concerning this

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No.5

F.E.Bowman Re-examination continued

T.D. 14 tractor that you were to get, if possible, in the future? (Objected to; allowed) A: The only facts which influenced me regarding the grounding of the tractor (Objected to).

HIS HONOR: He said the grounding was not influenced in any way.

(Witness retired)

No.6

J.R. Black Examination

No.6

EVIDENCE OF JOHN RICHARD BLACK

Sworn, examined, deposed:

10

MR: MEARES: Q: Do you live at Wallengra?

A: That is correct.

Q: Are you a grazier by occupation? A: That is correct.

Q: How long have you been a grazier? A: I have been on the land all my life - since leaving school. I went out west into Queensland at one time.

Q: Are you also the President of the Ashford Shire Council? A: That is correct.

Q: How long have you been the President of the Ashford Shire Council? A: Nine years. 20

Q: Was your father a President of the Ashford Shire Council before you? A: He was the President of the Council for 19 years before I was on the Council.

Q: During the time while your father was the President did you acquire any knowledge of council affairs? A: I became pretty deeply steeped in Local Government. Any time when I was at home I always accompanied my father on any trips in the Shire. 30

Q: Did those trips involve the observation of road works of varying kinds throughout the Shire? A: Yes. I have seen the Council grow from horse grading to the machinery it is operating today.

Q: So far as your own experience is concerned - up till and during the year 1951 had you had any knowledge of the Council's activities in connection with roadmaking and repair work? A: Yes. I had had three years on the Council then.

Q: What interest had you taken in it? A: I have always taken a very extensive interest in it, more so than quite a number of them. I have had more time to devote to it.

10 Q: Have you had innumerable opportunities of observing the operation and performance of the Council's machinery - of varying types? A: Yes. I have seen them working quite a lot.

Q: Does that include the operation of tractors for road work? A: Yes. Before the period when we had two T.D. 9's and a small International - I remember we had them working.

20 Q: Have you also had occasion to observe the operation of tractors on various types of country and under numerous types of circumstances? A: Yes, I have.

30 Q: In March 1951 was the Shire Council desirous of purchasing a heavy type tractor? A: We needed the services of a 60 h.p. tractor. I would not be sure whether 60 h.p., but we needed one of considerable horse-power - so our plant could be augmented to conform with the roadwork to be done I think that at that time we had purchased a 6-8 yard scoop and that we required a tractor to operate that scoop.

40 Q: Had you seen Mr. Bowman, who became the Shire Engineer, before this alleged conversation took place between him and Mr. Corney? A: I must have interviewed Mr. Bowman. I think Council passed a resolution to the fact that I was to interview Mr. Bowman in company with the Shire Clerk. It took place on a Saturday afternoon but I do not remember the date. It should be verifiable somewhere. I interviewed Mr. Bowman. The interview was satisfactory from my point of view and with Council's authority I told Mr. Bowman that he would be appointed as Engineer for the Ashford Shire Council.

Q: Do you remember the Shire Clerk ringing up

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Examination
continued

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J.R. Black
Examination
continued

concerning the possibility of purchasing a Breda tractor? A: Yes.

Q: Did you give him certain instructions so far as Mr. Bowman was concerned? A: He was to see the tractor. He came down to the Engineer's conference in Sydney and he was to look at the tractor while he was down here and to report on it - to tell us whether it was suitable or not.

Q: Subsequent to that conversation with the Shire Clerk did he contact you on the telephone again - subsequent to Mr. Bowman's visit to Mr. Corney? A: I cannot remember any other subsequent conversation, except that he rang me up at one period and asked for Council's - that was a later date, when I asked him to ring Council and get their approval.

10

Q: That is what I want? A: He rang me up and I instructed him to ring other councillors. We had a report from Mr. Bowman, apparently, that the tractor was suitable for the work which we required it for.

20

Q: Had the Shire Clerk told you that? A: Yes. I instructed him to ring the other Councillors. Those Councillors live from 30 to 40 miles apart. It is not possible to call a meeting at all times. We ring them up. When he rang back and said the rest of the Councillors were quite in accordance with the buying of the new tractor I instructed the Shire Clerk to put in a formal order for the tractor.

30

Q: Did you rely on the Engineer's report? A: I had nothing else to rely on.

Q: Did you rely on it? A: Yes. I did.

Q: Was that the reason why you purchased the tractor? A: Yes.

Q: Up till the time when the tractor was grounded finally, which would have been round about the middle of August - right up till and after that time was the Shire Council short of tractors to do the necessary work on the roads, and so on? A: Most certainly. The reason for that was that at this particular time quite a lot of money became available for developmental work and we had

40

managed to get our hands on a considerable amount.

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Q: The contents of the minutes in September were put to Mr. Bowman, to the effect that the council had resolved in September that if a reconditioned T.D. 14 tractor became available and if a refund were obtained from the Breda people, the T.D. 14 machine could be purchased -

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10 MR. REYNOLDS: Perhaps you would put the actual minute.

J.R. Black
Examination
continued

MR. MEARES: Q: Do you recall a resolution which was moved by Councillor Knight, seconded by Councillor Tighe, on the 14th September 1951 to the effect that the Breda people - that the Breda tractor be taken back and the money refunded - should that be done an order to be placed at once for a reconditioned T.D. 14 tractor. That resolution was carried. Do you recall that? A: To be perfectly frank I did not recall it until it was read out this morning. Now it has been mentioned I do recall it.

20

Q: You had certain discussions with the Shire Engineer concerning this tractor? A: Yes.

Q: Did you make a decision to ground it on one occasion after discussion with the engineer and subsequently, after discussion with the Council? A: That is right.

30 Q: And after listening to the Engineer's report? A: That is so.

Q: In no way was your decision to ground the tractor influenced by the fact that you might be able to get your money back and buy another one? A: Most definitely not. It would be impossible for me to presuppose what any councillor might say or was going to do pretty well a month in advance. I only see them once a month. They change their minds quite often.

40 Q: Do you recall an occasion on the 7th June 1951 when you came down to Sydney to attend a Shire conference? A: Yes.

Q: Prior to that time had you received certain

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J.R. Black Examination continued

information concerning the Breda tractor? A: Yes. Council had been concerned with the purchase of a tractor at that date.

Q: Did you call on Mr. Corney on that date?

A: Yes. I had been instructed by Council to call on him and to ask him two questions.

Q: What did you ask him? A: I inquired about the warranty.

Q: What did you say? Can you give it in direct speech? A: I said, "I have been instructed by Council to call on you and inquire about a warranty for the tractor, which we have not yet received." And he said, "As far as I know the warranty has been sent along." My reply was, "Well, we have not got it yet."

10

Q: What was your next question? A: The other question was - I asked him, "Is this tractor suitable for Council's work?" I was not there a great length of time but I did point out to him that I had come from the Shire Council and that we required a tractor for bulldozing and scooping - (Objected to; disallowed).

20

Q: What was the conversation? A: I said, "Will the tractor be suitable for Council's work?" and he said "Yes. Quite suitable."

Q: Did you mention the type of Council's work? A: Yes - scooping and bulldozing - road construction work.

Q: Did he express any doubt about it at all? (Objected to; disallowed).

30

Q: After that, was there any other discussion about it? A: Yes. There was no tractor in the showroom when I went out there - the main showroom - but I can remember that there was a small tractor in the back part of the premises. Mr. Corney took me out there and we had a discussion. I asked him for any technical details at all and then he told me he was going to send the warranty up, or he thought it had gone. He thought it had gone.

40

Q: You have seen this tractor working? A: I saw it working on two occasions.

Q: What was the first occasion on which you saw it working? A: The first occasion was on the first day at work, about, I think, the 14th May. Mr. Bourke was there at the time. I can only remember him as a man in blue overalls. I was introduced to him. Mr. Kramer was the tractor driver at the time. It was working on the Wallengra-Coolatai Road and the time when I came along he was taking the overburden off the top of the pit so that the underneath portion could be used for the carting of gravel.

10

Q: Was that being done with a dozer? A: That is so.

Q: What did you observe? A: As far as I could see the tractor was working very well. Everybody was interested in the tractor because it was something new. It was the biggest tractor that we had.

20

Q: It seemed all right? A: It seemed to be working quite all right.

Q: Was it being handled all right by Mr. Kramer? A: Yes, quite all right.

30

Q: Did you have, from time to time, certain conversations with the Shire Engineer, concerning how it was going? A: Yes, he would call in and see me on a few occasions. Most of our business is done by telephone on account of the distances. We had quite a lot - nearly every day sometimes - not at that particular time. We would be talking at least once a week on the telephone.

Q: Was this tractor mentioned? A: Amongst other things, yes.

Q: As a result of certain conversations which you had with Mr. Bowman, and from information which you had received, did you go out with him and have a look at the tractor while it was working? A: I did. That would be on the 12th July, the day before a Council meeting.

40

Q: Where was the tractor working on that occasion? A: It was working on the road No.187, the Inverell-Rocky Dam Road. It was about a mile from the Wallengra Post Office, on the Inverell side.

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Examination
continued

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Examination
continued

Q: Who was driving the tractor at that time?

A: Mr. Kramer.

Q: What did you observe about its operation?

A: First of all I observed when we went there - it was just coming into the tip - Mr. Kramer was starting to lower the under-part which collects the gravel - the bite - and as he went on it seemed to rotate - as the load was taken up the tractor started to weave and the chain slipped. On leaving the pit he pulled out altogether and, truthfully saying, the only time I can remember a sprocket jumping - it did jump on that occasion.

10

Q: What sprocket was that? A: That was the driving sprocket on the end of the track. It jumped a cog.

Q: Under what circumstances did that happen?

A: It was under load at the time.

Q: Was it going forwards, backwards, or sideways?

A: He might have been just about taking a turn.

Q: What was he using? A: He was using a scoop after pulling out of the pit. It was a shallow pit. It was only the surface gravel that they were taking away - stony - it was really the first stony ground this particular unit had worked on, as far as I know.

20

Q: Do you say that on that occasion it was very hard, easy, or medium? A: Medium. It would be medium scooping - medium to good, I would say.

Q: You noticed the sprocket jumping? A: Yes. I only observed it the once.

30

Q: How long were you watching it? A: It did a couple of runs before we pulled him up. He was taking gravel from the pit and conveying it to the scoop - with the under-belly of the scoop up, and he was taking it out on to the road and spreading it out. He went a couple of runs doing that - emptied the scoop and circled round. After doing that a couple of times I instructed the engineer to stop Mr. Kramer because we wanted to look at it.

40

Q: Did you look at it? A: Yes.

Q: What did you find? A: First of all, we were

primarily concerned with the tracks. I can remember that the corner of one of the grouters was broken off.

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J.R. Black
Examination
continued

10

Q: What is a groucher? A: It is the clip - I understand they are all in one piece - a plate with a clip on it. The corner one one piece that dug into the ground was broken off and a couple of chips - quite considerable longitudinal cracking across the face of the plate. The plates themselves were quite heavily scored. I think Mr. Bowman had a little three-cornered file on him and he ran it over it and it seemed to be pretty soft. The stones had actually dented - bruised I call it - the track.

Q: You observed the tractors on previous occasions? A: Yes.

Q: You have observed tractors that have done a very considerable amount of work? A: Yes.

20

Q: And from your knowledge of the tractors what opinion did you form about it? A. In my knowledge they were going to pieces quickly.

Q: Did you then direct that the tractor be grounded? A: Yes in consultation with the Shire Engineer. We saw no point in using the tractor any further and damaging it. I told Mr. Bowman to ground the tractor and that was verified at the following meeting of the Council.

30

HIS HONOR: Q: Was that the next day or that day? A: I told him to ground it straight away.

MR: BEARES: Q: You learned from the Engineer in regard to various troubles with the tractor from time to time? A: Yes.

Q: Just dealing with those troubles that you are having, in the whole of your experience of the employment of tractors in the Council, was it comparable with any other tractor problems you had encountered? (Objected to; question pressed).

40

Q: As far as the quantities of troubles and the time the tractor was in the workshop, and so on, this particular tractor is concerned, was that

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J.R. Black
Examination
continued

something that you were used to? What was the position in regard to that, compared with other tractors? (Objected to; question pressed; rejected).

Q: As to the maintenance of this tractor? A: Yes, the maintenance of this tractor was greater than any we had ever experienced.

Q: Was it greater? A: Oh yes.

Q: You tell us at this time you were President of the Shire? A: Yes.

10

Q: You had this money allocation? A: Yes.

Q: You were concerned to get the work done?

A: Yes, we must; any of those grants we received in Shire work, if you don't spend it in the year granted, very often you lose them and it is absolutely necessary to have machinery on the job to get the job done as soon as possible.

Q: I see, that is the purpose for which you bought this? A: Yes.

Q: Right up to the time it was grounded, was your desire to get the roadwork done as expeditiously as possible? A: Well, whenever we can make a machine work, we keep it working.

20

CROSS-EXAMINATION

Cross-
examination

MR. REYNOLDS: Q: When did this money cease to be available for the tractors; when was the year up?
A: Could I have the question again?

Q: As I understood you to say to Mr. Meares, your moneys are made available to be spent on particular projects and if it is not spent in the time you have to have it withdrawn from you; what I want to find out, if I could, when would this money have been withdrawn from you if it had not been spent on a tractor? A: That would be very difficult for me to answer, because we have different moneys coming in at different times. The Main Roads' comes in on the Christmas-to-Christmas basis, the Public Works grants come in from June to June. That was a question my clerk could answer better than I could.

30

Q: What sort of money was this? A: This was

40

developmental work, I take it. It would be probably be from Christmas-to-Christmas, Main Roads money.

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Q: Who is your present Engineer? A: We have no engineer at the moment.

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Evidence

Q: Who was your Engineer in the early part of this year? A: Mr. Robertson.

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Q: You know that he did some work on this tractor? A: Yes.

J.R. Black
Cross-
examination
continued

10 Q: Did he do it under your instructions?
A: He asked the Council first.

Q: Did he do it under Council's instructions; that so? A: That would be so. He asked Council, and they allow him to go ahead.

Q: He made a number of reports to the Council?
A: Yes, he would.

Q: He did? A: Yes, he did.

20 Q: And they were received and incorporated in the Minutes of the Council? A: That would be so.

Q: The tractor had been, at that time, lying idle for nearly five years - I am wrong - about that? A: About $4\frac{1}{2}$? A: Yes, $4\frac{1}{2}$.

Q: He got it going, did he not? A: Yes.

Q: And put it in use? A: Yes, it was; I never saw it working; it was off the road quite a considerable amount of time. It was in and out.

30 Q: You know the tractor is capable of being used at the moment? A: I cannot answer that one; I do not know what particular stage --- it must be - It is down at Sydney and has been tested.

Q: And it still has the same tracks on it?
A: To my knowledge, yes.

Q: How many hours has it done now? A: I could not answer that. I think it is some-

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J.R. Black
Cross-
examination
continued

where in the vicinity of 400, probably; but the time-sheets would show it.

Q: So, it has done as much or more since it was grounded in August, 1951, than it had done before?

A: Say that again?

Q: It has done as much or more time since it was grounded in August 1951, than it did in 1954?

A: It would be about the same. I cannot answer the inner technical details of the Council. I only work on the broader aspect.

10

Q: But this tractor has worked this year for the Ashford Shire Council? A: Yes.

Q: Do you know what spare parts had to be bought from Dependable Motors to achieve that? A: No, I do not.

Q: You cannot help me on that? A: No, the records would show that.

Q: Have you seen the tractor recently? A: No, I have not seen the tractor since the day it fell over in the Council yards - workshop.

20

Q: That means as this is 1956, the tractor has done some hundreds of hours' work and you have not seen it? A: No.

Q: Have you given consideration to the reports of the Engineer, that he made about it? A: The Council has.

Q: What about you, as President? A: I only administer the Council between meetings; it was the Council. The Engineer's instructions were to get the machine working if he could. That was the only instruction from the Council. I had nothing to do with it unless something seriously untoward happened.

30

Q: You knew the Council was involved in litigation?

Q: We got an answer from the solicitor; One thing was laid down; get in touch with the local solicitor to see if it was O.K. before he did.

Q: You got the O.K. from the local solicitor?
A: Yes.

40

Q: So I gather you were opposed to this tractor being put in order? A: I have not said that.

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Q: Were you? A: I have not said it.

Q: No, but were you? A: Yes. I would have been opposed.

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Evidence

Q: You were, and were not you? A: I said I would be; I had no voice in it, though, because I happened to be the Chairman; I think you have got something out of me; I don't know, that that was a fair question.

10

No.6

J.R. Black
Cross-
examination
continued

Q: Is that why you have not concerned yourself with reports from the Shire Engineer as to how this tractor is running and to know what he found wrong with it? A: We have not got the Shire Engineer - I have not got the same contact between the Foreman and the Council, as I had with the Engineer.

Q: No, but it was the foreman on the 27th March 1956? A: Yes, it was the Engineer, Mr. Robertson.

20

HIS HONOUR: Q: Roberts? A: G.U. Robertson.

MR. REYNOLDS: Q: You knew of the complaints about the tractor? A: Yes.

Q: Did you understand one of the complaints was about the clutch? A: Yes.

Q: Did you not concern yourself to see what Mr. Robertson reported to the Council on the clutch and its condition? A: Yes, we are always short of two things in this Council; one is money and the other is machinery, and if there is any possibility ---

30

Q: I asked you whether you were concerned to find out what Mr. Robertson reported finally on the clutch? A: Yes, he said he could fix it up; I do not know the technical details.

Q: Did he not report further that the clutch was O.K.? A: Yes, he probably did.

Q: You could not tell us at this moment whether the tracks to be seen today are in any worse condition than they were in August, 1951? A: No,

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No.6

J.R. Black
Cross-
Examination
continued

Re-examination

I could not tell you. It would have been about the time it was working down at the Dumaresq River, the ground was softer; the amount of work would be considerably less than it would be up in the hillier country.

RE-EXAMINATION

MR. MEARES: Q: Have you got any idea how long they were trying to fix this tractor up in 1956?
(Objected to).

Q: Have you got any idea how long it took them to get it back in work? A: I know it was a long time. I say, a longer time than was really economically -

10

Q: Can you give us an approximate idea of the time? Was it a day, half-a-day, two years?
A: All I know - I do not think it could possibly have been got started under three or four days?
(Objected to).

(Witness retired)

No.7

A.N. Heywood
Examination

No.7

20

EVIDENCE OF ALLEN NEWTON HEYWOOD

Sworn, examined as under:

MR. MEARES: Q: I think your full name is Allen Newton Heywood, and you are a clerk of the Ashford Shire Council? A: Yes.

Q: How long have you been a clerk? A: Since 1949.

Q: Do you recall early in 1951 contacting Mr. Wilkins at Inverell concerning a Breda tractor?

A: Either I contacted Mr. Wilkins or Mr. Wilkins contacted me.

30

Q: You remember discussing it? A: Yes.

Q: Did he send you out a pamphlet concerning the tractor? A: Yes.

Q: Is the document you received ? A: That would be similar.

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Q: You had better have a look at it, just in case it is not? (Shown to witness).

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Evidence

(Pamphlet tendered and marked Exhibit "H")

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Q: Subsequently to that conversation with Mr. Wilkins, did you contact the various Councillors by telephone concerning this Breda tractor?

A.N. Heywood
Examination
continued

A: Yes.

10

Q: You were advised by Mr. Wilkins that it could be purchased from Dependable Motors? A: That is correct.

Q: Did you then ring up the Engineer? A: Yes. I rang Mr. Bowman. He was in Sydney at the time.

Q: What did you ask him to do? A: I asked him would he go to Dependable Motors and have a look at the tractor and see if he thought that it was suitable for the work we required.

20

Q: Was that something which you did on the instructions of the Council? A: Yes.

Q: Did Mr. Bowman subsequently ring you up?
A: He rang me back within a day or so; I could not just be sure when.

Q: Did he tell you - What did he report on it?
A: He told me that he had inspected the tractor. It seemed to him to have plenty of horse-power and was big enough for the work we required.

30

Q: Did you communicate that to the various Councillors, including the President? A: Yes.

Q: Did you then receive instructions from the President as to its purchase? A: Yes.

Q: You were told to purchase it? A: Yes.

Q: You then received the machinery to buy it?
A: Yes.

MR. REYNOLDS: No questions.

(Witness retired and excused).

(Bundle of letters tendered and marked Exh. "E").

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No.8

EVIDENCE OF NORMAN DOUGLAS THOMPSON

Sworn examined as under:

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Evidence

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N.D.Thompson
Examination

MR.MEARES: Q: What is your full name? A: Norman Douglas Thompson.

Q: What is your occupation? A: Council Foreman of the Ashford Shire Council.

Q: How long have you been in that occupation?
A: I worked at the Ashford Council for 37 years.

Q: How long have you been its foreman? A: Since 1942. 10

Q: In that connection, have you had any experience in the employment of tractors for road-making purposes? A: Yes, I would say I have had quite a lot of experience.

Q: Has the Council, ever since 1942, had tractors for road-making purposes? A: Er....Yes, I would say we have had.

Q: Over the last eight or nine years, approximately, how many tractors has the Council employed? 20
A: Well, I would say about 14 - from 12 to 14; that is, including graders and tractors.

Q: How many tractors, roughly? A: About seven - seven.

Q: Are those tractors under your responsibility, as the Foreman? A: Well, they would be according to the amount of works they perform.

Q: When they are on the job, they are under you; is that what you mean? A: Yes, I would say they are. 30

Q: Is there any doubt about it? I want to get the fact? (No answer).

Q: Is there any doubt about it or not? A: No, there is no doubt.

Q: In 1951 was it part of your duties to keep a report of the employment of the tractors from day to day? A: Yes.

Q: Did you obtain the information that you put in the report as to where the tractors - various tractors - were working, and what they were doing, from your own observation, and from information you got from the drivers and leading hands?
A: Yes.

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Plaintiff's Evidence

No.8

N.D. Thompson Examination continued

10

Q: As far as the reports were concerned, you dealt in them, did you not - I will be tendering them, Your Honor - you dealt on a day to day basis; you did not deal in so many hours and minutes; you put in a report on a particular day? A: That is right - from day to day.

Q: Would you have a look at these documents? Are those your reports? A: I would say they are.

Q: What do you mean, you would say they are? Are they? A: Yes.

20

Q: I think, if you have a look at those, they cover the period for the week ending the 14th May to the week ending the 13th August, with the exception of one week that is missing, namely, the week ending the 23rd July; is that correct? A: Yes.

Q: That week beginning the 23rd July? A: Yes.

(Reports with written precis tendered and marked Exh. "J").

30

MR. MEARES: Could I direct Your Honor's attention to the typed list that would seem to show that after the first three days Your Honor, will recollect the Engineer said that it ran for about a week before it had bearing trouble, but this return would seem to indicate that it was off after the first three days, Monday, Tuesday, Wednesday, 14th, 15th and 16th; it was on the Wallengra Road; where Your Honor sees a cross, that means it was out.

MR. REYNOLDS: Because it was working again on the 21st, and the bearings were not fixed till the 24th.

40

MR. MEARES: I think it is proper for me to say that was wrong, the 21st, but that is what the records show. Then Your Honor will notice an

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N.D. Thompson Examination continued

entry for the 23rd July, page 2, a third of the way down, "radiator missing".

MR. MEARES: A: Have you seen it, this tractor working? A: Yes.

Q: Did you see it working before it was grounded in 1951? A: Yes.

Q: Did you see it working after it was repaired early this year? A: Yes.

Q: Would you tell me in as much detail as possible, over those times, what you could observe about its performance? (Witness hesitates). A: I never saw a great amount on the first occasions it was working; that is, each day, but since it started to work in September or July, or August - this last period - I saw it working nearly every day. I would see it at least three to four days of the five working days of the week. It gave me the impression that it did not work very capably. When I say, capably, I say I had it do work smaller tractors had been doing during other periods and moving more earth than it was moving, and on several occasions the other operators were pulled up, and I asked them what was wrong. (Objected).

10

20

Q: Did you notice it being pulled up; did you notice any trouble? (Witness' answer struck out by direction).

Q: Tell me this, as far as you were concerned, when you were observing the tractor, the times this year you have noticed the tractor idle, have the operators been sitting on the seat, or wherever they sit, just thinking" A: Yes.

30

Q: Then did you notice - (Objected to.)

Q: Would you just tell me what used to happen? Would you see them knocking off, or would you see it stopping, or what would happen? A: On most occasions, it would stop when I came. I don't stop on that particular section of the work. I travel around. On most occasions it would be stopped when I came to the job. I know by the action of the work that it had not been stopped for a great while, because the other machine was depending on the gravel it was loading into the trucks. Occasionally it was held up by the other one, not functioning full-time.

40

MR. REYNOLDS: Q: You say the Breda was held up because the other one was not functioning full-time? A: No, the T.D. was not functioning owing to the Breda not functioning to load on to the trucks.

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Plaintiff's
Evidence

No.8

N.D.Thompson
Examination
continued

MR. MEARES: Q: You would see it stopped?
A: Yes.

10 Q: Did you get any idea of the time it used to be stopped? A: Yes, from 20 minutes to three quarters of an hour.

Q: As a result of observing it stopping, you had certain conversations with the operators as to why it was stopped? A: That is right.

Q: Then would you see it started up again?
A: Yes.

20 Q: Now, on occasions, when it was started up again and had been working; did you ever notice anything about its working, as it continued on and got into heavy stuff? A: Well, yes. I noticed when it got heavy loads I had seen it slipping in the tracks; I mean jumping the sprocket.

30 Q: Tell me this, you have seen it working on quite a large number of occasions, have you, in the last year? A: Well, small jobs. We have been in a lot of flood troubles, wash-outs; very often move from one job to another. It might work an hour and a half at one place and then be loaded on to a truck and go 20 or 30 miles to another job.

Q: When you have seen it working, bearing in mind the size of it, you know what I mean?
A: Yes.

Q: What have you observed about its ability, if anything to shift the stuff, compared with other tractors of similar size? (Objected to; pressed).

Q: You have seen it used with its blade?
A: Yes.

40 Q: And you have seen it using its six or eight yards scoop? A: Yes.

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N.D.Thompson
Examination
continued

Q: Now, as far as the use of the blade and of the scoop is concerned, you appreciate what I mean - by taking a full cut with the blade, do you?
A: Yes, I do.

Q: You appreciate what I mean by taking a full heaped load with the scoop? A: Yes.

Q: Now, what is its ability in regard to either of those things? A: I say, poor.

Q: What do you mean by poor? You tell us, in your own words? A: I say it does not move as much as it really should do for a tractor of its size; that is my contention.

10

Q: You might tell me this, the occasions that you have it, the operator, the thing, stationary, and the work held up, does that happen only once or is it a frequent occurrence? A: I say it is frequent.

Q: You have explained to us that on occasions you have another machine, is that correct?
A: That is correct.

20

Q: In the tractor in which it is employed with a scoop, is it usually employed in conjunction with another machine? A: No, not a scoop; I was referring to stock-piling work with a gravel overhead loader. You have got a man on the earth, you load into trucks.

Q: Is that quite a common practice to use a tractor with a 'dozer blade in conjunction with an overhead loader? A: Yes, always.

Q: This year you told us the tractor has been used, what is the Council's position this year in regard to this equipment? Has it more than it wants or is it short? A: I say we are just about on an even keel; I say, not sufficient; nothing to spare.

30

Q: About March and April, in the floods, did you have any margin then? A: Well, yes, plenty.

Q: Don't give too much away. Plenty? Is that what you say? A: Quite a lot of times it was too boggy to use anything; it is a Yes and No sort of question.

40

Q: When the floods were on, I suppose, it was a case of all hands to the pump, or to the roads? (Objected to).

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Q: What is the position after the floods had gone? What was the position after the floods? Demands on your plant? A: Over-heavy, every item of plant we had we had out - very heavy.

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Evidence

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Q: Do you remember early this year it being in the workshops and some work being done on it?

10

A: Yes.

N.D.Thompson
Examination
continued

Q: Can you tell us, to the best of your recollection, how long they had been working on it in the shop? A: I could not say, any more than about five weeks - five to six weeks.

Q: You mentioned to us this question of a track slipping under load? Do you follow me? A: Yes.

Q: With your experience of tractors, having observed them over the years, what do you say about that? A: Well, they definitely lose; they lose their traction and they jump the sprockets. It appears as though the tracks were not all right originally enough to give - to bring about traction.

20

Q: I want to direct your attention, not so much to the sprocket jumping, as to the tracks spinning under load? Do you follow what I mean? A: Yes.

Q: Have you observed anything about that, about the tracks spinning? A: Nothing unusual.

30

Q: Nothing unusual since you have seen it this year; is that the position? A: Yes.

Q: As far as these hours are concerned in which the tractor is worked, that you have given in Exh. "J", when you say the tractor hours, does that include the times the tractor spent on the job when it has been waiting before they start working again; do you follow what I mean?

40

A: It does not mean the time the tractor is out for the day, but we have periods, say, when I say it is stopped for 20 minutes or three quarters; that is included in the 8 hours.

(Luncheon adjournment)

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N.D.Thompson
Examination
continued

AT 2 p.m.

MR. MEARES: Q: I want to just get this on the notes, Your Honor. The M.R. 187/21, what job is that? A: Well, it would be an item on the Main Roads programme.

Q: Which road? A: Actually Inverell-Yetman, known as 187.

Q: Is that the same as the Inverell-Rocky Dam road? A: Yes, the same one.

Q: And wherever one finds 187 on Exhibit "H", that refers to that road? A: That is so.

10

Q: You have told us about what you observed about this tractor this year, now what sort of work was it put on that you saw it doing? A: Well, it was cleaning up flood debris, quite a fair amount of time; then eventually it was put stock-piling gravel for the overhead loader.

Q: How would you describe that work? A: I say moderately easy work, comparatively, to what we had with a T.D. 9 tractor which is 38 horse-power.

CROSS-EXAMINATION

20

Cross-
examination

MR. REYNOLDS: Q: How is it that you did not see the tractor working on the first occasion to any extent in 1951? A: Well, we have a lot of jobs - probably four to five different gangs working on the Council, and sometimes it means that I only get round probably once a week to some of those jobs.

Q: Do you get more than that now? A: Well, yes.

Q: Much more? A: Well, yes; possibly get round now about every second day; second day as a rule.

30

Q: But you did see a bit of it, did you, in 1951? A: Oh yes.

Q: Have you seen it pulling a full-heaped scoop in 1956? A: We have not had it on the scoop in 1956 that I remember.

Q: I though you told Mr. Meares that when it pulled a full-heaped scoop this year, its performance was poor? A: The blade.

Q: Didn't you tell Mr. Meares that when it pulled a full-heaped scoop this year its performance was poor? A: I don't remember telling the scoop.

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Q: If you did, that would be quite wrong?
A: I don't remember it being worked on the scoop this year.

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10 Q: No. But if you did tell Mr. Meares that, it would be quite wrong, because you have not seen it pull a full-heaped scoop? A: Not this year.

N.D. Thompson
Cross-
Examination
continued

Q: You now say you have not seen it pulling a scoop at all this year? A: Yes.

Q: Is that right? A: Yes.

Q: Have you seen it pulling a scoop at any time? A: Yes.

Q: In 1951? A: Yes.

Q: Would this fairly summarise what you say about it now, that it does not seem very powerful? A: That is right.

20 Q: And the clutch gives trouble? A: Yes.

Q: Is that the total of the faults that you have noticed about it in the months of July, August, September, 1956? A: Yes. And that it slips its sprockets, jumps its sprockets when it is tied up.

Q: What is it you said? A: When it gets to an extra-heavy load it jumps sprockets, which loses the traction, and rather than skid its tracks it jumps the sprocket.

30 Q: That means it just sort of loses propulsive power on the tracks for one sprocket-distance?
A: Yes.

Q: Jumps out? A: Yes.

Q: Moves and goes on a space? A: Yes, that is so.

Q: And then reseats itself? A: Yes.

Q: When were those floods you speak of? A: Extended between February and June.

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N.D. Thompson
Cross-
Examination
continued

Q: Between February and June? A: No, from heavy flooding in February and again in June.

Q: Was this tractor used after the February Floods? A: Yes.

Q: It was used, was it, between February and June? A: Periodically.

Q: Would it be right to say now it is used as a relief tractor? A: Yes, as a relief tractor, I say.

Q: It is used when other tractors are out of commission? A: Not exactly; possibly we want an additional tractor, such as when flood works are on, and we require additional tractors to keep the units working. 10

(Witness retired)

No.9

No.9

E.W.Akhurst
Examination

EVIDENCE OF EDWIN WALTER AKHURST

Sworn, examined as under:

MR. MEARES: Q: Your full name is Edwin Walter Akhurst? A: Yes. 20

Q: You live in Inverell Street, Ashford? A: Yes.

Q: You were formerly with the Ashford Shire Council? A: Yes, foreman-mechanic.

Q: How long were you foreman-mechanic? A: I was there from 1951 to 1955.

Q: 1950--? A: 1947 to '55.

Q: You left then, and you are now tobacco-growing? A: Yes.

Q: Between 1947 and 1955 how many mechanics, generally speaking, did you have under you? A: From three to four. 30

Q: Were you in charge of the maintenance of all the Council's machinery? A: The maintenance was

left to the drivers, but I checked it to see that they were doing it periodically.

Q: Were you in charge of all the repairs of all the Council's machinery? A: Yes.

Q: Did that include graders and tractors and concrete mixers? A: Yes.

Q: In the time you were there, what was the number of tractors that you averaged? A: I recall seven or eight tractors and five graders, six or eight trucks, apart from the other small machines.

Q: Prior to going to the Council, I think you had been with the 2/8 Field Coy. in the War, were you not? A: Yes.

Q: And the 2/1st Forestry Coy.? A: Yes.

Q: And you had experience with tractors while you were with the Forestry Coy.? A: We had quite a few tractors in the Forestry Coy.

Q: And after you were demobilised, were you doing tractor-driving? A: Yes, I had 12 months' tractor driving for a contractor.

Q: You recall seeing, do you not, the "Breda" on the week before it arrived at the Ashford Shire Council, in Mr. Wilkins' garage? A: Yes.

Q: And it was there being fitted with a power-control unit? A: Yes.

Q: Do you recall it coming to the Ashford Shire? Do you remember it arriving? A: I remember.

Q: Do you remember it arriving? A: Yes, it came down on the Saturday or Sunday; I am not real sure.

Q: The Sunday would be the 13th May? A: Yes.

Q: On the Monday did you go to see Mr. Bourke? A: Yes, we went out to where the tractor was unloaded to work.

Q: Where was it? A: On the Wallengra-Coolati road.

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No.9

E.W. Akhurst
Examination
continued

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Evidence

No.9

E.W.Akhurst
Examination
continued

Q: What was the tractor put to work on on its first day? A: It was clearing a site for a gravel pit?.

Q: Was it using a scoop or 'dozer? A: No, using a 'dozer blade.

Q: And that being its first day's work, how would you describe the type of work it was put on to?

A: It was very light work just knocking grass and rubbish and small trees off the surface so we could get at the better gravel underneath. 10

Q: How did it perform? A: It seemed to be all right on that, and it was light work, and could not get any indication how it would behave, at that time.

Q: I think it worked on the Wallengra-Coolatai Road for a period of three days, did it not?

A: Yes.

Q: Did you keep a record, roughly, only of how your days were filled up? A: Yes.

Q: Would you have a look at this book and would you tell me if that book shows a record of how your days were made up? A: Yes. We did not put down a few minutes spent on the machine. If there were a few minutes spent on one machine, they would probably be charged to another one; but roughly that would be the amount of time spent on that particular machine. 20

Q: I notice in this book that mostly it refers to what you are doing on the one machine, substantially speaking, the whole of a day? A: Yes. 30

Q: Supposing you were on the machine for half an hour or an hour, it would not be put down?

A: Yes, not put down.

Q: Sometimes you would book it up to the wrong machine? A: Yes.

Q: Well, now, looking at Exh. "J", we see that the first day's work, it was on the Wallengra-Coolatai road; had you observed that after three days it was off.

Q: Had you observed in Exh. "J", which is made 40

up from Mr. Thompson's list, that it was put down as working again on the 21st May; do you see that? A: Yes.

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Q: Can you tell us about that? A: That is the following Monday.

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Q: Yes? A: Yes; well, I checked the tractor on the Monday morning and was satisfied that there was something wrong and I went away to another machine for that day, and had no recollection of what was on the tractor on the rest of the day.

No.9

E.W. Akhurst Examination continued

10

Q: As far as you know, on that day, the bearing had gone? A: Yes, on the Wednesday.

Q: The 16th? A: Yes.

Q: You checked it and it was on the Wallengra-Coolatai Road when you checked it? A: No, we brought it into the workshop; it was pushed up on to another truck and pulled off into the workshop yard.

20

Q: Can you tell us when it came in to the workshop? A: That would be somewhere one day towards the end of that week; I think, the Thursday of that week.

Q: Of the first week? A: Of the first week it was in

Q: No, the first week it was off, on the Thursday it came into the workshop? A: Yes.

30

Q: It did not leave the workshop there, to the best of your knowledge, until it got the bearing fixed? A: No.

Q: After it came back into your workshop did you also notice that there was something the matter with the fitting of the P.C. unit? A: Yes, we were not satisfied with the fittings of the P.C. unit and decided to alter it.

Q: Having a look at your book we see that on the Sunday, 20th May, McMullen was working on the day for three hours, do you see that? A: Yes.

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No.9

E.W. Akhurst
Examination
continued

Q: But apparently you never started work on that tractor after the bearing went on the 16th May until the 30th May would that be correct?

A: Yes.

Q: Now, having a look at your book, do you observe that you worked on it for the following full days, Wednesday, 30th May, Thursday, 31st May, Friday, 1st June, Saturday, the 2nd June, for six hours; Monday 4th June, Tuesday, 5th; Wednesday, 6th June, Thursday, 7th June, Friday, 8th June, Saturday for a full day, the 9th June, Sunday, a full day the 10th June, Monday the 11th June, Tuesday, 12th Wednesday, 13th, Thursday, 14th Friday, 15th, Monday, 18th, Tuesday, 19th June; would that be correct? A: Yes, that would be correct.

10

9. Now, do you notice on Exhibit "J" that on 15th June it went back on to the Wallengra-Ashford Road? A: Yes.

Q: Now, in the period of time from the 16th May to the 15th June were engaged on the days you mentioned in re-fixing the P.C. unit and in connection with the bearings? A: Yes.

20

Q: You found many bearings gone? A: There was one badly gone and another one had just started to go, which we replaced.

Q: You replaced two. Was Mr. Bourke up there some of the time to help you with it? A: Yes, he was up there all the time we were working with the bearings.

30

Q: Can you give us a rough idea how long you were working on the bearings? A: I think about 10 days we had on the bearings.

Q: And then when you fitted the two new bearings, what happened? A: The machine started up and it ran for a few minutes and we heard noises again and stopped the machine and pulled it out and one of the bearings had gone again, one of the same bearings.

Q: What did you do with that? A: Mr. Bourke rang the firm in Sydney to send up another bearing, and we waited for a few days for that to come and then fitted it in.

40

Q: Well, then, on the 15th June, you were out when it was doing some drainage work on the road? A: Yes.

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Q: On the Wallengra-Ashford Road? A: Yes.

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Evidence

Q: You had watched it in this light country, you said, on the 14th May and then you next observed it working on the 15th June? A: Yes.

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Q: That was the fourth day of its work of that kind? A: Yes.

E.W. Akhurst
Examination
continued

10 Q: What sort of work was it doing on the Wallengra - Ashford road? A: We were draining a creek in a concrete slab; it was in very light going, in sandy soil.

Q: Was it with a 'dozer? A: Yes, with a 'dozer.

Q: On that occasion, what did you observe about its performance? A: Any time we could get a full blade of dirt, the tractor would start to spin.

20 Q: Did you notice anything else about it or not? A: Yes - on the full day's work we noticed that it had used a fair amount of oil.

Q: Were you observing its oil consumption fairly closely from then on until it was finally grounded? A: Yes, well after working on the first three days, the bearings going on it, we naturally took particular attention to the oil.

30 Q: From then on, what was it doing in regard to using oil? A: From then on, it used an excessive amount all the time; say, somewhere, a gallon - or probably a bit better - every day was used.

Q: What was the usual oil consumption for a tractor of this nature? A: I have seen new tractors. Some of them go from oil change to oil change and use none at all, and would not be more than a quart between oil changes, a period of 30 hours.

40 Q: As far as the using of that oil was concerned did you see any evidence of the oil getting

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Evidence

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E.W. Akhurst
Examination
continued

away? A: Yes, it was showing a lot of blue smoke out the exhaust, which is an indication of oil burning.

Q: Now, from time to time did you make any attempts to stop that? A: Yes, I had a look around the machine at different times, and anything I could think of that might help, I checked on. I checked the valve clearance at one time to see if it was quite all right.

Q: Did you check anything else that you can recall? A: No. There is not a lot you can do around it; to do that might have any effect on the oil. At that particular time that was all that was done. 10

Q: Did you discuss the matter with Mr. Bourke?
A: Mr. Bourke came up at a later date and we had a look over and checked the oil consumption.

Q: We have heard evidence that in 5½ hours on that date it used ¾ gallon? A: Yes, that is correct. 20

Q: And as time went on did this consumption of oil improve in any way? A: No, it was much the same, right through. On heavier work it would use more oil than when it was working light.

Q: Now, we see here that you have mentioned the Wallengra-Ashford road, and you said it was slipping the tracks. What was the slipping; when it got into heavy work? Was that normal slipping, or an excessive slipping, or less slipping than the ordinary tractor? A: More slipping than on any other tractors that I had noticed, that I had anything to do with. 30

Q: Did you notice anything that I have forgotten to mention, on that day, on the Wallengra-Ashford road? A: Yes, we had a little trouble with the clutch on that particular day. It started slipping and heat up, and I made an adjustment on it, but did not do much more work that day and I did not see whether the adjustment made any difference to it or not. 40

Q: Had you discussed with Mr. Bourke the clutch adjustment when he came up to help with the bearings? A: Mr. Bourke, when we got the tractor out

to work the first day, after it arrived, Mr. Bourke gave us a run-through of the maintenance of it and he drew my attention to the clutch adjustment, which is a different type of adjustment than on the normal type of tractor. He showed me how to make this adjustment.

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E.W. Akhurst
Examination
continued

10 Q: You might tell me about this clutch that was on this tractor. Was it the usual type of heavy tractor clutch. A: It had a foot clutch; most of the heavy tractors have a hand clutch, an over-centre clutch.

Q: What is an over-centre clutch? Could you explain it to His Honor very briefly? A: It works on a cam, an over-centre clutch, and when the lever is pulled in position, the cam slips over and puts the pressure on to the plates, and the foot clutch, the pressure is just on by springs.

20 Q: The difference between either type of clutch is the other type is more or less of a grab-clutch? A: Yes, very positive.

Q: And this type of clutch in this tractor was a spring-loaded clutch, is that the position? A: Yes.

HIS HONOR: Q: Were not those two bits of metal that came together? A: The clutch face linings are pressed on to a metal plate on either side by spring pressure.

30 MR. MEARES: Q: Tell me, that type of clutch, this spring-loaded clutch, where do you usually see them? What types of vehicles? A: It is normally the type in cars and trucks.

Q: When you get the heavier type of vehicle what type do you find? A: Mostly over-centre types. Some tractors use the ordinary type of spring clutch, but not many of them.

Q: Do you know any that do, apart from this one? A: The older model Cletrac had this type of clutch.

40 Q: The spring type? A: Yes, I do not know whether they changed or not.

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E.W. Akhurst
Examination
continued

Q: Any other of the tractors you have had?
A: Any of the other tractors we had, had the over-centre.

Q: Then we observe, after that day on the Wallengra Road, on the 18th June it was travelling to the job, and on the 19th it was on the Inverell - Coolatai road clearing similar site, on the 20th it was doing 'dozing fillings to formation, on the Thursday 21st, it was idle owing to oil trouble, and on the 22nd it was being repaired?

10

A: Yes.

Q: In that period of time what did you observe about the working of the tractor? A: It had got on to harder work then, and we noticed more tracks slipping and had more slipping in the clutch, and at that time we noticed the sprocket started to slip in the tracks.

Q: To what extent were you getting sprocket slipping? A: Any time it picked up a heavy load and turned a little, it would mostly slip the sprocket.

20

Q: Did you try to do anything until the time it was grounded to cure that sprocket slipping?
A: We made three or four adjustments on the track tension not to see if we could stop it, but it did not appear to make any difference.

Q: At the end of the story, round about 10th or 12th August, what was the position of the spring tension? Did you have any further to go? Was it tightened right up, or what was the position?

A: We did tighten it right up at one time to see if it would make any difference, but it still kicked over the same, and we were a bit concerned about extra tension on the front idler putting too much strain on the bearings, on the sprocket, so we adjusted the tension for that.

30

Q: Tell me this, when it jumps a sprocket like that, I mean, does it just slip over or does it cause any strain? A: It causes a lot of strain, pulls whole teeth over and the front portion of the idler goes forward with a "bang".

40

Q: Goes forward with a "bang"? A: Yes.

Q: Supposing that trouble was allowed to continue indefinitely, would you be fearful in any way of anything happening? A: Yes, I do not like it at

any time, the tension on the spring would put a lot of pressure on to the bearings and the bearing housings and on the sprocket.

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E.W. Akhurst
Examination
continued

10 Q: In this period, you said before it came back to the garage again, in this period, that it was getting into some heavier work, what particularly did you observe about its efficiency in heavy work? A: Any time it got on to anything heavy, the tracks would spin and we would have trouble with the clutch, and did not seem to give any performance at all.

Q: What do you mean by having trouble with the clutch? A: The clutch would heat up and could not be released. You pressed the clutch in the tractor and it would still keep the tension on the tracks.

20 Q: It would still keep it even though you had your lever in, to disengage the clutch; it would still keep on going? A: Yes, it would still keep moving.

30 Q: Before it came back on the 22nd was this something that only happened on one occasion or was it something you were having a lot of trouble with, or no trouble, or what, the clutch trouble? A: The clutch trouble was with us all the time, from when the tractor went on to heavy work, the trouble started and it was there all the time; sometimes more, sometimes less. Made three or four adjustments on it and it did not seem to have any effect at all.

Q: When was it worst? I mean, with the scoop or with the blade? A: Oh, with the 'dozer it was at its worst.

40 Q: Take an ordinary day's work with it. Imagine it in reasonably heavy work; by that, by reasonably heavy work, it means reasonable work for a tractor of that size? A: Oh, would not be too heavy for it; had another tractor doing the same work at the time and had that type of work I classed as reasonably heavy; we would have to stop it quite often to let the clutch cool down.

Q: Take a day's work in reasonably heavy work; we can imagine the machine starting off and it is cold starting off, from cold? A: Yes.

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E.W. Akhurst
Examination
continued

Q: What would be the picture, how long would it work? A: Sometimes probably lose two or three hours a day waiting for the clutch to cool off.

Q: I want to take it to the other end, you have got it and it is cold; do you follow that?

A: Yes.

Q: When it was cold did it work all right?

A: Yes, for a short time.

Q: Well, then, suppose you got in to the heavy work; what used to happen to it then? A: When it got into heavy work, after it had run an hour, perhaps the clutch would start to seize up and the tractor could not be stopped.

10

Q: How would you stop it? A: It could be stopped by pulling the steering levers back and switching the motor off, but when you had the steering levers back you had no free hand to switch the motor off - kick it off.

Q: Did you see that happen on quite a number of occasions? A: Yes.

20

Q: Before it actually jammed, the clutch jammed, you understand that? A: I beg your pardon?

Q: Before the clutch jammed, before the clutch seized? A: Yes.

Q: Prior to that was there any trouble with the clutch slipping? A: When the clutch got hot after it had seized, and if you tried to move off again, it would stand, the tractor would stand if it had a load on it; it would stand and still slip. If you had it, your engine still running, the clutch would still slip, it would not move.

30

Q: You could not push it? A: No, it would not work.

Q: That trouble, the clutch slipping, did that continue right up until it was grounded on 10th August? A: Yes.

Q: Was there anything you could say, then, to cure it? A: No. It appeared to me the clutch was too light for the job and without pulling the clutch down I could not see any way of altering it at all.

40

Q: Towards the end, did it get better or worse?
 A: It gradually got worse towards the finish, as the clutch plate had worn gradually, got worse, and had to be stopped more often.

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Q: Then, I think, you repaired it; it was in on Friday, 22nd June, for nine hours, being repaired; is that correct? A: Yes.

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10

Q: On that occasion, on Friday 22nd - we will have a look at your book; "Breda - nine hours." There is a note there - "oil trouble"? A: Yes.

E.W. Akhurst
 Examination
 continued

Q: Do you remember what you were trying to do with it that day? A: Yes, we were trying to place the oil trouble; that would be the main trouble; and had a look around the machine for anything else we could do at the same time.

Q: Then on 13th July it is in again for eight days; do you know what that trouble was?
 A: I probably had a look at it working on the road that day.

20

Q: Then do you recall Mr. Bourke coming up on one occasion some time in July? A: He came up one time after we had the tractor for some time, and we went out and had a look at the machine to see if we could do anything about the oil consumption.

Q: Did he make certain adjustments to it?
 A: Yes, he checked the valves and had a look at the injector. Enlarged the holes in the crank case breather.

30

Q: Did that help the oil consumption at all?
 A: No, it was checked after that; we checked it for the 5½ hours after that, it showed ¾ gallon of oil used in that time.

Q: After he came up, was there any improvement in any shape or form with the jumping of the sprockets? A: No, no alteration.

Q: Or the spinning of the tracks? A: No.

40

Q: And as far as the clutch trouble was concerned, did that get any better? A: No, it was still the same.

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E.W. Akhurst
Examination
continued

Q: Did you notice in addition to those matters you have mentioned, as to whether or not there was anything the matter with the trouble with the tracks themselves? A: I beg your pardon?

Q: Did you notice, apart from the troubles you have mentioned with it, whether there was any trouble with the tracks themselves? A: Yes, we had a look at the tracks the day Mr. Bourke was there, and we noticed that some had cracked and some were bent and they appeared to be wearing quite an amount.

10

Q: What degree of wear compared with an ordinary track? A: Seemed to be a lot more wear on them than the normal run of tracks.

Q: You told us that you were observing the machine and its ability to work, that is correct, is it not? A: Yes.

Q: Now, I want you to imagine that it was required to do reasonably heavy work for a tractor of its size? A: Yes.

20

Q: Work, with the full work, with the 'dozer blade that was supplied or full work with the scoop; do you follow that? A: Yes.

Q: What was its performance under those circumstances when it was called on to do full work? A: Well, it seemed to perform poorly. Anything where it had to work harder at all, the scoop we had on it could not fill it up to capacity.

Q: It could not fill the scoop up to capacity? A: No, the scoop got somewhere near full, the tractor would start to spin and would have to be lifted out to the ground and had to be carted away.

30

Q: Would it have been, do you think, capable of doing any reasonably continual work of a light nature? A: I beg your pardon?

Q: Would it have been capable of doing work continually of a light nature? A: It would have to be very light or you would have trouble with the clutch. Any time when there was a fair amount of clutching or de-clutching, such as 'dozer work, the clutch would give trouble.

40

MR. REYNOLDS: May I see the book that you have been referring to? (Handed to Counsel).

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MR. MEARES: Q: Mr. Kramer was the driver of it, was he not? A: Yes.

Plaintiff's Evidence

Q: You saw him driving the tractor? A: Yes.

Q: Both with the blade and with the scoop?
A: Yes.

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Q: And you observed how he drove it? A: Yes.

E.W. Akhurst
Examination
continued

10 Q: Was there anything in his method of driving, which, in your opinion, caused any trouble to the tractor? A: No.

CROSS-EXAMINATION

MR. REYNOLDS: Q: You told Mr. Meares in some detail about the performance of this tractor in June, did you not? A: Yes.

Cross-examination

Q: And that was on the Coolatai-Wallengra Road?
A: Yes, Coolatai-Wallengra.

20 Q: How much time did you see it working in that week, the 18th June onwards; or, the fortnight?

A: I could not say the actual time, but from time to time I would go out and have a day and check on the different machines.

Q: How far out was that from the Council depot?
A: About 20 miles.

Q: (Approaching): See, on the 18th June you travelled out to the job? A: Yes.

Q: That means you helped take it out there?

A: I would travel with it and keep an eye on it after it had been -

30 Q: No work done that day with it, by the look of it? A: No.

Q: Then the following day, the Tuesday, you stayed out there, apparently? A: Yes.

Q: And it was worked to clear a gravel site?
A: Yes.

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Evidence

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E.W. Akhurst
Cross-
examination
continued

Q: The next day, the Wednesday, you are shown as on the Cletrac from 7 o'clock to 4.30 in the afternoon? A: Yes.

Q: Where was that? A; I don't remember.

Q: Would it be the same place as this; it would not be, would it, the "Breda". (Witness hesitates) A: I cannot remember.

Q: Well, on the Thursday, you worked all day on the Cletrac? A: Yes.

Q: Was that in that week; would I be right in thinking that you only had one day to observe the performance of this tractor? A: There is another full day on the Friday. 10

Q: Is that worked, or is that work it had performed? A: That would be a check on the oil trouble.

Q: When were those words "oil trouble" written in there? The same time as you wrote that? A: Yes, that would be written in at the same time. 20

Q: The same time? A: Yes.

Q: What was the oil trouble? Does that mean working, your working from 7 to 5.30, and you just checked the oil, or what? A: It would have meant that or it could have meant I had a day on the tractor, checking why it was using that oil.

Q: You do not know? A: No, I am not sure.

MR. REYNOLDS: Q: Let us take the next week, 25th, 26th, 27th, 28th and 29th. You are shown for the first four days of that week working on No.1 S.P. What is No.1 S.P.? A: It was a medium grader. 30

Q: Where was that? A: That would probably be at the workshop.

Q: Where was the Breda that week? A: It would be working on the Coolatai-Wallengra Road.

Q: Twenty miles away? A: Yes.

Q: You would have no knowledge what it was doing

excepting from what people told you? A: That is correct.

Q: This evidence you are giving, is it based on what you saw yourself or what you were told?

A: The days I was there -

Q: Let us see what days were you there. In the first June week there was one day for sure it was working - have a look at the diary, starting at the 18th - travelled out the first day. It cleared gravel site on the second day?

10

A: Yes.

Q: And the third and the fourth days you were working on the truck all day which was probably in at the depot? A: Yes.

Q: And the fourth day, you cannot tell me where it was and you had to look for some oil trouble, or whether you didn't work that day? A: That would be so.

MR. MEARES: What date are you up to?

20

MR. REYNOLDS: The 22nd, Friday of that week.

Q: In that week you are only sure you saw the tractor working on the one day? A: Yes, the one day. I checked it while it was travelling to the job.

Q: Did it travel under its own power? A: Yes.

Q: Gave no trouble then? A: No.

Q: The only day you saw it in work was on the Tuesday? A: Yes.

30

Q: The following week you didn't see it in work at all, did you? Have a look at your diary" A: (Witness looks at diary). That is correct.

Q: And the next week, on the Monday you were working again on the No. 1 S.P.? A: Yes.

Q: And on 3rd July you say that you worked "7 o'clock to 5.30, Breda" - what does that mean? A: I could not remember just what I was doing on that particular day.

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E.W. Akhurst
Cross-examination
continued

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Plaintiff's
Evidence

No.9

E.W. Akhurst
Cross-
examination
continued

Q: Was it working for eight hours on the Coolatai-Wallengra Road on forming? A: It could be

Q: What does this mean, "7 o'clock to 5.30 Breda"?
A: I would be there keeping an eye on it.

HIS HONOR: Q: What date is that? A: 3rd July.

MR. REYNOLDS: Q: What does this book of yours mean? Does it mean you made out an entry like that if you were keeping an eye on the tractor which was at work? A: If I had to go out on to the job for a certain job I would put it down to that machine. 10

Q: So if you were sent out there to tighten some nuts, 20 miles away, you would book it as you have done here 10 $\frac{1}{2}$ hours Breda - you put nine here?
A: Yes.

Q: What you now say is that you did not work for nine hours on the Breda? A: No.

Q: Or anything like it? A: No.

Q: We are told here that it worked 8 hours on that day (Objected to; rejected).

Q: Is it consistent with your entry that that tractor worked for 8 hours on a job that day? 20
A: That could be right, a few stops while I checked the machine in some parts of it.

Q: There is no doubt on your evidence that prior to this date, 3rd July or the 4th July if you like, the clutch trouble was very bad? A: I just didn't catch that question.

Q: Is it true that there was very bad clutch trouble before 4th July? A: We had clutch trouble continually, right through. 30

Q: Was it bad before 4th July? A: I cannot remember the dates actually.

Q: Have a look at your diary?

MR. MEARES: Can you give him the mishap of the tree incident - that may help him.

MR. REYNOLDS: Q: Apart from the time of the mishap to the tree, that was 5th July - have you got

that date 5th July when the radiator coil was pierced? A: Yes. I haven't anything down to the machine that day.

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Q: I want to draw your attention to that date.

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Evidence

At that time had the machine been having bad clutch trouble? A: Yes.

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Q: Had you discussed that with the engineer, Mr. Bowman? A: It would have been mentioned, but we might not have had a discussion on it.

E.W. Akhurst
Cross-
examination
continued

10 Q: So that the thing which was really making the tractor ineffective at that time was the clutch trouble? A: It was one of the things.

Q: What else was there? A: Excessive slipping of the tracks, the slipping over the sprockets, and excessive use of oil.

Q: Did you ever suggest that a new tensioning spring should be sought? A: No.

Q: You did not dismantle the clutch? A: No.

20 Q: Did you suggest or recommend that the clutch should be dismantled? A: Yes, well I suggested something would have to be done about it.

Q: To whom? A: It would be Mr. Bowman. He was our engineer at the time. I was responsible to Mr. Bowman for any work I did.

Q: It is not possible to tell from your book how much time was spent with fixing up the power control unit? A: No.

30 Q: Did you put the radiator core back after it had been damaged; Did you replace the missing radiator core with a fresh one? A: No. When the stick went through the radiator core -

Q: Did you ultimately replace the radiator core yourself? A: No.

Q: Who did? A: We didn't get the radiator core until after the tractor was stood down.

Q: So that at the time you stood the tractor down in August it then had one-sixth of the

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E.W. Akhurst
Cross-
examination
continued

radiator core missing? When was it put in, if ever, the new one? A: It was not put in while I was on the shire.

Q: So I may take it then that by 1955, last year, there was still one-sixth of the radiator core missing? A: Yes.

Q: There is no doubt about that is there? A: No.

Q: Now you wanted to tell me something about when the stick went through? A: Yes.

Q: Would you tell me what that was? A: We were a bit concerned about what would happen to it and we got in touch with Mr. Bourke. 10

Q: Who did? A: Mr. Bowman.

Q: Were you there? A: No. I told him about it and -

Q: You spoke to him? A: I spoke to Mr. Bowman.

Q: And subsequently he gave you some instructions? A: He told me that Mr. Bourke had said to block that section of the radiator off. It would be quite all right to work it if we watched it and saw the engine did not overheat. 20

Q: Is it difficult to get hold of a radiator core? A: It was at that time.

Q: How do you know that? A: We were a long time before we had it forwarded to us.

Q: What do you mean by a long time? Was it ever forwarded to you? A: Yes, we did get it.

Q: When? A: After the tractor was stood down.

Q: How long after? A: I cannot remember that.

Q: Where did you get it from? Do you know where it came from? A: I could not say the actual place. 30

Q: Where was it put, in the store? A: It was put in stores.

Q: That is where it was when you left the council,

when you ceased to be in the employ of the council? A: Yes.

Q: Did you plug up the gap where the broken portion of the core came through or leave it open? A: It was left open.

Q: You felt it might be dangerous to run the motor with one-sixth of the core missing?
A: I think it would be all right but I waited for information from Mr. Bourke.

10 Q: I thought you said you were a bit concerned about it? A: No.

Q: You didn't say that? A: No.

RE-EXAMINATION

MR:MEARES: Q: As far as this radiator core was concerned that of course controls the heat of the water in the radiator? A: Yes.

20 Q: Did you at any time from the time the tractor was first run until it was grounded have any trouble at all with the overheating of the water system? A: No.

Q: Non at all? A: No, the engine was run at the normal heat.

Q: And I want you to assume that the number of days this tractor was working was a total of 30 days approximately? A: Yes.

30 Q: Can you give us a rough idea of how many different occasions it was you watched and observed its working in various places during that time? A: As far as I can remember 8 or 10 days in that particular time.

Q: During those 8 or 10 days you observed it working, apart from the worsening of the clutch position, did its method of working vary to any great extent? A: Unless it was in very light work it always had trouble with the track spinning, the clutch slipping, at all times on heavy work.

(Witness retired)

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E.W. Alhurst
Cross-
examination
continued

Re-examination

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No.10

EVIDENCE OF CLARENCE GARFIELD KRAMER

Sworn, examined, deposed:

Plaintiff's
Evidence

No.10

C. G. Kramer
Examination

TO MR. MEARES: My name is Clarence Garfield Kramer and I am a tractor driver.

Q: You have been with the Ashford Shire Council since 1948? A: That is right.

Q: And you are still there? A: Yes.

Q: And since 1948 have you been engaged on tractor driving? A: Yes.

10

Q: And until you took over the Breda tractor in May of 1951 had you been doing mostly scoop work? A: Yes, mostly scoop work.

Q: Had you done any blade work? A: Just a little.

Q: But not a great lot? A: No.

Q: Had you been driving different types of tractors over your experience in that time? A: Yes.

Q: Light ones and heavy ones? A: Yes.

Q: Had you ever had charge of a brand new tractor? A: Yes.

20

Q: Prior to the Breda? A: Yes.

Q: What one did they give you before that? A: A Fiat.

Q: Were you on the Fiat, did they take you off the Fiat to go on to the Breda? A: Yes.

Q: When did you take the Fiat over? A: I have no idea. I have forgotten.

Q: You recall, do you not, the tractor going out on to the Wallangra-Coolatai Road on the Monday the day it arrived? A: That is right, yes.

30

Q: Did Mr. Bourke give you some instructions as to maintenance and operation? A: He did, yes.

Q: Was he out there on that day? A: Yes.

Q: What sort of work did you have it on that day? A: Very light work, light tractor work, clearing gravel site.

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Q: Is that easy or heavy? A: It is easy.

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Evidence

Q: How did it perform? A: It seemed to be going all right.

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Q: Then I think you worked it for a matter of some three days? A: Yes.

C. G. Kramer
Examination
continued

10 Q: You were out on the Wallangra-Coolatai Road in that period of three days? A: Yes.

Q: Were you still on this clearing for the gravel? A: No, I was doing a bit of dozing up the road.

Q: What sort of work was that? A: It was not real heavy work. Some of it was black soil.

Q: What does that mean? A: Not real hard on the tractor, no stones of any sort.

20 Q: On the Wednesday, on the third day, did something happen in regard to the oil pressure? A: I heard a noise in the tractor and I looked at the oil gauge and the oil pressure had dropped.

Q: Did you immediately then switch the engine off? A: Yes.

Q: Then was it off quite a long long time having the P.C. unit adjusted and some bearings put in? A: Yes, that is right.

30 Q: Was Mr. Bourke up there for some of that time helping Mr. Akhurst with it? A: Yes.

Q: (Approaching witness with Exhibit J) You might observe on Mr. Thompson's notes - you know Mr. Thompson's notes? A: Yes.

Q: It is shown on Exhibit J, for the week ending the 18th, that there were three days work there and then it went off - do you follow that? A: Yes.

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C. G. Kramer
Examination
continued

Q: And then it is shown off on a large number of days, you understand that, until 15th June?

A: Yes.

Q: Then you notice he has got one day in, on the Monday following the week it broke down, working on the Wallengra-Coolatai Road - can you see that?

A: Yes.

Q: Have you got any recollection after it broke down with the bearing trouble ever being a single day on the Wallengra-Coolatai Road? A: I have a recollection we did a day's work after the bearings were fitted.

10

Q: Between the time the bearings went and the time it was all fixed up, do you follow me?

A: Yes. No, it was not.

HIS HONOR: I notice there is a week missing at the beginning of June.

MR. MEARES: Yes, Your Honor.

Q: Do you recall some trouble with a stump, knocking over a stump, hurting the radiator core?

A: Yes.

20

Q: When the tractor started work again after this bearing trouble on or about 15th June, do you follow that? A: Yes. I wouldn't know the date.

Q: When you had new bearings put in, did you start it off initially on light work with the new bearings? A: Yes. We done a light day's work.

Q: Then on July 5th you had some trouble with a stump, do you remember that? A: Yes.

30

Q: What happened to the stump? A: I went to push a tree down actually and when it fell a root came up under the plough and went through the coil of the radiator.

Q: What did you do about that? A: I just stopped the tractor and left it there.

Q: You didn't work it after that? A: No.

Q: Take that time when you had the stump trouble,

at that time would you tell me what trouble you were having, if any with the tractor? A: It was jumping the back sprockets, especially in reverse when you turned round in reverse, and the clutch - we had a lot of trouble with the clutch. It used to seize up. It used to get hot when it was going with a load and we would have to ease the pressure off the load and when you put the foot on the clutch it would keep going. It would not stop. It would get hot and you could smell burning.

10

Q: First of all about the sprocket jumping, tell me roughly in relation to the stump trouble when did it start, and did it get better or get worse or remain the same? A: No, it kept getting worse.

Q: No, the sprocket? A: About the same all the time it was.

20

Q: When would it jump? A: Especially going back in reverse and turning, when you are turning in reverse.

Q: What sort of a noise would it make when it did that? A: A big bang.

Q: Did it only happen once a week or once every second week, or how often? A: Fairly often. It could be two or three times a day or something like that.

30

Q: As far as the clutch was concerned, do you remember Mr. Akhurst coming out from time to time and making adjustments? A: I do.

Q: Did those adjustments do it any good?
A: No, they didn't seem to do it any good at all.

Q: When did you have most difficulty with the clutch, under what conditions? A: When it had the blade on.

Q: That is the dozer work? A: Yes.

Q: It was not so difficult with the scoop?
A: No.

40

Q: What would happen, take a day's dozing - do

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C. G. Kramer
Examination
continued

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C. G. Kramer
Examination
continued

you follow me? A: Yes.

Q: What would happen in regard to the clutch in a day's dozing?

MR. REYNOLDS: Which day's dozing?

MR. MEARES: Q: Can you tell me an ordinary average day's dozing, what would happen to the clutch?

A: You would probably waste two or three hours work during the day waiting for it to cool down. It would seize up and you would have to switch off to cool it down.

10

Q: When you cooled it down how used it go then?

A: It would probably go all right for an hour, or half an hour, or two hours and then it would get seized again, and seize up again.

MR. MEARES: Q: When used you to get the most trouble with the clutch - with the dozer blade?

A: With heavy work. We would get more trouble then.

Q: As far as that was concerned, supposing you got into heavy work with it and were getting clutch trouble what would you do, if anything, to avoid trouble or to make it as little as possible?

20

A: Could I have that again please?

Q: Was there anything you could do? A: There was nothing I could do about it. We used to have to ease the pressure or lift the blade.

Q: You would do that to make it easier? A: Yes.

Q: Can you remember any occasion, as far as this seizing was concerned, and you had to switch it off - did that only happen once or twice, or was it a common occurrence? A: It was a common occurrence.

30

Q: Were there any occasions when you got into real difficulty with it? A: My word there were. To push the tray down - you could not push it satisfactorily - to pull the clutch you would be on the tooth like that.

Q: So far as the clutch trouble was concerned, did it get worse or did it get better? A: It got worse.

40

Q: At the end of the time - when it went off the road on 10/12th August, do you say that it was worse then than it was at the beginning?
A: That is right.

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Q: So far as the scoop was concerned - what was it like with the scoop? A: The tractor did not handle the scoop so badly. The tracks used to spin a lot. They used to spin a fair bit. You would have to take it further to fill the scoop.

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C. G. Kramer
Examination
continued

10

Q: You had a 6-8 yard scoop? A: That is right.

Q: What about its ability to handle a full scoop? A: You could get a full scoop. You would have to go along on certain gears and change them. You would get about 8 yards.

Q: If you went farther than that what would happen, if you got more than 6 yards what would happen? A: The tracks would start to spin when you put a load on it.

20

Q: You would have to go along until you got a 6-yard load? A: Yes.

Q: If you put any more in you would get the spinning tracks? A: Yes. You would have to leave the stuff and go away.

Q: When you took delivery of the tractor what was showing on the hour-meter? A: Seven hours.

Q: At the time when the bearings went - how many hours were showing then? A: Thirty hours were showing then.

30

Q: Do you remember - when the bearings went Mr. Wilkins came out there on a Sunday - after the tractor had been placed in the workshop?
A: That is right.

Q: Were you there at the time with Mr. Wilkins?
A: I was.

Q: Did he then drain the oil out of the tractor? A: Yes.

Q: Did he refill it with fresh oil? A: Yes, that is right.

40

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Evidence

No.10

C. G. Kramer
Examination
continued

Q: Did he tell you anything about the tractor on that occasion - Mr. Wilins - (Objected to; not pressed).

Q: You have told us that you have driven a large number of tractors and that you are still driving tractors? A: Yes.

Q: Compared with other tractors of its size and the work which this particular tractor is capable of doing - (Objected to ; disallowed).

Q: Putting it this way - if you had it doing very light work, work which a tractor of 25/30 h.p. could do, would you have less trouble with it? 10
A: I would, yes.

Q: Do you remember the occasion when you were driving the tractor - towards the end of June - for the purpose of levelling off some roadwork?
A: Yes. I remember that occasion.

Q: Do you recall whether or not during those days another tractor was brought in for any purpose?
A: There was another tractor there at the time. 20

Q: What was it doing after you started? A: It was pushing filling up on to the road.

Q: Was there any particular reason why it was doing that on the job which you were doing then?
A: I was loading-down and the other tractor was pushing it up on to the roadway.

Q: Was that an easier job than pushing the dirt up? A: Yes.

Q: What tractor was it? A: It was a T.D. 14 International tractor. 30

Q: Had you tried to do that work with your tractor? A: I had.

Q: How did it handle it? A: It would only take half as much as it should have taken.

Q: After the radiator core went, do you remember that, subsequently, you drove the tractor until you knocked off some time in August with the radiator core section still out of commission? A: Yes.

Q: Did you ever have any trouble with the water boiling or over-heating? A: No. 40

CROSS-EXAMINATION

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No.10

C. G. Kramer
Cross-
examination

MR.REYNOLDS: Q: Do you say that from 5th July until you ceased driving the tractor it had a portion missing from the radiator core? A: Yes.

Q: Have you driven the tractor this year?
A: No.

Q: Have you seen it working this year? A: No.

Q: Where have you been working throughout this year? A: I have been working on a lot of different jobs but it has not been in our gang.

10

Q: What are you driving now? A: I am driving a D.6 Caterpillar tractor.

Q: At the time of your ceasing driving the Breda tractor were the seals of the hour-meter still intact? A: As far as I know they were.

Q: That is the meter which records the number of hours the tractor has been used? A: Yes.

Q: Do you say that adjustments were made to the clutch before the end of July? A: Yes.

20

Q: Did you see them being made? A: I might not have just seen them. I was there when they were made.

Q: How were they made? A: I know I was there.

Q: Did you watch them being made? A: You have them - just the clutch.

Q: Did you stand by? A: I may have been doing something else.

Q: Who would make the adjustment? A: The mechanic, Mr. Akhurst.

30

Q: You would not stop and watch him while the clutch was being adjusted on your tractor?
A: No.

Q: You did not or would not? A: No, I would not.

Q: When you told us that adjustments were made

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Plaintiff's
Evidence

No.10

C. G. Kramer
Cross-
examination
continued

to the clutch and they did no good - you did not see them being made? A: To tell the truth, that is what he came out after - to adjust the clutch.

Q: When the bearing went do you say that the oil pressure dropped? A: Yes.

Q: Did you then ascertain that there was insufficient oil in the lubricating system? A: There was plenty of oil in it then.

Q: Do you say that the pressure dropped? A: Yes.

Q: You heard a knock? A: Yes. I heard a knock and I look down and the oil pressure was down below what it normally was. So I just cut the engine off then. 10

Q: There was no loss of oil? A: No. I looked in and there was plenty of oil in it.

Q: Do you say that the failure of the bearings could not have been due to lack of lubrication? A: No.

Q: There is no question about that? A: No.

(Witness retired)

20

No.11

No.11

N. K. Mell
Examination

EVIDENCE OF NEVILLE KELSOE MELL

Sworn; examined, deposed:

MR. MEARES: Q: Where are you living? A: Albury Street, Ashford.

Q: Are you a mechanic employed by the Ashford Shire Council? A: Yes.

Q: Are you still so employed? A: That is right.

Q: How long have you been working for the Ashford Shire Council as a mechanic? A: I have been there for two years now. 30

Q: In that time have you been concerned with the repair, amongst other things, of the Council's tractors? A: Yes.

Q: How many have you got up there? A: There are 2-9's, a Cletrac, a "220" -

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Q: Were you in the Royal Australian Air Force between 1946 and 1948? A: Yes.

Plaintiff's
Evidence

Q: Amongst other places, have you also worked at the Rocket Range? A: That is right.

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Q: Did you do a nine months fitters' works course when in the Air Force? A: That is right.

N. K. Mell
Examination
continued

10 Q: When in the Air Force were you also concerned for a period of time with diesel tractors?
A: Yes.

Q: Were you given a job in December of last year to see what could be done about the Breda tractor? A: Yes.

Q: Did you, when doing that job, complete a workcard showing the work you did on that tractor? A: Yes.

20 Q: Did you complete that card from day to day as you were doing the work? A: It was not done from day to day - over a period.

Q: Some days you put it down - at varying periods? A: Yes.

Q: Do you recall when it was that you first started on the job? A: It would be about the 6th December.

Q: What did you do on that occasion? A: I took the clutch out of the machine and broke the tracks.

30 Q: How many days were you working on it during December? A: From time to time I would spend a few hours on it.

Q: What were you doing? A: I was dismantling the clutch.

Q: May I take it that at the end of December you had completely dismantled the clutch?
A: Yes.

Q: Roughly, how many hours did it take to

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Plaintiff's
Evidence

No.11

N. K. Mell
Examination
continued

dismantle the clutch? A: I should say it took from 14 to 16 hours.

Q: Did the Council's employees go on holidays in December? A: That is right.

Q: Did you start work on the clutch again on the 12th January? A: Yes. We had to get springs made for the clutch. We started to put it back together again.

Q: After dismantling the clutch in December did you observe anything the matter with the clutch? A: Yes. The clutch facings were badly worn and the springs were too. There are six springs in the clutch and four out of the six were broken.

10

Q: What do those springs do? A: They spread the clutch.

Q: After they were broken - what happens then?

A: They just do not spread the clutch.

Q: Were you required to get new springs made for the clutch? A: Yes.

Q: New springs were supplied and you had the new clutch facings? A: Yes.

20

Q: Did you fit in the new springs and the new clutch facings on the 12th January? A: That is right.

Q: Did you re-assemble the new clutch on the 13th January? A: I cannot remember what the date was.

Q: (List shown to witness): Would you look at the entries there and tell me what you did? A: That is correct.

30

Q: You re-assembled the clutch on the 13th January? A: Yes.

Q: Were you working on that job for four hours? A: That is right.

Q: Did you start the motor up after completing the re-assembling? A: Yes.

Q: What happened then? A: The motor was started to see if the clutch would disengage.

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Q: Did it disengage? A: No.

Q: You had not achieved very good results up to that time? A: No.

Plaintiff's
Evidence

Q: What did you do then? A: I dismantled the clutch again to see if I could find out what was the cause of the trouble.

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Q: Was it the 17th January 1956 when you dismantled the clutch again? A: Yes.

N. K. Mell
Examination
continued

10

Q: Did you spend another four hours dismantling it on that occasion? A: That is right.

Q: Did you spend a further 8½ hours on the 18th January checking the clutch in an endeavour to find out what the fault was, apart from those faults which you had detected on the 12th January? A: That is correct.

Q: What trouble did you find then? A: The toggles were not correctly adjusted.

20

Q: Speaking as a layman, would you explain to His Honor what you mean by the toggles not being properly adjusted? A: They are three fingers which work the clutch and allow it to open evenly. They were not allowing the clutch to open. They were not true.

Q: To what extent were they not true? A: They were out about 15-thousandths of an inch.

Q: Is that an excessive difference? A: Yes.

30

Q: What is the general margin? A: About 5-thousandths of an inch.

Q: These were 15-thousandths out? A: Yes, that is right.

Q: Could you detect from an inspection whether that was as a result of wear? A: It did not appear to be wear.

Q: Did you then re-assemble the clutch? A: I did.

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Plaintiff's
Evidence

No.11

N. K. Mell
Examination
continued

Q: Were you engaged for about 8 hours on that particular job, on the 20th January; a further 8 hours on the 23rd. (List shown to witness).
A: Yes. That is right.

Q: In addition to those toggles did you have to do anything about the "shims"? A: The shims had to be put up to even the toggles.

Q: What is a shim? A: It is a piece of thin brass.

Q: You had to make the shims to even up the toggles? A: That is right.

10

Q: You got the toggles right and re-assembled and tested the clutch? A: That is right.

Q: Did it seem to be all right? A: It seemed to function all right then.

Q: Did you set out to see what you could do in regard to the tracks on the 24th January? A: Yes.

Q: Did you spend eight hours on the 24th and eight hours on the 25th January? A: Yes.

Q: And five hours on that particular job on the 26th January? A: Yes.

20

Q: What did you do on that job? A: Pieces of brass were cut and put in by the springs, in front of the springs.

Q: As far as the tension spring was concerned, was it supposed at that time to tighten the tracks up in any way? A: It could not have adjusted the tension spring at all. The tension springs did not seem strong enough for the track.

Q: What did you do as an improvisation? A: I cut down the free-travel - where it comes back inside the springs. You cut a piece of brass and put it behind to cut down the free-travel.

30

Q: Was that done for the purpose of stopping the tracks from jumping? A: Yes.

Q: From the 9th February 1956 until 5th March did you spend a total of 91 hours on the engine.
A: Yes.

Q: Did that involve the provision of new rings, valve grinding and so on? A: Yes.

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Court of New
South Wales

Q: Did you also fit new injectors? A: Yes.

Q: Did you make new fuel guides? A: That is right.

Plaintiff's
Evidence

Q: Did you also make and fit a new radiator grille? A: Yes.

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Q: What was that like compared with the original radiator grille? A: It was a much heavier grille. The other one was very light.

N. K. Mell
Examination
continued

10

Q: Was it very much lighter than the grilles on other tractors of that type? A: Yes.

Q: Was the tractor put into operation shortly after that? A: It was.

Q: Was it working on various jobs on various occasions up till approximately September of this year? A: Yes.

Q: Did you have occasion to do any repairs on it in that time from time to time? A: Yes.

20

Q: Did you also have occasion to see it working? A: Yes.

Q: Did you see it working on a number of occasions? A: Yes.

Q: To what extent? A: About 10 or 12 times, I suppose.

Q: How did it go on those occasions? A: It did not give an extra good performance for the simple reason that the clutch did not stand up to it. It seized and the tractor had to be stopped to allow the thing to be cooled down.

30

Q: Was that something that happened only once a month or was it a regular occurrence? A: It was very regular.

Q: Having considered the problem and had the clutch stripped down could you think of anything to overcome that trouble? A: No.

In the Supreme
Court of New
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Plaintiff's
Evidence

No.11

N. K. Mell
Examination
continued

Q: So far as the slipping of the clutch was concerned, was that something that occurred in all types of work, or did it get worse under certain conditions? A: It was occurring on all types of work.

Q: Was it better or worse if the work was heavy?
A: It was worse if the work was heavy.

Q: What used to happen when the clutch jumped?
A: You could not stop the machine. You would have to switch off your motor or you would have to disengage the steering clutch to stop it.

10

Q: Did you see that happen? A: No.

Q: Did you see it after it was in the jammed condition? A: Yes.

Q: Did you see it waiting to cool? A: Yes.

Q: What was it like when it cooled off? A: It would be all right again until it overheated again and started to slip.

Q: Did you see it when doing the work and the clutch slipped? A: Yes.

20

Q: After it got overheated and when it started to get heated - first of all, when stone-cold did it give any trouble so far as the clutch was concerned? A: No trouble.

Q: When it started overheating and the clutch started slipping, would that involve any loss of driving power at all? A: Yes.

Q: A lot? A: Yes.

Q: What would have to be done then about using it? A: The clutch would have to be adjusted again.

30

Q: When you got a loss of driving power what work was it then capable of doing after? A: Very little.

Q: What type of work was it doing? A: Mostly dozing work.

Q: Was it a light type of work or work of a heavy type? A: It was light work.

Q: When you saw it operating - did you see it operating in comparison with other tractors?
A: I did.

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Q: Did you see it operating in comparison with tractors of very much less horse-power rating?
A: Yes.

Plaintiff's Evidence

Q: What did you see? A: 35/38 h.p. -

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Q: What was its working compared with them?
A: Nothing in comparison at all.

N. K. Mell Examination continued

10 Q: Why? A: It just would not do the work.

Q: Was it stood down in August of this year?
A: It was stood down. I cannot remember the time.

Q: It was stood down and not used again?
A: Yes.

(Further hearing adjourned until 10 a.m. on Monday 19th November 1956).

No.11

PLAINTIFF'S EVIDENCE
NEVILLE KELSOE MELL

CROSS-EXAMINATION

Cross-examination

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
IN CAUSES) CORAM: FERGUSON J.

ASHFORD SHIRE COUNCIL

- v -

DEPENDABLE MOTORS PTY. LTD.

FOURTH DAY: MONDAY, 19TH NOVEMBER, 1956

30 MR: MEARES: I would ask leave to correct the transcript on p.114, eight questions down on the page, the answer to read "It seized and the

In the Supreme Court of New South Wales

tractor had to be stopped to allow the thing to be cooled down".

Plaintiff's Evidence

NEVILLE KELSOE MELL

On former oath:

CROSS-EXAMINATION

No.11

N. K. Mell
Cross-
Examination
continued

MR. REYNOLDS: Q: You didn't check the toggles before you re-assembled the clutch the first time?

A: No.

Q: Then when you did check them and re-assembled the second time you got a clutch that functioned?

10

A: Yes.

Q: And did it start to overheat when first used after re-assembling? A: Not straight away, no.

Q: How long did it operate efficiently? A: I would not have any idea because I was not operating the machine.

Q: Were you observing it? A: Not out on work.

Q: When you told us what happened after that was very regular; that is what someone told you, is it? A: No, when it would go we would be called out on to the job.

20

Q: You were called out on to the job from time to time? A: Yes.

Q: What - whenever the clutch jammed? A. (Objected to - rejected).

Q: Having regard to the answer you gave on Friday to Mr. Meares, was that something that happened once a month or was it a regular occurrence?

A: No Sir, it was very regular.

Q: What does that mean - you were called out very regularly? A: Yes. When the clutch started to go it would slip that way but the clutch would have to be adjusted again, and it would last for a while and then it would have to be adjusted again.

30

Q: How often were you called out to adjust the clutch? A: The last time that I can remember three times in a fortnight.

Q: The last time was three times in a fortnight - when was that? A: The last period it was worked.

In the Supreme Court of New South Wales

Q: Somewhere about September, two months ago? A: Yes about that time I should imagine.

Plaintiff's Evidence

Q: Is that the worst example? A: No, it was much the same right through.

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10

Q: Is there some record which shows how often you were called out to attend the Breda? A: No.

N. K. Mell Cross-examination continued

Q: What would you do when you adjusted the clutch on these occasions? A: Remove shims.

Q: From where? A: They are adjusting shims on the outside housing of the clutch.

Q: That would indicate I suppose wear on the clutch facing? A: Yes.

20

Q: Did it ever occur to you that there must be some lack of trueness in the central clutch plate that was causing this seizure? A: As far as we knew it was true.

Q: Did you test it? A: No we did not test it not while it was in the machine. We tested it before we put it back into the machine.

Q: Have you looked at the tracks from the time you got this tractor back into commission up to the present time? A: Yes.

Q: They haven't got any worse, have they? (Objected to).

30

Q: From the time you got the tractor back into commission, that is January or February, I think you told us? A: March I think it might have been.

Q: To the present time? A: Yes.

Q: Have the tracks got any worse in their apparent condition? A: There seems to be more bending in the tracks.

Q: As tracks they still operate? A: Yes.

In the Supreme
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South Wales

Plaintiff's
Evidence

No.11

N. K. Mell
Cross-
examination
continued

Q: Although they have some bending and skidding?

A: Yes.

Q: Have you ever considered the advisability of getting fitted a stronger or more powerful track tension spring? A: That is out of my line. It has nothing to do with me.

Q: What you did was to do the best with the material you had? A: Yes.

(Witness retired)

No.12

A. R. Higgins
Examination

No.12

10

EVIDENCE OF ALBERT ROY HIGGINS

Sworn, examined, deposed

TO MR. MEARES: My name is Albert Roy Higgins and I am a tractor operator employed by the Ashford Shire Council.

Q: How long have you been with the Council?

A: 11 years.

Q: What part of that time, if any, have you been engaged in driving tractors? A: The whole time.

Q: What sort of tractors have you driven in that time? A: Every one that the Shire has.

20

Q: What sorts have they got? A: Cletracts, T.D. 9, Breda and W.D. 6.

Q: Prior to this year had you even driven the Breda? A: No.

Q: Prior to this year had you ever seen the Breda working? A: No, I was in a different gang.

Q: In this year were you for a time driving the Breda? A: Yes.

Q: From when to when? A: From the 27th July to the 10th August. You have the records of the correct dates.

30

Q: During that time what work were you doing? A: Very light work.

Q: What were the jobs you were on? A: Shifting sawdust from the sawmill, shifting it further out from the mill, clearing it from the mill.

In the Supreme
Court of New
South Wales

Q: That did not involve digging the blade into any immovable object? A: Only just the sawdust.

Plaintiff's
Evidence

Q: What else? A: Stockpiling the loader.

No.12

Q: What does stockpiling mean? A: Stockpiling pushing gravel into a heap so that the loader can pick up the load on the truck.

A. R. Higgins
Examination
continued

10

Q: In that process was the gravel that you were pushing loose gravel? A: Yes.

Q: You didn't have to dig it out? A: No.

Q: And the other job? A: Spreading gravel. After the scoop brought it in I was levelling it off with the grader.

Q: Again on that occasion was the gravel you were spreading loose gravel? A: Yes.

Q: Anything else? A: I was stockpiling gravel to cover the sports ground up there.

20

Q: What do you mean by stockpiling? A: To be loaded on to the trucks again.

Q: Again, was it loose? A: Yes.

Q: What else? A: The last job was doing clearing for the Masonic Hall, a little bit of timber.

Q: Was that heavy or light work? A: Light. One tree was heavy, a big box tree.

Q: What was the nature of the ground you were clearing? A: Trap rock ground (?), light ground.

30

Q: As far as these dates are concerned, the records show from the 16th July? A: That would be correct.

Q: Until the date you mentioned in August, 10th August? A: Yes.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.12

A. R. Higgins
Examination
continued

Q: Incidentally before this time, immediately before it, what sort of a tractor had you been using? A: T.B. 9.

Q: What is the horsepower of that? A: 38.

Q: During this period of time you were operating the Breda was it always with the 'dozer blade?
A: Yes.

Q: As far as the tractor was concerned, did you or did you not have any trouble concerning the tracks doing anything? A: Yes they used to have a tendency to run off. 10

Q: Take a bicycle chain and the sprocket wheel of a bicycle chain, do you appreciate that? A: Yes.

Q: Can you describe it in relation to that?
A: It is the same principle as the bicycle chain. Underneath the tractor you have five rollers. She comes off them and then comes off the front one and she keeps on going, and she came off the underneath rollers first.

Q: When it started to come off the underneath rollers would you get any warning? A: Just a tightening of the track chain. 20

Q: What does that result in? A: You just feel it goes to one side.

Q: As far as that was concerned when it started to come off the chain, what was the method of fixing it? A: Just reverse back.

Q: Then it would go back on to the chain?
A: Yes.

Q: As far as that trouble was concerned can you give us any idea of the frequency of it? A: It used to do it 5 and 6 times a day. It has done it more than that at times. 30

Q: Was it a thing that only happened once a week, or a thing that happened daily? A: Oh daily.

Q: As far as that was concerned was there any difference in its frequency, as to whether it was doing heavier work than usual or lighter work than usual? A: It was on light work all the time. 40

Q: Apart from that what were you doing with it in regard to oil? A: Using about half a gallon a day, putting a half a gallon in it in the morning and then again at lunch time.

In the Supreme
Court of New
South Wales

Q: How much again at lunch time? A: Another half a gallon, one of those Sunshine milk tins full.

Plaintiff's
Evidence

No.12

Q: You know what they hold? A: Yes.

A.R. Higgins
Examination
continued

10 Q: You say you put in half a gallon in the morning? A: Yes, before I started, and then again at dinner time.

Q: That makes a gallon for the day? A: Yes.

Q: The Sunshine tin, did you carry oil with you on the tractor? A: No, we always had the drum there with us. We used to carry the 4-gallon tins. I used to pour it out of that into the Sunshine milk tin.

20 Q: As far as that consumption of oil was concerned, how does it compare in your experience, with any other tractor? A: Very heavy.

Q: How much heavier? A: A terrible lot.

Q: What has been your experience of other tractors? A: On the T.D. 9, just about a fruit tin per day.

Q: By that you mean a tin of canned peaches or something of that sort? A: Yes.

30 Q: Would that be somewhat similar in regard to other tractors, the same amount of oil with other tractors? A: All my experience of that has been so.

Q: From the time you started to drive it until you finished driving it on August 10th, did that consumption of oil continue? A: It kept just about that consumption right through.

Q: As far as the tracks were concerned, when it used to jump these tracks, did you endeavour to do anything about it? A: I used to tighten them, there is an adjustment there to tighten them.

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Court of New
South Wales

Plaintiff's
Evidence

No.12

A.R.Higgins
Examination
continued

Q: What result would that have? A: It would not last very long.

Q. How long? A: You might get a couple of hours out of it.

Q: And then they start jumping again? A: Yes.

Q: In addition to those troubles you mentioned did you have any troubles or not with the clutch?
A. Yes.

Q: What were they? A: Going along if you got your blade anyway full of this loose dirt she would just automatically stop, your engine still running and your tracks not moving over. I used to have to put it out of gear and let the clutch cool off.

10

Q: As far as that was concerned what do you say as to the frequency of that trouble? A: That was done 5 and 6 times a day, perhaps more. Sometimes I have added up 9 times a day.

Q: Were you losing time as the result of it?
A: Yes.

20

Q: How much were you losing a day? A: 8 to 10 minutes every time it happened.

Q: Did you ever have any trouble in addition to that with the clutch jarring? A: Only the once when I was pushing that log away.

Q: What happened on that occasion? A: She locked there properly on me and I just got the foot up and kicked her out of gear otherwise I would have gone clear over the top of the lot of it.

Q: Was anything done about adjusting the clutch from time to time? A: Yes, the mechanic was up.

30

Q: Did that do it any good, or not? A: For a while it used to.

Q: How long used it last for? A: Approximately an hour.

Q: Then would she go again? A: She would heat up again.

Q: On the last occasion when the clutch jammed and it went on to the log, how did you get it away? A: I had to send down for the mechanic to come up and adjust it. I could not reverse gear. I could not remove it.

In the Supreme
Court of New
South Wales

Plaintiff's
Evidence

No.12

A.R. Higgins
Examination
continued

Q: After you drove it, finishing up on the 10th August, I think it was then grounded? A: Yes.

Q: And to your knowledge has not been used again? A: That is so.

10 Q: As far as this clutch trouble was concerned, when you started off in the morning when the engine was cold you never had any trouble I understand when it was cold? A: No.

Q: Only when it got warmed up? A: Once it got heated.

CROSS-EXAMINATION

Cross-
Examination

20 MR:REYNOLDS: Q: I gather Mr. Higgins that Council has been hiring you and this tractor out to private people at so much an hour? A: No, only on the one occasion.

Q: What occasion, the Masonic Hall? A: The Masonic Hall was in the Shire work.

Q: What was the other occasion? A: The sawmill.

Q: Shifting sawdust? A: Yes, shifting the sawdust.

30 Q: Did you lose any time that day? A: It took me approximately two hours to do the job and I would say I lost quarter of an hour through the clutch.

Q: You remember that time? A: Yes.

Q: What did you book up the sawmills, 2 hours or $1\frac{3}{4}$ hours? A: 2 hours.

Q: Are you sure of that? A: Yes.

Q: You say that the Masonic Hall job was a council job? A: That is correct.

In the Supreme Court of New South Wales

Plaintiff's Evidence

No.12

A.R. Higgins Cross-Examination continued

Q: You didn't book up any time to any institution or body? A: I didn't book up any time at all.

Q: You said that the clutch was slipping 5 and 6 times a day, perhaps up to 9 times? A: Yes.

Q: How long would you have to wait before that trouble rectified itself? A: Anything from 5 to 10 minutes.

Q: And on those occasions in July to August did you get anybody to come out from the Council depot in relation to that trouble? A: Yes, the mechanic.

10

Q: Who? A: Mr. Mell.

Q: How often? A: It had above five adjustments.

Q: That is in the period from 16th July to 10th August? A: Yes.

Q: What sort of adjustment would he make when he came out? A: As far as I could check up he would take the shim or something out of it.

Q: How long would that take him? A: An hour to an hour and a half.

20

RE-EXAMINATION

Re-examination

MR. MEARES: Q: As far as this work that you were doing that you have described to me, how would it compare with the type of work you could do with a 38 horse power tractor? A: The 38 horsepower would do more work than the Breda.

(Witness retired).

No.13

No.13

A. Lockhart Examination

EVIDENCE OF ALEC LOCKHART

30

Sworn, examined, deposed:

TO MR. MEARES: My name is Alec Lockhart and I am an automotive engineer employed by the National Roads and Motorists' Association.

Q; How long have you been with them? A: Six years.

In the Supreme Court of New South Wales

Q: For sometime you had your own garage at Windsor did you not? A: Yes.

Plaintiff's Evidence

Q: You were with a light battery detachment in the Army? A: Yes.

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Q. And you have had other engineering experience apart from that? A: 21 years all told.

A. Lockhart Examination continued

10

Q: What has your experience been in regard to diesel engines? A: I have done a lot of diesel work right throughout the period of time I have been in the motor trade.

Q: During the time you have been in the N.R.M.A. have you been engaged to a substantial extent in a consideration of the faults in diesel machines and the rectification of them? A: Yes.

Q: Has that included a large number of different types? A: Yes.

20

Q: In August of 1955 did you as an engineer of the Association visit the Ashford Shire for the purpose of testing the Breda tractor? A: The exact date was the 14th July.

Q: You went up there and when you got up there where was the tractor? A: It was at their workshops at Ashford, at the Council workshops.

Q: Did it have any attachments fitted to it? A: It had a blade but no P.C. unit to operate it. The blade was on fixed position.

30

Q: That meant you could not give it any test other than with the blade, driving it with the blade down? A: Yes.

Q: First of all tell us what you did? A: We started the tractor and -

Q: What about the starter, did you have any difficulty starting it? A: No it started quite normally. Started to warm the motor up, it ran quite well then we operated it. I was not driving it, Mr. Kramer was driving it. It

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Court of New
South Wales

Plaintiff's
Evidence

No.13

A. Lockhart
Examination
continued

was operated over just normally undulating country, a few drains and things like that, then we took it out, hooked the blade on to a small tree and tried it in reverse.

Q: First of all how long was it operating in this undulating country? A: Quarter of an hour.

Q: Was it pushing dirt in that time? A: No, up some fairly steep gradient.

Q: Just running about without using the 'dozer blade? A. Yes.

10

Q: In that period of 15 minutes did you see anything wrong with it? A: No.

Q: What did you do then? A: Then we hooked on to a small tree to pull it back, to see if we could pull the tree with it, and immediately the driving sprocket jammed the track leverage.

Q: Was the load you imposed upon it an unreasonable load? A: No. There was no track spin whatsoever, just a medium load.

Q: When you subjected it to that load it jumped the driving sprocket? A: Yes.

20

Q: What did you next do? A: Next we drove it forward to push on to the same tree, to see if it would push just a normal sized tree down, say a tree we would expect it to push a 4 inch tree or a bit more, and after bumping the tree a couple of times the clutch slipped and refused to operate. It would not deliver any power through the clutch then.

Q: You could not get the tractor to work in other words, as a tractor at all? A: No.

30

Q: Could you tell me how long after operating under load that the clutch did that? A: 20 minutes, 20 minutes operating altogether, not under load.

Q: How long operating under load? A: It would be only half a minute. It may have been a minute, just backwards and forwards.

Q: Did you notice anything about the clutch,

in the condition of heat or otherwise? A: The clutch housing was very hot. You could smell the burning of the clutch. It would not disengage.

Q: Were you able to disengage it later? A: The motor was stopped and allowed to cool and the clutch operated satisfactorily.

Q: Did you then drive it back to the workshop?
A: Yes.

10 Q: Did you have a look at the area on the Wallengra-Coolatai Road where it had been working? A: Yes.

Q: What sort of ground was it? A: It was a sandy granite kind of country.

Q: How would you describe it from the point of view of heaviness or lightness for a tractor of that sort? A: It was loose granite type of country, it was a sandy type with some surface rock, fairly volcanic rock but only a small bit on the surface.

20 Q: Would you describe it as being heavy or medium or light? A: It would be good operating country for a tractor either 'dozing or scooping or ribbing.

30 Q: Did you then make an inspection of the tractor with a view to ascertaining if you could for the reason for this jumping of the sprockets?
A: Yes, I examined the tractor. The track tension appeared to be ample. When I say ample, average for any other type of tractor, ample track tension. Then I examined the sprockets, driving sprockets and the track bushes which fit into the driving sprockets.

Q: When you say the track bushes, would an ordinary motor cycle chain indicate what you mean by the sprockets and bushes so that His Honor can follow? A: Yes.

40 Q: (Approaching witness with motor cycle chain). Which are the sprockets and which are the bushes.
A: That (indicating) is your driving sprocket and the bushes are the sections in between the links, which roll into the track sprocket.

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A. Lockhart
Examination
continued

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A. Lockhart
Examination
continued

Q: Is that the principle on which the tractor tracks work? A: Yes.

Q: Did you give some consideration as to what the cause of this was? A: Examining it, it was my opinion that the driving sprockets or the pull to the driving sprockets was shallow and the angle of the sprocket was greater than would normally be found in tractors of that size, and the lid of the angle was more than normally found.

Q; Did you form any opinion then as to the cause of that sprocket jump? A: In my opinion that was the reason for it, the design of the sprocket teeth, the shallowness of the teeth and the angle of the tooth.

10

Q: As far as the design of the tracks themselves were concerned did you observe anything about the nature of the design compared with other tractors? A: Yes, the grouser plates and the links are an integral part and not made in two separate sections as in modern day practice as in most other tractors.

20

Q: Did you observe anything about the condition of the tracks themselves? A: Yes, the tracks I counted 7 links where the tracks had been damaged and one link was overlapped or butting against the other, instead of butting as they should.

Q: I want you to assume that the tractor was run for a comparatively short time, say 400 hours or something of that nature, how would you describe the degree of wear you saw in those tracks?

30

MR. REYNOLDS: I point out to my friend that is a wrong premise. At that time it was only 200 hours.

MR. MEARES: Q: I want to put to you it had only run 200 hours. What do you say to that? A: The damage to the set of tracks was excessive for that number of hours.

Q: Having a look at the design of the tracks and the degree of wear on them that you have said you found after 200 hours, then I want you to assume that the tractor had been working in and about the country shown to you and which you have described, were you able to form any opinion as to whether

40

or not the tracks were suitable for road work?
 A: The damage to the tracks indicated that they were of soft material for the extent of being used that length of time.

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Q: First of all tell me this, as far as the tracks of a tractor are concerned are they things one normally expects to retyre like a motor tyre? A: No, they must be replaced, but after many hundreds of hours.

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10 Q: Give us a rough idea? A: That would again depend on the type of country.

A. Lockhart
 Examination
 continued

Q: In country of this nature? A: I would say 5000 hours. That would depend on what it was pulling.

Q: On an average you would put it at an average run of about 5000 hours? A: Yes.

20 Q: Having a look at these tracks what did you think their life was like? A: I would not like to answer that, to say how quick they would deteriorate there. They had deteriorated rapidly in that stage.

Q: So that there may be more rapid than you would expect in the normal trend? A: Yes.

Q: On this question of the jumping the sprockets, did you give consideration to a comparison between the size of the sprockets and the conformation of the sprocket with the bushes, did you give consideration to those matters in comparison with other tractors? A: Yes.

30 Q: Did you give consideration to the various sprocket profiles of other tractors? A: Yes.

Q: After having given consideration to those other sprocket profiles in use in other tractors did that confirm the view that you have expressed concerning the sprocket or otherwise?
 A: That confirmed my view.

Q: Did you recently make an inspection of the tractor? A: Yes.

40 Q: Before we come to that inspection, at the time of the inspection in July of 1955, did you examine the cooling system? A: Yes.

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A. Lockhart
Examination
continued

Q: What did you find? A: There was one segment of the radiator core removed, the radiator was in six segments and one was removed.

Q: Did that in any way affect the working operation of the tractor when you were undertaking your tests? A: No.

A: As far as oil consumption is concerned on a tractor of this size, what would be the normal oil consumption for a tractor working for 8 hours? A: A tractor in good order and condition, approximately one quart per 8 hours, that is if it is in good order. 10

Q: Supposing I told you this tractor was using over a gallon, what would you say about that? A: It is high oil consumption.

Q: As far as the radiator grille was concerned, did you inspect the radiator grille? A: Yes.

Q: What did that suggest to you? A: It was a light pressed metal grille, just a stamped pressed metal grille. 20

Q: How did that compare with the grilles of tractors suitable for road work? A: The normal grille is a heavy steel grille somewhere around quarter of an inch.

Q: Can tractors be used for agricultural purposes? A: Yes.

Q: Having a look at the tracks of the tractor and the radiator grille itself, the tractor generally, what did its appearance suggest its use to? (Objected to). 30

Q: Its suitability for use? (Objected to - question pressed; question left).

Q: You didn't take the clutch down did you? A: No.

Q: I think you have read the evidence of Mr. Mell, have you not? A: Yes.

Q: And you have read the evidence of Mr. Akhurst, and Mr. Kramer? A: Yes.

Q: And you saw Mr. Kramer out on the job driving the tractor? A: Yes. 40

Q: How did he handle it? A: He appeared to be quite a good operator.

Q: Was the tractor brought down to Sydney, and did you make an inspection of it this year?

A: Yes.

Q: When was that? A: I couldn't give you the exact date. I examined it without starting it at Granville and then I inspected it again last Monday.

10 Q: Was anybody with you? A: Yes, Mr.Lindsay.

Q: He is in your association? A: Yes.

Q: Did you experience any difficulty with it when you were ram loading it? A: I was not there when it was ram loaded.

Q: When it was brought down to Sydney did you make certain tests of it to determine whether the draw bar horsepower was according to the specifications in the instruction book? A: Yes, last Monday.

20 Q: What was in the instruction book as its draw bar horsepower? (Objected to).

(Mr. Meares called for the Breda instruction book, that part which deals with its draw bar horsepower; not produced. Mr. Reynolds stated he would produce it on instructions from His Honor. After argument the book was produced).

Q: What did you find the draw bar horsepower to be specified? A: 14,300 lbs.

30 MR.REYNOLDS: Q: That is not the horsepower with great respect, it is the draw bar pull in pounds? A: That is tractive horsepower too.

MR. MEARES: Q: It is specified at 14,300 lbs? A: Yes.

Q: You made certain tests of that tractive horsepower did you? A: Yes.

Q: It was on Monday the 12th November you did it? A: Yes.

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A. Lockhart
Examination
continued

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A. Lockhart
Examination
continued

Q: Where did you do it? A: At the Department of Works, Mascot.

Q: How did you do it? A: We had a traction dynamometer coupled up between the tractor and a Caterpillar grader, imposed the bearing load with the grader blade.

Q: By that means were you able to estimate the tractive horsepower? A: We were able to estimate the tractive horsepower.

Q: Under the first test what did you get the maximum draw bar pull at? A: The first test was carried out in rather loose country and it went to 13,000 lbs.

10

Q: Then did you do a second test? A: Yes.

Q: What did you get up to then? A: 10,000lbs - that was in rather loose country too.

Q: Then did you do a third test? A: Yes.

Q: Up to the time of the third test how long had the tractor been running? A: From the time it was started and warmed up, until we started the test, about 20 minutes.

20

Q: In that time had it been working to any extent or not? A: No, only driven out and back up to the grader, headed up to it, and the tests did not take very long - just a matter of driving along and applying the load.

Q: How long would each pull on the test take? A: About 3 or 4 minutes.

Q: Did you then connect it up to do a third test? A: Yes.

30

Q: Was it connected up in the same way? A: Yes in the same manner.

Q: Was the load applied on to it? A: Yes.

Q: What happened? A: The clutch failed.

Q: In what respect did it fail? A: It just would not deliver any power to the axle or to the driving sprockets and it was spinning badly. It

would not disengage and at that stage we had to stop the motor.

Q: Did you stop for any period of time? A: Yes we stopped then for approximately $1\frac{1}{2}$ hours, over the lunch period.

Q: Then did you start it up again and do a fourth test? A: Yes.

10 Q: On the fourth test did it show a maximum draw bar pull of 13,000 lbs., and on a subsequent test 14,000 lbs.? A: Yes, the last tests were on hard cinders with no track: slippage, nearly ideal ground to test it on.

Q: Have you ever had the clutch down, ever stripped the clutch? A: No.

Q: But you have seen the manual? A: Yes.

Q: Showing the design of the clutch? A: Yes.

Q: Bearing in mind your own tests alone at this juncture - do you follow me? A: Yes.

20 Q: Taking your own tests alone, first of all when you made these tests of draw bar power and found what you did find would that suggest to you that there was anything the matter with the engine or its capacity to in any way detrimentally affect the clutch? A: No, the engine delivered 14,000. 14,300 is the maximum. That indicated that the motor was in quite good fair condition.

Q: The engine was doing its schedule work?
A: Yes.

30 Q: Bearing that in mind; leaving out anything you heard at this moment, from the tests you made on the occasion you have mentioned what did they suggest to you in regard to the clutch?
A: That the clutch design and size was not sufficient to transmit the horsepower available.

Q: Bearing that in mind, did you consider closely the design of the clutch as designed in the book of operation and maintenance of the tractor?
A: Yes.

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Examination
continued

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A. Lockhart
Examination
continued

Q: And have you prepared some drawings which you think may possibly assist the Court in apprehending the matter? A: I helped Mr. Lindsay.

Q: (Approaching witness with drawings). Would you have a look at the drawings and endeavour to explain to His Honor the principles of this clutch, its design, its suitability of design and a comparison of its design with the modern clutch? A: This one is the type of clutch adopted by the Breda. It has three fingers only, that means there are only three pressure points. If I remember rightly it is 11 inches diameter. There are only three pressure points in the whole diameter in the clutch and there are two plates and it relies entirely on the one centre spring to apply the pressure to the three fingers, to hold the plate. In there (pointing to diagram) there is a pressure plate, another driving plate with two linings on it, another pressure plate and another driving plate which comes against the flywheel. They rely on this single spring to apply the pressure. That is the most widely used type of clutch in heavy tractors. The over-centre clutch, positive engagement. There are no springs in this. The load is applied by these toggles there going over centre and forcing these arms down and locking the plates. 10 20

Q: How is that done, how is that pressure exerted? A: On this type of clutch you have a long hand lever. This takes a big pressure to overcome the over-centre. You cannot operate it with a foot pedal you would not have sufficient pressure. It has a long handle up as high as the driver's seat. 30

Q: And is the effect of that, it seizes, it grips the shaft by the use of the handle? A: No, it just applies the pressure to that collar and once that goes over centre it locks all these arms here (indicating). They lock. 40

Q: You then get a locked clutch? A: It is locked and it cannot move. These clutches are nearly always heavy steel plates running in oil.

MR.REYNOLDS: Q: You say this is kept down by a spring? A: Yes, that is the over-centre clutch.

MR.MEARES: Q: So far as the first one is concerned, can you tell us generally what is the use

of that, if any, at the present time? A: I don't know of any other vehicle that is using it at the present time. The single centre clutches were used up to 1930 in cars like the old Hupmobiles, but I haven't seen them other than this one, used, since then.

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Q: Have you ever seen that type of clutch used in the present day tractors? A: No.

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10 Q: And as far as the present day tractors are concerned what clutches are in use? A: Mainly the over-centre. There are a few of the Borge and Beck type.

A. Lockhart
Examination
continued

Q: Will you describe that to His Honor?

20 A: That is the Borge and Beck type. You have the plate there, pressure plate, and the outer housing but on these it varies, the number of springs according to the size of the clutch but there are at least 8 springs pressing evenly around the pressure plate so that the pressure plate is pushed in evenly. That is used by agricultural tractors, wheel tractors.

Q: And as far as the Borge and Beck type is concerned, is that type of spring clutch supplanting the other type of clutch you described in your first drawing? A: It is in cars, yes, a long while ago.

30 Q: And as far as heavy tractors are concerned you tell us that the over-centre clutch is the normal one but there are a few cases where a spring clutch is still used? A: Yes.

Q: But a spring clutch still used is the one that has got the 8 heavy springs or more?
A: Yes.

(Drawings tendered and marked Exhibit K).

Q: As far as the clutch problem is concerned on a heavy tractor, and I take it you describe this tractor as a heavy duty tractor do you as far as horsepower is concerned? A: Yes, as far as horsepower is concerned.

40 Q: Is the strain on the clutch in a heavy duty tractor very important? A: Well it must be

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A. Lockhart
Examination
continued

sufficiently rugged to transmit the power of the motor.

Q: Would you get more strain in the heavy tractor than you would in a car or something of that nature? A: Yes.

Q: Is it a thing that might be more vulnerable in a tractor than a car? A: Yes, you are transmitting heavier loads with them.

Q: Did you generally consider from the Breda instruction book of the model 70D, the size and dimensions of the clutch in relation to the size and dimensions and horsepower of the 70D tractor? A: No I didn't. Mr. Lindsay was dealing with that.

10

Q: Bearing in mind your tests and what you observed I think you have told us in your opinion the clutch was too light for the purpose, is that correct? A: Yes.

Q: And as far as design is concerned, what do you say about the design? A: In that design you only have three pressure points on a plate of 11 inches diameter and that tends to cause overheating, hot spots on the pressure plates and distortion.

20

Q: You found this clutch failure to occur in your tests after the tractor had done some 200 hours and that suggested to you there was something radically wrong with the clutch, is that correct? A: Yes.

Q: Then you have read Mr. Mell's evidence as to what he found, with the clutch when he took it down? A: Yes.

30

Q: Did that confirm your view or otherwise?

A: Yes it confirmed my view. I considered when I first tested the business -

Q: I want you to assume that Mr. Mell did the work he described? A: Yes.

Q: And that thereafter the clutch was again put back into commission? A: Yes.

Q: And I want you to assume it was being called

upon to undertake ordinary tractor work for a tractor of that size - do you follow? A: Yes.

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Q: I want you to assume then that within the space of 200 hours, probably before that, the clutch started to go again with its slipping, seizing after the repairs Mr. Mell did?

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A: Yes.

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10 Q: What would that suggest to you? A: It confirmed my view that the clutch is not sufficiently heavily designed to transmit the load of that size motor.

A. Lockhart
Examination
continued

Q: The story of this tractor that you have from reading this evidence and from your own observations, is there any cure for it? A: In my opinion no.

20 Q: Why do you say that Mr. Lockhart? A: If it was to be used on heavy work, say on road-making and scooping it would require a completely redesigned clutch and besides the cost of that there would be a great possibility of having trouble with tracks and driving sprockets if the full power was ever to be transmitted through continuously.

30 Q: Would you run a risk of putting extra strain on any of the other part? A: It could throw more strain on your transmission because the clutch slippage is definitely the safety valve for any power. It is quite likely it is not able to take that load because the rest of it is only as strong as that.

Q: The size of the clutch, what do you think its ability is, the size of the tracks and radiator grille for what it is worth, bearing that in mind and also the question of the working speed of the tractor - I think you ascertained what its working speed was, didn't you?
A: Yes.

Q: What is it? A: 1-6 miles per hour.

40 Q: Bearing those factors in mind what is your view of what the tractor is suitable for?
A: It is a powerful tractor, it is a fast tractor and in my opinion it is more suitable for agricultural work than heaving 'dozing.

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A. Lockhart
Examination
continued

Q: In your opinion is it suitable for heavy
'dozing? A: No.

Q: Even going on agricultural work, it is de-
signed on full output of your engine for agricul-
tural work? A: Not in your lowest gear.

Q: Why is that? A: In agricultural work you
would be working at a faster speed and therefore
you would not have the strain or out put from
your motor being delivered.

Q: What I am trying to get at is this, I do not
know whether it is right or wrong, you have got
there this draw bar horsepower you described -
do you follow me? A: Yes. 10

Q: And you have told us how when you exerted
that horsepower you have the clutch seizure, and
you have described the track wear and so on and
you have described the size of the clutch - do
you follow me? A: Yes.

Q: What I am putting to you is this, would the
design of the machine, the tracks the clutch and
so on, would you not agree that the horsepower
for it is excessive? A: Yes. 20

Q: And that in principle a lower horsepower job,
any saving of expense that may be involved would
be quite as efficient? A: Yes.

CROSS-EXAMINATION

Cross-
examination

MR.REYNOLDS: Q: Of course there are many horse-
power ratings related to a tractor are there not?
A: Yes.

Q: And one figure which is discussed amongst
people who understand these things is the maximum
horsepower? A: Yes. 30

Q: And that means the horsepower which at a cer-
tain rate of revolutions the motor can develop?
A: That is correct.

Q: And in this case you understated it to be 85
or thereabouts? A: I did not test it for -

Q: But you told Mr. Meares you looked at the
book. Didn't you look at that? A: The book

states 70 sustained rating.

Q: Would you agree it could probably have a maximum rating of 85? A: It could have very close to it.

Q: Well then it cannot deliver either on a belt test or a draw bar test its maximum horsepower can it? A: No.

Q: No tractor can? A: Oh no. You must allow for friction.

10 Q: You know the Nebrasco tests? A: Yes.

Q: Quite familiar with those? A: Yes.

Q: I suppose the clutch would have something to do between the maximum horsepower and either a belt horsepower and your draw bar horsepower?

A: No, the maximum horsepower from the motor is delivered to the clutch.

Q: But it is what comes out of the other side that counts? A: No, in maximum horsepower it is what is at the flywheel.

20 Q: But the horsepower which is delivered at the other end is what counts, that is the effective horsepower? A: Yes.

Q: If a man was buying a tractor and he asked and was told what was the maximum horsepower of the engine that would not help him at all as to the efficiency of the tractor, would it?

A: He would expect -

Q: Would it help him, that effect alone?
(Objected to; question allowed).

30 Q: Do you understand what I am putting to you?
A: No I don't.

Q: One buys a tractor to do work I suppose Mr. Lockhart? A: Yes.

Q: And the working end is not what the motor develops but what comes out of the draw bar or at the belt? A: Yes.

Q: And merely to ask and be told what was the

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A. Lockhart
Cross-
examination
continued

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A. Lockhart
Cross-
examination
continued

maximum horsepower developed by the engine would not be a guide to you as to the working capacity of the tractor? A: No, it would be a guide but not conclusive.

Q: It would be a guide because I suppose you might expect the belt or the draw bar to be some percentage of that? A; Yes.

Q: And one factor in what percentage it would be would depend on the efficiency of the clutch?

Q: Yes.

10

Q: One factor? A: Yes.

Q: Another factor of course is the friction that had to be overcome between the motor and the ultimate output? A: Yes.

Q: What you tell us is that this tractor has a clutch of a type that went out even with motor cars in the mid thirties? A: That single centre clutch, yes, I haven't seen it since.

Q; These Italian designers or manufacturers are 20 years behind? A: On that type of clutch on heavy duty tractors, yes.

20

Q: The Breda Company, do you know the company?

A: Yes.

Q: They are a well-known Continental company?

A: Yes.

Q: They make all sorts of things besides tractors I believe? A: Yes.

Q: They are 20 years behind the times in clutches?

A: I would say so on that design, yes.

Q: This grille you speak of, is it not the fact that if you buy a tractor for heavy work you buy a steel plate grille as an extra to protect your radiator? A: It is an optional fitting.

30

Q: In other words if you go to buy a tractor and you want a grille to protect your radiator you order it? A: If a blade is fitted, it is fitted with it.

Q: That is if you ask for it and pay for it? (Objected to; question allowed).

Q: That is so, some tractors are used for purposes which do not require the heavy grade iron?
A: Yes.

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Q: And even if one goes today to buy a T.D. 9 or a T.D. 14, if one wants a heavy shield one asks for it and pays for it? A: Yes.

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10

Q: Did you notice that the seals had been broken on the hour-meter of this machine when you saw it recently? A: The hour meter was not operating.

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A. Lockhart
Cross-
examination
continued

Q: Did you notice that the seals had been broken? A: No.

Q: Normally there is a seal of wire and a blob of lead and some such like on the nut of the meter? A: Yes.

Q: You didn't notice whether that was intact or not? A: No. I didn't.

20

Q: So far as the clutch trouble is concerned, of course another clutch could be put into this tractor? A: Well it would be rather useless putting another one.

Q: I didn't ask you that. I heard your answer before. What I am asking is, another clutch could be put into this? A: I would not like to say yes or no to that question without -

30

Q: Why, do you say it could not be done?
A: One thing is the cost of it, and secondly there are light tracks on it, light driving sprockets.

Q: I am asking could it be done, that is clear enough I am not asking whether it is advisable. I am asking could it be done? A: You want to know can you fit another clutch of a different type?

Q: Yes? A: On that I would not like to commit myself.

Q: You haven't considered it? A: No.

Q: What you have told us before - A: I have

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A. Lockhart
Cross-
examination
continued

considered it but I would not like to say - it could be done at a price.

Q: You cannot tell us what that price is, or would be? A: No.

Q: From what you told us before in your view, even if you fit a clutch you would have some doubt as to whether the tracks would stand up to the additional transmitted power, is that so?

A: Yes.

Q: Did you notice any marked difference between the tracks as you saw them in July 1955 and as you saw them in November 1956? A: Yes, there was more damage to them now than then.

10

Q: In which way? A: There are more blades damaged now.

Q: How many are damaged now? A: I didn't count the exact number this time but I did check over it and noticed there was more damaged.

Q: How many were damaged the first time?

A: Seven.

20

Q: How many do you suggest are damaged now?

A: I could not give an exact figure on it.

Q: Would you say that the horsepower of this tractor is excessive for the weight of the tractor? A: No.

Q: You think the tractor is heavy enough?

A: If it had the right clutch and tracks on it.

Q: What would you say to this proposition, that even if you got an effective clutch in it and got the motor in perfect running order, the tractor could not do the right work? A: You would still require a different type of driving sprocket.

30

Q: You think the tracks would not stand up to it? A: Yes.

Q: But weight of the tractor in your opinion is not its fault? A: No.

Q: It is heavy enough? A: Yes.

RE-EXAMINATION

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A. Lockhart
Re-examination

MR. MEARES: Q: May I ask you this, if you were told that the horsepower of a tractor of this type was 85, and assuming you had some degree of comparable size tractors - do you follow that -- assuming you know the D.C.6 and the T.D. 19, and tractors of a somewhat similar size - do you understand that?

A: Yes.

10 Q: If anybody had told you, supposing you had a bit of experience with tractors, if anybody had told you that the tractor had a horsepower of 85 - do you follow that? A: Yes.

Q: Would that suggest to you that the tractor was engined and designed for road work?

A. (Objected to; rejected). (Mr. Meares asks for permission to ask question by leave; objected to; after argument question rejected).

20 Q: You said to Mr. Reynolds as far as its horsepower was concerned that it could be very close to 85. Would you tell us what you meant by that? A: You only take it from the draw bar horsepower comparable to other motors of the same type and their maximum. It is 57 draw bar horsepower at that speed which would give you much the same as other types of tractors with the same size motors.

Q: How much, in regard to 85? A: I would say round about 80 at least.

30 Q: Would it get up to 85? A: It could.

Q: Can you say whether it is probable (Objected to; question rejected).

(Witness retired).

No.14

EVIDENCE OF DOUGLAS KEITH LINDSAY

Sworn, examined, deposed:

No.14

D.K. Lindsay
Examination

TO MR. MEARES: My name is Douglas Keith Lindsay

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D. K. Lindsay
Examination
continued

and I am a technical engineer employed by the National Roads and Motorists' Association.

Q: How long have you been with them? A: Only a very short period, six months.

Q: What has your engineering experience been outside that? A: 14 years all told, 9 years in the tractor industry, 3 years as a mechanic, 3 years as foreman mechanic and 3 years as an instructor on tractors.

Q: Are you a member of the institute of - A: Associate Member of the Institute of Diesel Engineers. 10

Q: In your 9 years experience in the tractor industry have you been concerned to any extent with diesel type tractors? A: All types, yes.

Q: Are you at present engaged by the N.R.M.A. as an expert, in consideration of diesel engines? A: As a specialist, yes.

Q: You have listened to Mr. Lockhart's evidence, have you not? A: Yes I have. 20

Q: Have you yourself had a look at this tractor? A: I have, yes.

Q: Were you with Mr. Lockhart on Monday 12th November when certain tests were made? A: Yes.

Q: Has the evidence he has given about this, does it accord with your own recollection? A: It does.

Q: Prior to that time had you had occasion to drive the tractor? A: I had.

Q: When was that? A: On the 8th November, at the Department of Main Roads, when I was loading it on to a float in preparation to taking it to Mascot for test. 30

Q: What is a float, is that a motor thing or a truck? A: It is a low loader, a vehicle for transporting heavy equipment.

Q: You take them along the road? A: Yes. This was a side loader and you drive it up on the side.

Q: At the time you got up to the side to drive it up, how long had the tractor been operating?
A: It had been running approximately 10 minutes.

Q: In that period of time had it been working or simply moving around? A: Just moving up to the low loader.

Q: Did you get it up on to this ramp to go on to the low loader? A: I did.

10 Q: Did anything happen to you? A: The clutch seized and the tractor would not stop, and the tractor mounted the gooseneck on the low loader and I had to halt it to prevent the tractor going over the other side.

Q: When it seized were you able to disengage the clutch? A: No.

20 Q: Have you made a study of the design of the clutch in the first place of this Breda tractor and also of a consideration of the size of the clutch in relation to the horse power and size of the tractor? A: Yes.

Q: You have seen and made a study of Exhibit K? A: Yes.

Q: Have you heard Mr. Lockhart's evidence concerning the various clutches and their use that are set out in Exhibit K? A: Yes.

30 Q: Do you agree with his evidence or do you wish to add anything to it? A: No I don't think there is anything I can add to it. I agree entirely.

40 Q: Can you tell us what your views are apart altogether from the type of the design of the tractor, of the clutch, what are your views concerning the size of the clutch? A: The design of the clutch is obviously not for that size tractor, or shall we say I criticise the application of the design more than the actual design. For industrial application the work required of that clutch is too great. It is too heavy. It would be more suitable on light orchard work or something of that nature.

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D. K. Lindsay
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continued

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Examination
continued

Q: As far as that type clutch is concerned, with the three application points, are you aware of any other clutch of that nature at present in use in a tractor of this size? A: No.

Q: What has your experience been in regard to these heavy type tractors? A: The most popular type of clutch is the over-centre clutch with a positive engagement. The only other one is the heavy multi spring type. The central spring type went out many years ago in this type of application. 10

Q: Can you tell us where the multi spring type is used? A: It is used by the Cletracs, but it too is being replaced by an over-centre type in recent models.

Q: Have you any idea as to when they abandoned the multi spring type clutch for use in heavy duty tractors? A: It has never been widely used.

Q: The Olliver Cletrac people when did they abandon it? A: They have never abandoned it in their latest lines. 20

Q: Did you take some sprocket profiles of various other tractors? A: I did.

Q: As far as the sprockets are concerned you heard Mr. Lockhart's evidence of the jumping of the sprockets? A: Yes.

Q: You have also explained have you not that there is a history of this tractor jumping its sprockets? A: I do believe that. 30

Q: What is that due to? A: Both the design of the sprocket, the diameter of the bushings in the track and the tension on the track spring.

Q: First of all in regard to the design of the sprocket, what have you to say? A: The angle of the ramp is such that it would permit of much easier jumping by the bush than with normal tractors in use today. The diameter of the bush is also very small, that would also assist in jumping of the tracks. 40

MR. MEARES: Q: I want to take the D.4, the D.6 and T.D. 18. Can you tell me whether or not they compare with the Breda as to size?

A: On the outside diameter of the bushes its tracks are bigger than the Breda.

Q: Can you tell me how those tractors compare with the Breda? A: The D.40 is very much smaller - about 40 draw-bar horsepower; the T.D. 18 is slightly smaller in horsepower. The D.6 is slightly bigger.

10

Q: Would you have a look at these four drawings and tell me whether or not they illustrate your views of the inadequacy of the Breda tracks. First of all are they drawings of the sprocket and what do you call the "bedding"?

A: Actually the contact point of the bush.

Q: And the contact point of the bush of the T.D. 18, D.6, D.4 and the Breda? A: The Breda has a smaller outside diameter bush, and the profile of the sprocket too is such that it would permit it to ease right up the bush.

20

Q: How does it compare with the others?

A: It has a very low angle of the sprocket profile. The other bushes are much bigger and sit down further in profile and the degree of the ramp is not so slight.

(Document tendered, Exhibit "L").

Q: As far as the sprocket of the bedding in Exhibit "L" is concerned may we take it the closer the equality you get of the bedding with the sprocket the better? A: To a certain point, yes.

30

Q: Did you make an inspection of the tracks of the tractor? A: I did.

Q: First of all what have you to say concerning the design of it? A: The design of the tracks went out in America about 20 years ago. They are of integral construction and these

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continued

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continued

days with heavy usage of tracks it is more desirable to have separate construction so that when one part wears out the other one can be replaced more readily. The difference in the metallurgy in the construction of tracks also makes it difficult in mono- construction type, because the rails have to be relatively hard to resist wear, whereas the growers have to be relatively hard to resist shocks; they have to be tough; more tough than the rails. This type of construction makes it relatively impossible - this type of mono-construction makes servicing relatively difficult.

10

Q: These graders are of mono-type construction?
A: Yes.

Q: What does that mean? A: The blade of the growers and the links are all in one piece.

Q: As far as that construction is concerned is the construction of the tracks of this Breda a modern type construction or not? A: It is used in some equipment which is relatively slow moving, such as ditchers but not in tractors.

20

Q: Assuming that this tractor was using upwards of a gallon or more a day; what do you say about that? A: It is recognised through the industry that a quart a day is reasonable for engines of this size. Anything above that would be excessive.

Q: As far as the tracks are concerned; in your opinion would they or would they not be suitable for road work with a dozer blade for a tractor of this horsepower? A: In comparing them with other type tractors they would not be suitable.

30

Q: Did you have a look at the tracks? A: Yes, I did not examine them closely but they were well dented. Their appearance suggested that the material was of a weak or inferior nature in comparison with tracks of tractors of equal horsepower.

Q: What is the life of tracks, that one can expect in a heavy duty tractor on roadwork? A: On

40

roadwork of that nature, approximately, I would say, about 3,000 hours.

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Q: I want you to assume that this clutch started to give trouble within the first 100 hours of its running - the tractor's running - and that it started to slip and overheat and jam. Then I want you to assume that after approximately some 200 yards running Mr. Mell stripped the clutch and found the matters at fault that he mentioned in his evidence - a copy of which you have read - do you follow that? A: Yes.

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continued.

10

Q: Do the faults that he found confirm your view as to the design of the clutch or otherwise?
A: They confirm my views in application to that tractor - that it was too heavy. The clutch would not transmit the horsepower required of the job they were doing and in so doing it wore out relatively very early in its life.

20

Q: Incidentally you were consulted about this matter a very considerable time ago - some weeks ago? A: Yes.

Q: And you expressed the views which you are expressing now before you read Mr. Mell's evidence, or knew of it? A: I did.

30

Q: I want you to assume that after - incidentally as far as Mr. Mell's work is concerned, his story is - that he tells - was the work that he did on it proper? A: Yes, on his report which I read I would say so - that it was quite proper work that he had done to the point that he had done it.

Q: I want you to assume that shortly after Mr. Mell after the tractor had done another 200 hours, after Mr. Mell did his work, the clutch started to give way again and that it commenced to slip and to overheat, with the result of the machine refusing to work; do you follow that? A: Yes.

Q: What do you say to that? A: It would

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continued.

confirm my opinion that the application of the unit was not as was intended by the manufacturer.

Q: Tell us of your views about the possibility of being able to - from a practical point of view - design some clutch so that it could be used to neutralise the formal horsepower of the tractor on road work? A: I think it would be hazardous to estimate that because of the safety factor that governs design work right through the transmission would not be sufficient, in my opinion, to fit a clutch that would transmit the four engine horse power.

10

Q: Why do you say that? A: That is just a design feature. The safety factor would not be there if you transmitted that horsepower to the tracks, or it might go in the clutch; it might go in the transmission it might strip a gear, or it might make the tracks jump the sprockets.

Q: Have you also had experience in the market price of tractors? A: I have.

20

Q: And have you been concerned from time to time in the selling of them and of varying sorts? A: It is essential to know the value of tractors when you are repairing them so as to be able to fully realise the cost of repairs.

Q: Have you also had experience in attending auction sales and the prices that are being fetched for them? A: Yes.

Q: I want you to tell us what in your opinion the present value of this tractor is without a dozer blade? (Objected to; question pressed - argument.)

30

(Further hearing adjourned to 10 a.m.
Tuesday, 20th November, 1956.)

No. 14

DOUGLAS KEITH LINDSAY Examination continued

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IN THE SUPREME COURT)

OF NEW SOUTH WALES)

IN CAUSIS)

CORAM: FERGUSON J.

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No. 14

ASHFORD SHIRE COUNCIL

- v -

DEPENDABLE MOTORS PTY. LTD.

D.K. Lindsay.
Examination
- continued.

FIFTH DAY: TUESDAY - 20TH NOVEMBER, 1956

10 MR. HEARNS: Your Honor expressed a view yesterday morning concerning the measure of damages and I have taken the liberty of asking leave to address Your Honor on it now. (Addressed).

20 MR. REYNOLDS: This arose as a result of an objection by me as to the present value of the article. I am disposed to agree with my friend's submissions; it seems to me this matter is concluded in favour of the view my friend is putting in Cullinane v. British Rema Manufacturing Company 1954 Q.B. p.292 at pp. 301 & 303, "The two subsections do not I think assist or clarify the general statements applicable ... machine had been as warranted". Then at p.303, "As a matter of principle also it seems to me that a person who has obtained a machine ... and the material that he got." (Counsel addressed further).

30 MR. HEARNS: I am not pressing it on the basis of that question. We agree with what my friend has put. The only addition that we say we are entitled to is any special damage that occurred to us during a period and it seemed to us also, subject to Your Honor's view, that the relevant time for ascertaining the disposal time of this factor was not now. The question we put to the expert yesterday was misconceived.

DOUGLAS KEITH LINDSAY Further examined as under:

40 MR. HEARNS: Q. With your knowledge and experience of tractors and with the history you have been given of this tractor, I want you to consider the question of the advisability or wisdom of trying

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Examination
- continued.

to do something to improve the tractor's performance as at the middle of August 1951. Can you tell me approximately what you would have to do if you embarked upon the problem? (Objected to - pressed - argument ensued).

Q. From the evidence of Mr. Alhurst and Mr. Lockhart and Mr. Mell and from the history and from your own findings of this month, would you tell me what would be the matter to consider in endeavouring to do something to this tractor and also discuss the advisability of it? (Objected to - pressed).

10

HIS HONOR: Q. First of all what would have to be done? A. The first two immediate things that would have to be done would be to renew the clutch and renew the tracks and track release spring mechanism. That would be the first two immediate things that would have to be done.

MR. MEARES: Q. What would be the cost of that approximately? A. On present-day prices? (Objected to).

20

Q. Can you give us an idea? Can you tell us approximately what the price would have been towards August or September of 1951? A. Yes, approximately £1,000.

Q. Does that include the cost of installation or only the cost of the articles? A. No, that is the cost of the article.

Q. Can you give us an idea of the approximate cost of installation? A. It could be something in the vicinity of approximately £200.

30

Q. Supposing you did those two things, would they be advisable? A. Taking the rest of the tractor into consideration I should not think that would be advisable and I would not embark upon a scheme like that myself; I have never seen it done and I think I would be trying to sell it rather than to try and make a good machine. (Objected to - pressed).

HIS HONOR: He said he does not think it is advisable.

40

MR. MEARES: Q. Why don't you think it is advisable? A. In my opinion the tractor is ill-designed and,

having that in mind, having fitted a stronger clutch anything might go wrong with the transmission and we do not know the stresses and strains the transmission has to take; it would be completely a matter of conjecture as to what the result would be.

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- continued.

10 Q. Assuming you did ascertain that, you put in the heavier bracks and heavier clutch and you found from experience that the machine was not basically designed for those things, then, would you suffer or not, any further damage to the tractor?
A. I would like you to put that question again.

Q. Would you run the risk, assuming you did those things, of further breakages occurring in the tractor from over-stresses or strain?
A. Definitely.

Q. You would not advise it? A. I would not attempt it.

20 Q. You told us yesterday that you had had experience of values of tractors? A. That is right.

Q. In 1951 and '50 were you closely connected with resale values of tractors? A. Mostly of used tractors; you could not buy new tractors at that time.

Q. At that time, in 1950 and 1951, were you engaged in reconditioning second-hand tractors from the Pacific Island and elsewhere? A. Yes.

Q. And selling them as reconditioned tractors?
A. That is correct.

30 MR. BRYNGIDES: Who was selling?

MR. MEARES: Q. Just tell me what that experience was? A. My employer was engaged in the sale of them; to tender for the repair of them it was necessary to know their values to advise on the advisability of repair, because you can spend so much on tractors, you can spend £2,000 on a tractor and if it would bring £2,000 at auction you would certainly send it to auction.

40 Q. In that period of 1950 and 1951, can you tell us whether or not, as a result of your doing the work that you were doing that the question of values of these second-hand tractors that had been

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Examination
- continued.

repaired and reconditioned by you were known to you? A. I was closely associated with the valued of them, yes.

Q. Then in 1952 and 1953 I think you were with a Department? A. The Department of Works.

Q. In connection with the department, did they undertake the sale of a large number of second-hand tractors? A. They did.

Q. Did you become acquainted with the prices that were obtained for the various machines that were sold by the Department? A. Again, as their foreman mechanic, I had to know values and their disposal yards at Rosehill - I was in charge of there for a short period, not actually in the sale of the equipment but the sales were going on all the time and I did become acquainted with the sale value of the tractors.

10

Q. Apart altogether from that knowledge, during that time from 1950 to 1954 have you had occasion to attend numerous auction sales of tractors?

20

A. I have attended auction sales.

Q. During that period? A. During that period.

MR. REYNOLDS: That denies the use of the word "numerous".

MR. MEARES: Q. What do you say? A. It would not be over ten.

Q. I want you to take this tractor as at September 1951, this Breda Tractor and I want you to assume it was being purchased by or being offered to a purchaser who know its history. Do you follow that? A. Yes.

30

Q. In your opinion what could that tractor have been disposed of to a purchaser in that condition as at September 1951? (Objected to - pressed).

HIS HONOR: On the grounds that is not the date?

MR. REYNOLDS: No, on the grounds the witness has not qualified himself to give an estimate. (Question allowed).

MR. MEARES: Q. What is your answer? A. My estimated opinion of that tractor's value at that

40

particular time was 1/8th of its original purchase price.

Q. What does that work out approximately in your view? A. Approximately £800.

MR. HEARDS: I submit Your Honor the test is to the discerning purchaser and not to a purchaser who is misled. If Your Honor thought differently I would get another valuer.

10 HIS HONOR: I think the true value must depend upon the knowledge of the actual fact so far as the purchaser is concerned.

Cross-examination

MR. REYNOLDS: Q. What was this purchaser going to be told? That the tractor was no good? A. Yes, generally that is not done.

Q. But I am asking you in computing this £800, was the purchaser going to be told this tractor was no good? A. If he investigated for himself he would probably find that out for himself.

20 Q. I did not ask you that did I? A. Would you mind repeating the question again?

Q. Didn't you hear it? A. No.

Q. Was this purchaser to be told that the tractor was no good? A. I do not know what he was to be told.

HIS HONOR: Q. In your estimate? A. Yes, in my estimate the purchaser would not.

30 MR. REYNOLDS: Q. He would be told what? What did you envisage when you fixed this 1/8th? A. The Purchaser would be acquainted with the previous history of the tractor.

Q. What would he be told? A. I think that is a very difficult question to answer.

Q. You have given the evidence based on what he would be told? A. I think he would be acquainted with all that had happened with the tractor.

Q. Who would he be? Would he be a person who wanted to use it for road building or a farmer?

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- continued.

Cross-
examination.

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Cross-
examination
- continued.

A. I think he would be a person who had already owned a Breda tractor.

Q. Are you trying to answer my questions?

A. I am trying very hard.

Q. You say in this £800 you have limited the purchasing field to people who have already owned a Breda? A. He would be the most popular buyer, a buyer who wanted this vehicle most urgently.

Q. What you are trying to say of course is, he would buy it for spare parts; is that what you are trying to say? A. That would be in the back of his mind. 10

Q. What you are telling His Honour is that the spare parts value of that machine in 1951 was £800? A. Among other things, yes.

Q. But is that what you had in your mind that the spare parts value of it was 1/8th of its original value? A. To the owner of a Breda tractor, yes.

Q. Is that what you had in your mind when you fixed £800? A. Yes, partly it was, as the value of the sale for spare parts. 20

Q. You did not give it any value as a usable tractor? A. As a usable tractor it would be approximately the same, taking into consideration that the purchaser knew of its past history. It would be desirable to some persons who could possibly have utilised it on a small holding. Small tractors were hard to get and for that purpose, in my opinion, it would still be worth approximately £800. 30

Q. Do you really set yourself up as an expert in tractor values? A. I have made no previous claim to that.

Q. Do you make the claim today that you are an expert in tractor values? A. I do not like the word "expert".

Q. Whether you like it or not, what is your claim? A. I would claim to know tractors. Tractor values, I am not an expert.

Q. You claim to be able to throw your mind back 5½ years, or over 5 years, and pinpoint a value then, do you? A. I do. 40

Q. Would you say this tractor could have been used by a man with an agricultural holding in 1951, September? A. That is quite possible.

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Q. And supposing he was told, for example, that this tractor had been shown to be unfitted for heavy work but could do farm work; supposing that was told to a purchaser, would you regard that as being a misrepresentation of the position in September 1951? A. No, I do not think it would,

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D.K. Lindsay.

10 Q. You think it would be a fair statement?
A. I think it would be a fair statement.

Cross-examination
- continued.

Q. Do you suggest that you could not get more than £300 at that time? A. I was very closely associated with them at that time and I do not think it would have warranted any more.

Q. Whether it warranted it or not, what people were prepared to pay in that time of shortage?
A. I am basing my estimations on its actual value.

20 Q. Do you then take it there is no association between demand? A. Yes, I do, I agree with you there.

Q. Have you, in fixing the figure, not taken demand into account? A. I have taken demand into account.

30 Q. To what extent? A. To the extent that tractors at that time were unprocurable in a new condition. However, they were procurable reconditioned, secondhand American tractors of excellent quality and they were available for the same horsepower ratings as this was being sold for at approximately 40 drawbar horsepower at around about £2,500 at that particular time.

Q. Were you taking the demand into account when you fixed that £300? A. Yes.

Q. The demand for spare parts or the demand for usable tractors? A. The demand for both.

Q. Will you agree that the price of tractors, whether new or second-hand, has tumbled since 1951?
A. Yes.

40 Q. Indeed, today, would you agree it is almost impossible to sell a tractor whether new or second-hand? A. It is quite easy to sell the more popular American tractors; it is most difficult to sell Continental tractors.

Q. Most difficult to sell Continental? A. Most difficult.

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Cross-
examination
- continued.

Q. And the only time the public seemed to want those Continental tractors was in 1951 when there was a tremendous shortage of American tractors - well they were non-existent? A. That is correct.

Q. And people bought Bredas and Ansaldos and such like? A. That is correct.

Q. Because they could not get American tractors? A. That is right, they could not buy new American tractors.

Q. You have arrived at a figure, haven't you, for its present-day value? A. I have. 10

Q. What is that figure? £700? A. The value of that tractor on today's market is approximately £250.

Q. £250? A. £250.

Q. Spare parts or to use? A. Either spare parts or its trade-in-value more or less on another tractor.

Q. How long is it since you have had anything to do with selling tractors? A. Approximately 12 months. 20

Re-examination.

Re-examination

MR. MEARES: Q. Have you had experience of the sales prices of brand new heavy Continental tractors? A. Yes, in 1951 I was employed by Tractors, Diesels & Equipment, they were importing a French tractor at the time, the Nord; it is a very similar range of tractors as the Breda. They were selling those new, that is the 60 h.p. model in 1951. 30

Q. Have you had any experience of other new Continental tractors fetching much less than their list price? A. It is quite a well-known fact today that you can buy Continental tractors at approximately one-third or less of their original purchase price brand new.

(Witness retired).

No. 15

EVIDENCE OF WARWICK VARNEY

Sworn, examined, deposed.

In the Supreme
Court of New
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Plaintiffs
Evidence.

No. 15

W. Varney.

Examination.

TO MR. REARNS: I live at 164 Powder Works Road,
North Parrabeen.

Q. You are a Civil Engineer with the Degree of
Bachelor of Civil Engineering? A. That is right.

10 Q. You are now employed by Waugh & Josephson and
they are the agents for the Caterpillar tractor;
that is a brand of tractor? A. Yes, that is the
trade name.

Q. And also several other makes of tractors:
A. Yes.

Q. In that connection has it been part of your
duties to value all trade-ins? A. That is
correct.

Q. Of tractors? A. Yes.

Q. You have been with them for 12 months? A. Yes.

20 Q. You have been valuing tractors that have been
traded in during that period, for Waugh & Joseph-
son? A. Yes.

Q. Before that I think you were manager of Con-
structors Ltd., and you were disposing of a large
amount of earth moving equipment? A. Yes, mainly
for a mining company, a subsidiary.

Q. And in that capacity you had dealt with all
types of Continental tractors? A. Not many
types, one particular type.

30 Q. When you were with Constructors Ltd., you had
occasion to consider the second-hand market of
tractors? A. Yes.

MR. REARNS: Q. When were you with Constructors?
A. I terminated my employment in 1954.

Q. How long had you been with them? A. Approx-
imately four years.

MR. REARNS: Q. You were consulted in this matter
this morning were you not? A. I was telephoned
this morning and asked if I would come.

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No. 15

W. Varney.

Examination - continued.

Q. Has anybody suggested to you, prior to you coming to Court this morning, any price at all?
A. No.

Q. You know the Breda tractor do you? A. I have seen one - only one.

Q. I want you to assume that this Breda tractor had been purchased for some 6½ thousand pounds in May 1951 and to assume that it was used by the purchaser with a scoop and with a 10-ft. 10" dozer blade on road construction, clearing and maintenance work. I want you to assume that very shortly after it commenced work it started using upwards of a gallon of oil or more, every .8 hours. I want to assume that after 3 days a bearing broke and it and another bearing which subsequently broke before the machine got back on to the road had to be replaced. I want you to assume that when the tractor was working that when it was reversing or turning it had a tendency which continued, for the track to throw one or more sprockets and although the tensioning spring was adjusted from time to time that did not seem to help the position very much and that position continued up till the time it was grounded in about the middle of August. I want you to assume also that shortly after the tractor was started to work that it developed clutch trouble and that trouble involved overheating of the clutch when it was called on to do fairly heavy work, ordinary what one might call work, for a tractor of its horsepower which was stated to be 85. I want you to assume that that clutch trouble continued and it involved the operator in having to stop the tractor waiting until it cooled down and then start off again and it might have him waiting for an hour or 2 hours or even more a day, waiting for his tractor to cool off. I want you to assume also that from time to time the clutch seized and the tractor would remain in gear and you could not get it out of gear until it cooled and not being able to get it out of gear it used to just carry on and the only way you could stop it was by stalling your engine or by use of your steering clutch. I want you to assume that that trouble continued and got worse up till the middle of August 1951 and I want you to assume also that the tractor for the period of time it was worked from May 1951 until the middle of August 1951, that although it was used on normal roadwork and that its tracks were not subjected to any unusual strain by virtue of extraordinary conditions - the conditions were normal - I want you to

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assume that the tracks were showing quite substantial signs of wear giving an indication that they were too light for the job of roadwork. I want you to assume furthermore that during the time the tractor was being used there was a large and considerable number of hours spent in trying to keep it on the road; that there were numerous clutch adjustments made and that those clutch adjustments did not seem to help at all. I want you to assume also that the experts have expressed an opinion that the clutch was too light and of not a suitable design for the work the tractor was called upon to do for its horsepower.

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W. Varney.

Examination
- continued.

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Under those circumstances would you tell me what, in your opinion, was a fair value of that tractor in September of 1951, bearing in mind the market where the purchaser had a knowledge of the tractor? A. That would be the tractor bare without equipment?

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Q. Without the bulldozer or P.C. unit? A. It might have been possible to find a buyer for it in probably the \$800 to \$1000 range, I would say.

Q. Would that estimate be an estimate you had made before you heard Mr. Lindsay's evidence?
A. Yes, it was.

Q. And you saw Mr. Cassidy outside the Court?
A. Yes, that is my estimate to Mr. Cassidy outside the Court.

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Q. Have you had any experience of sales of a comparable type of tractor? A. Yes.

Q. What was it? A. A Kobar, a German tractor we imported in 1951 or thereabouts for the sum of \$10,000 landed in Sydney and those units follow the usual pattern of Continental design and gave considerable trouble. So much so that we were unable to work them commercially and endeavoured to sell them. We did offer them as low as \$1,500 with no takers; to my knowledge the units are still unsold.

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Q. As far as those Continental tractors are concerned do they acquire a reputation in the trade after a few of them have come out? A. That is the biggest trouble with trying to resell them, that is the reputation they gain, because a contractor or operator talks so much that it gets

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Examination
- continued.

Cross-
examination.

amongst the fraternity very rapidly and everybody shies off them. If you give a dog a bad name you are in trouble.

Q. Were you aware of the Breda in 1951?

A. I know of their reputation.

Q. What was their reputation? A. Very poor.

Q. That was not a reputation that was only in the trade? A. It was known in the contracting fraternity.

Cross-examination

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MR. REYNOLDS: Q. You are quite clear about that, the Breda had a bad name in the trade in 1951?

A. I said amongst the contracting people.

Q. How long had it had that bad name in 1951?

A. I could not tell you. Naturally when you have been in the earth moving business all your life you take an interest in anything new that comes into the country and I have discussed the Breda with other contractors and that was the reputation they had.

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Q. Which other contractors? A. It is stretching it a bit in my recollection, I could not pinpoint the individuals.

Q. But you are quite sure that it had a bad name in September 1951? A. I am positive.

Q. Did you know how many there were in N.S.W. at the time? A. No.

Q. Did you know if there were any? A. Yes, I knew there was one.

Q. Where? A. I do not know but I had a contractor talk about seeing the machine.

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Q. You had not seen one? A. No.

Q. So far as you were concerned it may have been idle rumour about those tractors? A. Quite correct.

Q. But some contractor had seen one and told you he did not like it? A. He told me some of the troubles they had and instanced they had cast growser plates and they either corroded or wore excessively, you need high tensile steel on those.

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Q. Someone told you that? A. Yes.

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Q. You cannot remember who it was? A. No.

Q. Was it about this tractor you were told, at the Ashford Shire? A. No, I did not know of the Ashford Shire before today.

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Evidence

Q. What you are telling us is now you can get American tractors people won't touch those Continental machines and that is why it has been so low?
A. That has been my experience.

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W. Varney.

10 Q. And indeed, people would only touch it in 1951 because they could not get anything else?
A. I do not agree with that entirely, you could get second-hand machines.

Cross-
examination
- continued.

Q. New ones? A. You could not get new American machines, you could get second-hand ones.

Q. You could get new Continental tractors in 1951?
A. That is correct.

20 Q. Of course the fact you could not get any new tractors would tend to inflate the price of the Continental ones, you would agree with that?
A. No, I do not think I would agree with that only on my experience of the ones we imported.

Q. You express opinions of values. You do not think that freedom from competition affects prices?
A. It did not help us in the example I have quoted.

Q. You mean your tractor you could not sell at any price? A. No, could not shift them; we were misguided enough to import six of them.

30 Q. And no one bought them? A. No could not sell them.

Q. Were they good mechanically? A. No, they were a poor tractor, very poor.

Q. I suppose if you bought a Breda and used it for a month, that is in 1951 and it gave no trouble, you still could not sell it second-hand for anything like its new price? A. Would you repeat the question?

Q. Take this situation. The Ashford Council acquires a Breda in May 1951 and after it has run it

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Cross-
examination
- continued.

for a week and it appears to be operating reasonably well, what could Ashford Shire Council then sell it for? A second-hand Breda in 1951?

A. I could not answer that question.

Q. Have you not made so bold as to answer what it would have got for it with certain things wrong with it? A. Yes. If those tractors give no trouble I could not estimate what they would bring; it was the fact that they gave trouble that lowered the value.

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Q. All Breda tractors, once they were second-hand had very small value in 1951? A. That would be my experience.

Q. When you put the figure of £800 to £1000 on this one you had in mind that if Mr. Jones had had one and used it it would be worth only £800 to £1000 also? A. Quite true.

HIS HONOR: Q. Even though it had not given any trouble at all? A. No, that is our present experience with those types of tractors, with brand new ones, being offered, of Continental make out of the box and there were no takers.

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HIS HONOR: If this tractor were a perfectly good tractor it would only be worth £800 second-hand.

MR. REYNOLDS: It is like a Continental car which is driven around the block; it loses value of £500 immediately.

HIS HONOR: Q. Supposing you paid £1000 more for goods than they are worth; do you take that into consideration when considering damages? Because that is your fault, that loss does not flow from the breach.

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(Witness retired).

(Short adjournment)

MR. NEARNS: Your Honor, it is admitted by the defendant that the goods in question were of a description which it was in the course of the defendant's business to supply. It is also admitted, Your Honor, that the value of Mr. Alhurst's work in repairing the tractor, apart altogether, Your Honor, from, excluding the work on the bearings on the P.C. unit was £32.11.0. That only takes it, of

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course, up to the time it was grounded in August. It is also admitted that the quantity of oil that it used - over one quart per day - represents an amount of \$9.8.0. It is further admitted that Mr. Kramer's loss of time on the days the tractor was working, only, or out on a job, based upon his losing two hours a day, which would include days that it was most of the day being repaired, the value of his services for that period, based on two hours a day is \$24.15.0; which makes a total of \$66.14.0, and, Your Honor, the document is here now, and I put it in.

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(List of figures tendered, marked Exh. "M").

CASE FOR THE PLAINTIFF CLOSED

CASE FOR THE DEFENDANT

No. 16

EVIDENCE OF ALBERT CORNEY

Sworn, examined as under:

MR. REYNOLDS: Q. What is your full name?

A. Albert Corney.

Q. Where do you live? A. 49 Highfield Road, Lindfield.

Q. What is your position with the defendant company? A. Managing Director.

Q. Was that your position in the year 1951? A. Joint Managing Director.

Q. In the year 1951 did your company buy some "Breda" tractors? A. Yes.

Q. From whom? A. Hedeson & Co.

Q. I want to direct your attention to March, 1951. How many had your Company bought then? 70 D's?

A. At March 1951, two 70 D's and 2 50's.

Q. And two 50's; that is a smaller type of the same manufacturer's product? A. Yes.

Q. When did your company make the first sale of a 70 D tractor? A. We sold a 70 D tractor to Lloyds Tractors N.S.W. Pty. Ltd.

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Cross-examination - continued.

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Examination.

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A. Corney.

Examination
- continued.

HIS HONOR: Q. Where? A. Lloyds Tractors.

MR. REYNOLDS: Q. When was that? A. In March.

MR. MEARES: I don't mind you leading.

MR. REYNOLDS: Q. See the 9th March, that invoice you have there - the long book. (Handed to Mr. Reynolds). Look at Invoice 164. (Shown to witness)
A. Yes.

Q. Does that enable you to say on the 9th March, 1951, you sold this "Breda" tractor, 70 D - that you sold? A. Yes. 10

Q. You then had two left, did you? You see the three, the first lot - and you bought -?
A. No, two 70 D's.

Q. You then had one left? A. Yes.

Q. We have been told that it was about 13th March that Mr. Bowman came to your showrooms? A. Yes.

Q. Did you have then only one unsold, one 70 D?
A. Er...Yes, I think another shipment had come in subsequent to the first shipment of tractors. About that time. 20

Q. Do you remember Mr. Bowman coming to see you?
A. Yes.

Q. How did he introduce himself? A. He introduced himself as Mr. Bowman, the Shire Engineer from the Ashford Council.

Q. I want you to tell us, to the best of your recollection, what took place between you and Mr. Bowman on that day? A. When Mr. Bowman came in he introduced himself and told me where he had come from and he would like to have a look at a Breda tractor, 70 D Model. There was one in the showroom at the time, and I pointed to it. We then walked over and he said that he had been instructed to give a report on the tractor to his Council with a view to purchasing. He proceeded to look over the tractor and asked numerous questions and asked for specifications, which I went and got, a pamphlet, to confirm the weights and size and tracks, etc. You know, the general specifications of the tractor with a brochure. 30 40

Q. That is the brochure, copy of which is in evidence? A. Yes.

Q. The yellow-covered one, the exhibit? A. Yes, that is the one.

HIS HONOR: Q. You gave him one of those?
A. Yes, I got one.

MR. REYNOLDS: Q. What is Exhibit "H". Do you recollect whether you had that or he had it; any precise recollection of it? A. I went and got it from the office and when he was asking the questions I handed it to him. He studied it himself as he inspected the tractor.

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Q. What is your recollection as to what, if anything, the tractor was required to do? A. There was nothing definitely stated what the tractor was required to do at that stage. It appeared to me - (Objected to). (Rejected).

Q. You cannot say what appeared to you?
A. Well, he didn't tell me what he was going to do with the tractor.

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Q. Was there something said about a blade being fitted to it? A. Yes, after he thoroughly inspected the tractor, he went over it from front to back, and inspected every feature of the machine; I spent, I say, an hour and a half, a couple of hours, I might have been there, and had the motor running when he finished the inspection. He mentioned the Council, if they decided to purchase, that they would require a 'dozer blade. He asked me if they could have that fitted. I said they could. He said would it take very long. What would be the delay of having the blades fitted? I said approximately a month. I rang the firm under the name of Brown & Bunyan, trading under ---

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Q. That is while he was there? A. That is while Mr. Bowman was with me, and asked them how long.

MR. MEARES: Was he listening to this?

MR. REYNOLDS: Q. It does not matter. Did you speak to Brown & Bunyan on the 'phone?
A. He was with me. I called the office.

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Q. Did you speak to Brown & Bunyan about the matter of delay? A. Yes. I told him the delay would be approximately three weeks to a month. After inspecting the tractor superficially he asked questions about methods of driving, steering, clutches, etc. He had a look at the blueprint,

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Examination
- continued.

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Examination
- continued.

which more or less gave a cut-away view of it, so he could see inside the machine, and when he left me that more or less comprised the conversation.

Q. Do you remember which, if anything, of these was the one he saw? Was it the one that is already in evidence there? A. Yes, the big one hanging in the office.

Q. "D" - is that the one? A. Yes, that is the one.

Q. You say you showed him that? A. Yes; so he could get a view of the innards of the machine, which he could not see from the outside. 10

Q. Is that the one? (Document shown). A. Yes.

Q. Those words appeared on the top, did they? A. Yes.

Q. "Trattori Schema della trasmissione" - my Italian is very poor? A. Yes.

Q. Is there a plate beside the driver's seat on, like the instrument panel of this tractor?

A. Yes, there is a brass plate on the dash of the tractor. Probably that book says we ---- 20

Q. Does that have on it the same words: "Trattori Agricoli"? A. Yes, the same words.

Q. You told us he looked over it? A. Yes, he looked at that, and then that more or less finished the conversation. He said he would have to report back to his Council on the inspection.

Q. I want to ask you specifically did you tell him that there were several others of this make in operation at the moment? A. No. 30

Q. Were there, in fact, any in operation at that moment? A. One just about operating, a 70 D.

Q. Have you got any information of that, at that point, of time? A. No, we hadn't any information at that point of time.

Q. That is the tractor you sold to Lloyd Tractors? A. Yes.

Q. Who ultimately acquired that? A. A chap by the name of Buckingham out of Orange.

Q. Did you say anything to Mr. Bowman on this day about one on the North Coast or Kyogle? A. No.

Q. Did you say anything about one round Tamworth, or somewhere? A. No.

Q. In point of fact, did you subsequently sell a tractor to a man at Kyogle, and another to a company at Tamworth? A. Yes.

10 Q. Can you, by refreshing your recollection, by referring to the invoices, say when you sold those tractors? A. In May. (Book shown to witness).

Q. Would you look at Invoice 16174? A. Yes. 30.5.51. Moore, Green, Pigeon, via Kyogle.

Q. At the beginning of March 1951, had you had any contact at all with either of those ultimate purchasers? A. None whatsoever.

Q. How many 70 D tractors did you sell in the year 1951? A. (Witness hesitates) Five.

20 Q. You have referred to three of them - that is, Ashford Shire, Moore Bros. and Armstrong Bros., in addition did you sell one to a man named Price? A. Yes.

Q. And you have mentioned them all now; Price is the only other one? A. Yes, Price is the only other one.

Q. Just running through them; Lloyd Tractors, which went to Orange, Ashford, Armstrong Bros., Price, Moore Bros.? A. Yes.

Q. The plaintiffs? A. Yes, the plaintiffs.

30 Q. On this day, I am speaking of the day Mr. Bowman came to your showroom, did he ask you, in any form, what work this tractor was capable of doing? A. No.

Q. Were you ever asked by anybody? (Objected to; question pressed; rejected).

Q. Specifically, did he tell you that the tractor was required to pull a particular-sized scoop? A. No, he did not mention that to me.

40 Q. Did you tell him that roadwork was the type of work this tractor was built for; it was just the type of work to suit it? A. No.

Q. You told us that he told you that he was going

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Examination - continued.

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A. Corney.

Examination
- continued.

to report to his Council? A. Yes.

Q. And he left, did he? A. Yes.

Q. We have heard how you received a written order and how you acknowledged it by letter? A. Yes.

Q. From that time that the tractor was delivered in May until last week, had you seen the tractor at all? A. Until it was delivered in May....I saw the tractor about a week ago.

Q. Until you saw it a week ago? A. Yes.

Q. Until you received the declaration through your solicitors in this case, dated 2nd July, 1954, had anyone either by word of mouth or in a letter, accused you of breaking contract? A. No.

10

Q. Had anyone by word of mouth or by letter suggested you had given some assurance as to capacity of this tractor? A. No.

Q. Do you have a recollection of Mr. Black, the President, coming down in the month of June, 1951? A. I have got a recollection of Mr. Black coming down somewhere in June.

20

Q. He gave evidence of your being asked two questions by him; do you recollect that evidence? A. Yes.

Q. Do you recollect the incident? A. Yes.

Q. Did he ask you something then about what you said the tractor could do? A. He was only there for a few minutes. He did ask me could the tractor do Council work.

Q. What did you say? A. Yes.

Q. Had you ever been asked that question or anything like it before then? A. No.

30

Q. Did you hear from that time forth of complaints about the purpose of this tractor? A. Yes.

Q. Some letters are in evidence, and we have heard about the 15th August Mr. Bowman came down with a report? A. Yes.

Q. On that occasion is it true that you conducted him to Hedeson & Coy., the people from whom you had brought the tractor? A. Yes, that is true.

Q. At that point of time did you dispute the claims which were put forward about the performance of this tractor? A. In that letter, no.

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Q. That are in that report? A. No, I didn't dispute it.

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Q. I want you to come to the point of time where -

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MR. MEARES: What letter did you refer to when you say, "in that letter"? I think I know what you mean.

A. Corney.

Examination
- continued.

10 MR. REYNOLDS: Q. Is the letter and the report of the 14th and 15th August, after you had referred Mr. Bowman to Hedeson & Co. in August; did you hear anything between then and the month of November, when you got a letter? A. I received a copy of a letter.

Q. The next communication you had was the receipt of this letter? A. - bearing date 12th November, 1951. (Shown to witness). Yes, I received that.

20 MR. REYNOLDS: I withhold tender for the moment. I call for a letter written by the deft. to the plaintiff of the 3rd December, 1951. (Produced).

Q. Did you send a reply dated 3rd December?
A. Yes, I sent a reply.

(Letter and reply of 3/12/51 tendered and marked Exh. "1").

Q. I note that in the last paragraph of your letter you say: "Awaiting your further advice as to the nature of the repairs required." A. Yes.

Q. Did you ever get any advice? A. No.

30 Q. In the meantime, did your company send accounts for parts outstanding? A. Yes.

Q. The next you heard was, you got this letter dated 11th March, 1952? (Shown to witness).
A. Yes.

(Letter 11th March, 1952, tendered and marked Exh. "2").

Q. We have got a copy of the account? A. It is on the ledger-card written-off as a "bad debt". I could get that.

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Examination - continued.

Cross-examination.

MR. REYNOLDS: The ledger card, month of August, shows no particular

MR. HEARES: That is all right.

MR. REYNOLDS: Q. This was March, 1952? A. Yes.

Q. What was the next thing you heard or received?
A. A writ.

Q. That was in the month of April, 1954? A. Yes.

Q. Was there any letter making any allegations about breach of contract before the writ? A. No. (Objected to).

10

Cross-examination

MR. HEARES: Q. You tell us that the date this tractor was sold to the Shire Council - that you had bought from Hedeson's, two 50 D and one 70?
A. No, two 70 D. Pardon me, the date it was sold - there was another shipment when inspected and will be ----

Q. Had you paid Hedeson's for them? A. Yes.

Q. Can you give us an approximate idea of capital outlay of your company on those four tractors? (Objected to; allowed). A. You want the exact -?

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Q. No, an approximate will do me? A. What, the Australian price?

Q. Yes? (Witness hesitates). A. Approximately sixteen-odd thousand.

Q. That is for the four? A. Yes. I can confirm the figures, get them if you wish.

Q. I suppose under those circumstances you were quite anxious to sell these tractors as soon as you could? A. Yes.

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Q. You, of course, are a salesman? A. No, I don't class myself as a salesman; I can sell.

Q. You say you don't class yourself as a salesman; how long have you been in business? A. About 30 years.

Q. And over that period of time you have spent a large part of your time in selling various equipment? A. In motor cars, trucks.

Q. And rippers? A. Rippers?

Q. Yes, you have sold other than motor cars and trucks in your day? A. We have had a few second-hand rippers and stuff we brought from the Islands.

Q. May we take it, over your 30 years in business you have had very vast experience as a salesman?

A. Yes.

10 Q. Of course, I suppose, apart from altogether the capital cost of these tractors that you had outlaid, a sale brought you in - you thought, at any rate, did you not, at the time Mr. Bowman came down - that a sale would give you a very substantial profit? A. Yes.

Q. Would you give me a rough idea of the gross profit to you of the sale of a 70 D Breda tractor to the plaintiff? A. (Witness hesitates) A little over £1,000.

Q. Were not you getting 33-1/3 on them? A. No.

Q. You were not; just think? (No answer).

20 Q. You were getting 33-1/3 on them? A. No, not 33-1/3.

Q. Which was more than £1,000? A. Approximately £1,000.

Q. Are you sure of that? A. Not without checking the figures to get our initial cost.

Q. I suppose we may take it, then, under the circumstances you were placed in March 1951, you were indeed anxious to sell those tractors? A. Yes.

30 Q. I suppose you would agree with me, you were an experienced salesman? A. Yes.

Q. I suppose you would agree also that when Mr. Bowman came down that as an experienced salesman, you did your level-best to sell this machine to him? A. No, Mr. Bowman came down to inspect the machine, he did not discuss the machine.

Q. Mr. Bowman came down and he told you he had to report on the machine, didn't he? A. Yes.

40 Q. I put it to you that on that occasion you did your level best to persuade Mr. Bowman the machine was suitable? A. No, the less said with Mr. Bowman the better, because he had a mind of his

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Cross-
examination
- continued.

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A. Corney.

Cross-
examination
- continued.

own. If you attempted to sell him ---
(Interrupted).

Q. Do you say you did not do your level-best,
when Mr. Bowman came down, to sell this machine to
him? I am using the colloquialism, you understand,
to sell this machine to him? A. Yes.

Q. I suppose you did not hesitate to point out
any qualities you thought might appeal to him?

A. I pointed out all the machine to him.

Q. And I suppose any qualities you thought were
good selling points in the machine you pointed
out to him? A. Yes, I would have. 10

Q. You would have? Did you? A. Yes.

Q. And the qualities of the machine that you
thought were good selling points, did you point
out to him? A. Oh, I cannot recall.

Q. May I suggest to you, that you have not got
any recollection at all, as to what good qualities
you pointed out to him; no recollection at all,
have you? A. Oh well ... very hazy, actually,
on what I pointed out to him. 20

Q. And, of course, you knew, did you not, that at
this time this tractor was suitable for roadwork?

A. I knew it was suitable?

Q. Yes? A. Yes; it would do roadwork.

Q. You had no doubt at all that it would do road-
work, had you? A. In its capacity, no.

Q. Of course, that was one of the sources you
hoped of sales, to people who wanted it for road-
work; that is so, isn't it? A. Well, it was a
tractor we hoped to sell it to anyone who wanted
to use it in any direction. 30

Q. Did not you hold this 70 D tractor out as be-
ing suitable for roadwork? A. Yes.

Q. You did? A. Yes.

Q. And you advertised as being suitable for road-
work? A. Yes.

Q. And you advertised it as being suitable for
roadwork using a 'dozer blade? A. Yes.

Q. And of course you advertised it, moreover, with the 'dozer blade attached to it, didn't you?
A. Yes.

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Q. And the very brochure you showed him shows the 'dozer blade attached to it, does it not? A. Yes.

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Q. So that, what you sought to do, in regard to these Breda tractors, before Mr. Bowman came down, was to sell these tractors to people for road purposes, roadwork, that is so, isn't it? A. Not -

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10 Q. Amongst other uses? A. Amongst other uses, yes.

Cross-
examination
- continued.

Q. And you advertised it as being suitable, before he came down, as being suitable for roadwork?
A. Yes.

Q. So if Mr. Bowman asked you was it suitable for Council roadwork, you would not have hesitated to have told him it was? A. No, not if he asked me.

Q. Of course, at that time, you firmly believed it was suitable for roadwork? A. Yes.

20 Q. Let me put it once again, that if by any chance he said to you "I am thinking of buying it for the Council of Ashford, and it is going to do roadwork, what is it like for that work?", you would not have hesitated to have said, "It is very suitable, that is what it is designed for."? That is what you would have said? A. Possibly.

Q. Probably? A. No, the question was not asked me.

30 Q. If he had asked it, would not you have said it?
A. Asked?

Q. Was it suitable for roadwork? A. Yes, I probably would have said it, yes.

Q. Of course, you have had very many conversations, have you not, concerning sales of various equipments in your life? A. Chiefly motor cars and trucks.

Q. You were served with a writ in this case in July 1954? A. Yes.

40 Q. Well, from early in the piece, from the time of sale until July, 1954, did you have any

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particular occasion to recall in any detail, this conversation which you have just told us about today? A. No, no cause to recall it.

Q. I suppose you have countless dozens of conversations with various people during the day?

A. Yes.

Q. Concerning the sales of equipment? A. No, I very seldom touch the sales.

Q. Concerning the trucks and things like that?

A. No, I don't come in to that side much now. 10

Q. No; in 1951 you were doing it? A. 1951, yes.

Q. That is right? A. Yes.

Q. In 1952 you were doing it? A. Not very much.

Q. Do you seriously suggest to us that under those circumstances you would be able to clearly remember a conversation that took place in March 1951?

A. I think I could remember it very clearly.

Q. Would you tell me, if you can remember it very clearly, would you tell me what good qualities of the machine you pointed out to him, if you can remember it very clearly? Just enumerate them? 20

A. Well, one would be the accessibility.

Q. Not what it would be? A. One was the accessibility.

Q. What did you say to him? A. What did I say to him?

Q. Yes? A. (No. answer).

Q. Got any idea? A. I pointed out to him ---

Q. I am asking you what you said to him? A. I pointed out the accessibility of the machine. 30

Q. Now look --- (Objected to).

HIS HONOR: Q. I think what Mr. Heares wants you to do, if you can, is try and tell the words?

A. I am trying to.

MR. HEARES: Q. Would you tell me the words you

used to him, if you remember? What did you say to him? Imagine he is there and you are there. If you remember this conversation, what did you say to him? A. The accessibility of the tractor; well, got to bring that point out; pointed out to show him - pointed to the thing.

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Q. You pointed to something and said what?

10 A. For instance, if you get a difference in work, in transmission, you have not got to break the whole tractor. You can dismantle a section there very easily. The motor is very accessible to work on. The tracks cast in one piece, and instead of having one master pin, you have a master pin in each pad; that means that you can take one pad out without taking the whole track out. That would have nearly comprised all the points I pointed out to him. He was more interested in looking at that.

20 Q. You told me about 10 minutes ago, if I remember rightly, that you could not remember what was said about this particular point that you pointed out, didn't you? A. Yes, you wanted me to explain, but I can recall the conversation.

Q. He was there for an hour and a half - for two hours approximately ----? A. Approximately that.

Q. You were with him all the while? A. Yes.

Q. I suppose that if the man had been there with you, at the time, and if he was writing it down, it would have filled pages and pages of a book?
A. No.

30 Q. You were trying to sell it? A. Well, Mr. Bowman ---

Q. You were trying to sell it, is that right?
A. I was trying to sell it.

Q. When was it he inspected the 'dozer blade?
A. After he inspected the tractor.

Q. You rang Brown & Bunyan up, did you? A. Yes.

Q. Had you ever had a 'dozer blade fitted to the machine before? A. No, I had not, but Lloyd Tractors had, the one that was sold previous.

40 Q. When he said to you could you get a 'dozer blade fitted, I suppose you were concerned to know the purpose for which he wanted the blade?

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A. Naturally, would know if he wanted a blade.

Q. How would you know? A. There is only one purpose.

Q. What is that? A. Road work.

Q. Levelling ground? A. Levelling ground and pushing-up work.

Q. First of all, you knew it was the Ashford Shire Council? A. I knew it was the Ashford Shire Council.

Q. You knew that that tractor that you were discussing to sell to Ashford Shire Council, was going to be used for roadwork? A. I knew it was going to be used for Council's operations, and included in that, naturally would be roadwork. 10

Q. So before Mr. Bowman left you knew that this tractor was going to be used for roadwork? A. I knew it was going to be used for roadwork.

Q. You also felt that it was suitable for roadwork? A. Yes.

Q. And you also knew that it was going to be used with a 'dozer blade? A. Yes. 20

Q. Of course, there are very many different designs of bulldozer blades, are there not? A. I am not very conversant with different designs; I knew this one is termed an "angle 'dozer".

Q. You know there are very many different-sized blades? A. Yes.

Q. You, of course, knew that the question that determines the type of 'dozer blade you used is the type of work you do? A. Yes. 30

Q. You told Brown & Bunyan, over the telephone, that you wanted this 'dozer blade fitted for a tractor for roadwork, did you not? Now, just think? A. No.

Q. What? A. I did not.

Q. What did you tell them it was needed for? A. I don't think it was discussed.

Q. The moment you rang Brown & Bunyan up, you simply told them that you wanted the 'dozer blade and did not tell them the purpose of it?

A. Yes, I wanted an "angle" blade.

Q. Do you suggest that Brown & Bunyan naturally would know what it was for? A. Naturally they would anticipate it was for road work.

Q. They would anticipate it was for road work?

A. Yes.

10 Q. So, Brown & Bunyan would have anticipated it was for roadwork? A. Yes.

Q. And you, of course, anticipated that this tractor was required for roadwork? A. Yes.

Q. May we take it, then, that that being in your mind, you understand, it being in your mind, that this machine was required for roadwork; you follow that? For the Council? A. Yes.

Q. You being quite confident that it was suitable for roadwork - you understand me? A. Yes.

20 Q. You would have no particular reason, would you, for remembering whether or not Mr. Bowman had said that it was required for roadwork? You would have no particular reason for that sticking in your mind, would you? A. No, no particular reason.

Q. Of course, also, you would not have had the slightest doubts at all at this time it would have done work with a 6-8 yards scoop; you knew that, didn't you? A. I knew it would handle a 6-8 yds. scoop.

30 Q. If you had been asked that question at that time, you would not have hesitated to say it would have done that work quite all right? A. No, I would not.

Q. You told Mr. Reynolds it had on the plate "Trattori Agricoli"? A. Yes, on the plate.

Q. But you are not suggesting that you were holding out these tractors as suitable only for agricultural work? A. No, they are a crawler tractor, to my mind.

40 Q. Of course, when this Council put this tractor in to work, you sent Mr. Bourke up there? A. Yes.

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Q. You were perfectly aware what work he was doing? A. Yes.

Q. You never suggested to the Council that you sold this tractor to the Council for agricultural purposes only? A. No.

Q. You knew, of course, at the time Bowman came, that he required the tractor, or the Council required it, for Council work? A. I knew they required it for Council work.

Q. You knew that the Council work was 'dozer work with the 'dozer blade and scoop? A. Yes. 10

Q. You were well aware of that before Bowman left? A. Yes, they were going to use it for Council work with the blade on, yes.

Q. You have told us, as I understand it, that at this time you had only sold two other tractors; you hadn't sold any 70's? A. One.

Q. You had only sold one 70 D? A. Yes.

Q. I suppose, by that you mean, do you, that you had not got any deposits, or anything, for 70 D's, or anything of that sort? A. No. 20

Q. When did Price pay his deposit? A. I would have to look it up.

Q. Would you deny that you got a deposit from Price for a 70 D in March - on 8th March, 1951? A. No, not without looking at the figures; I would not deny it, without looking at the figures.

Q. Would you deny that you had been dealing with Price concerning the sale of a Breda from November 1950? (Witness hesitates). A. No, I did not have any tractors out here then. 30

Q. That you had been negotiating with him from November 1950? A. No ... I have to check informations

Q. Do you remember up at the Narrabri Court; you were up there, weren't you? A. Yes.

Q. Do you remember Price giving evidence of having paid a deposit? (Objected to; question pressed).

MR. MEARES: I call for any documents showing payment and the sale, or part of the purchase price, by Price to the defendant.

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MR. REYNOLDS: The reference in that book is Invoice 16175. It was sold to the Australian Guarantee Corporation, but Price was the

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WITNESS: The 31.5.51, was sold to the Australian Guarantee Corporation.

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10 MR. MEARES: Q. I am asking you about the deposit. When was the deposit paid? A. The list deposit, paid by R.G. Price - £2,000.

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Q. What is the date of that? A. I have to get the receipt to get that.

Q. Would you also search for a payment made by him of £50, payment of £500 deposit, and a further £50 to secure the order? Would you make a search over the lunch hour? A. It might take a little while to do.

20 Q. What I am suggesting to you is this, that you, by the time Bowman had come in, had already sold a tractor to Price? A. Well, I have to check the dates to see whether he placed his order --- you want £50? That the amount?

Q. And £500? The fact is, by the time Bowman came in, you had negotiated this sale with Price?

A. I have to look at those dates to see.

Q. Did you see Price about the sale of a tractor?

A. I saw Price later on, but I just don't know what time.

30 Q. Did you see him concerning the sale of a tractor? Did you sell it to him? A. No, I did not sell it to him.

Q. Did he come and see you before he bought it?

A. That was when he was about to take delivery of it; that is the only time I saw him.

Q. Do you remember a conversation you had with Price? A. No, the only time I saw Price was when he wanted to arrange terms.

40 Q. Are you able to tell us that conversation accurately? A. As close as possible.

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Q. Can you relate it accurately? A. Well, accurately, to a word or two.

Q. To a word or two? A. Do you want me to tell you?

Q. Let me put this to you: as a matter of interest, do you seriously suggest that you, when you are acting as a salesman, are you able to recall, with any degree of accuracy, three years after a conversation takes place, what you said or what the other chap has said? A. Yes, very closely. 10

Q. For instance, let me put this to you: supposing I had been to you and negotiated the sale of a tractor from you in the year 1950 - follow that? A. Yes.

Q. And supposing six years had flowed by since then, and you had made other sales - follow that? A. Yes.

Q. Do you tell us, you would be able to write down at this moment, after having thought about it, of course, with any degree of accuracy, the conversations precisely that took place? A. Yes, I could write down that conversation as near as precisely as possible. 20

Q. Would you relate to me the wording of the last question that I put to you here; that is about three sentences ago? A. No, I cannot.

Q. You could not possibly do it? A. No, my mind is not trained that way.

Q. What I am suggesting to you is, therefore, that you would have little chance of being able to remember, with any degree of accuracy, the conversation that took place concerning this Breda tractor five or six years ago? A. No. 30

Q. You have no reason for remembering particularly whether he said he wanted this for roadwork? You would have no reason at all? A. No, I do not think so.

Q. You told Mr. Reynolds when you got this letter of the date you mentioned, or when you were shown the letter, of complaints, that you never disputed them? A. That is right. 40

Q. Do you dispute them now? (Objected to; pressed; rejected).

Q. Let me put this to you: by the time you got that letter, Bourke had been up there on numerous occasions, hadn't he? A. Yes, on two or three occasions.

Q. You had discussions with Bourke? A. Yes, I had discussions.

Q. About the tractor? A. Yes.

Q. Bourke had been up there, hadn't he? A. Yes.

Q. Examining this tractor? A. Yes.

10 Q. And Bourke had reported back to you about the tractor? A. Yes.

Q. And then, you finally got at Bourke's request, you got this letter of complaints about the tractor? A. Yes.

Q. When Mr. Bowman came down with that letter, you never disputed with him, at any time, that these complaints were unfounded, did you; that is the position, isn't it? A. No, I didn't dispute it.

20 Q. And you have never done it since? A. No, I have never done it since.

Q. Did the Company ever ring you up on the telephone? A. Which company?

Q. The Council - anyone from the Council, did they ever ring you up on the telephone and make any complaints concerning the tractor, if you can recall? A. I cannot recall them ringing me directly.

30 Q. Have you any recollection of anybody ringing up about complaints concerning the tractor? (Witness hesitates). A. Yes, I think it was Mr. Bowman rang up on one occasion, about bearings or something or other, a knock in his motor.

Q. Do you remember the Council, or anybody from the Council, ringing up about anything else, ringing you and complaining about it? A. No, I cannot recall any conversation further.

40 Q. Well, you see, let me put this to you: suppose, if there had been complaints about this tractor in 1951, it would have been a matter of some importance to you? A. Yes.

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Q. Can you tell us whether you can recall whether anybody from the Council ever rang you up complaining about certain matters relating to the tractor? A. Rang me personally.

Q. Yes? A. Well, I recall when they rang up about the 'knock' in the motor.

Q. Yes, but apart from that? (Witness hesitates).

A. No, I cannot recall.

Q. Would you deny that in July --- ? A. No, I cannot deny.

10

Q. Just a minute! I have not put it to you - that in July, 1951, that you were not contacted on the telephone by somebody from the Council, and complaints were made about the tracks? A. No, I cannot recall that one.

Q. Would you deny it? A. No, I would not deny it.

Q. The position is simply this: you have not got absolutely any recollection of that conversation? A. No, no recollection.

20

Q. Would you deny that you were told by one of your employees that the Council had rung him, and complained, amongst other things, on the telephone, about tracks? A. No, I cannot recall that.

Q. So you have got absolutely no recollection whatsoever of any such telephone conversation to you, or related to you, by somebody else? A. Not on that particular one, no.

10 Q. No recollection of it at all? A. No.

Q. To the best of your knowledge, this is the first time you have ever heard it? A. Yes.

Q. Do you hold yourself out as having a good memory? A. Yes.

Q. I suppose, if I might put it to you this way: I suppose, if somebody had rung you and complained about the tractor, you

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would have more reason for remembering that than if Mr. Bowman told you that he wanted the tractor for roadwork? A. Oh, not necessarily.

Q. It would be equally as important? A. Yes, equally as important.

Q. You have got no recollection of that at all?

A. No, I can't recall that one.

Q. I suppose you tell us you were anxious to sell this tractor? A. Yes.

Q. And you pointed out its good qualities?

A. Yes.

10

Q. Did you point out any of its bad points?

A. No.

Q. Did it have any, to your knowledge?

A. To my knowledge, no.

Q. To your knowledge, right up to the end of 1951 did it have any bad points? A. This tractor?

Q. No, the 70 D Model? A. The end of ?

Q. - 1951, right till the end of 1951, did this 70 D Model, to the best of your knowledge, have any bad points? A. Only what had been pointed out in my own mind; not as bad; it was pointed out ---

20

Q. What? A. Reports we had on different operations of the tractor.

Q. Such as what? A. Such as oil consumption, tracks, such as given by Ashford.

Q. Did you have any complaints about clutches from anybody else other than Ashford? A. No we have only supplied facings to anyone else as normal wear.

30

Q. So we may take it, apart from this one, you sold to Ashford Council, you had no complaints concerning clutch trouble? A. Clutch facings we supplied.

Q. May we take it, apart from Ashford Shire, you have had no complaints concerning anyone concerning clutch trouble with the Breda tractors you were selling? A. In the 70 D?

Q. Yes? A. No.

Q. You are quite certain of that? A. Apart from the facings; facings, we had that trouble.

Q. Apart from facings? A. Clutch facings were supplied, but that is not trouble; that is general wear.

Q. General wear? A. Yes, clutch linings.

10 Q. Apart from clutch facings, apart from the 70 D, up to the end of 1951 you had no trouble or complaints? A. Yes.

Q. Quite certain of that? A. Yes.

Q. As far as the 50 D was concerned, up to the end of 1951 had you had any complaints concerning trouble with clutch efficiency on the 50 D? (Objected to). A. Yes.

Q. When did you first get your trouble about that? A. The first tractor; Lloyd Tractors sold - we sold two to them, a 50 and 70, and the chap had trouble with that. It was rectified.

20 Q. Did you, apart from supplying clutch facings, in connection with normal wear, you, with the 70 D, you never had any complaints? A. No.

Q. And there is nothing the matter with your memory? A. No.

Q. Had you had any trouble yourself in regard to the clutches of the 70 D? A. How do you mean, ourselves?

30 Q. Yourselves. Yes, had any trouble yourselves with the clutches on the 70 D? A. From using them, or what?

Q. Had you had any trouble yourselves concerning the clutch of the 70 D? A. No, not that I can remember.

Q. You have got no recollection of any trouble at all? A. No.

Q. You deny that you had any trouble, would you, yourselves? A. Yes, you are speaking of the mater clutch?

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Q. Yes, I am speaking of the master clutch. You have had engineering experience, have you?

A. I had some.

Q. Quite a bit? A. Goes back a lot of years.

Q. Supposing, after five or six days, - I just want to put this to you as a hypothetical case, if I may - that clutch face, the facing, is badly worn and scarred. There were heat cracks in the surface of the plate, that the clutch fingers were not operating, that the clutch finger anchoring plugs were too tightly fitted and burnt, and the release housing had been broken - follow that?

10

A. Yes, that is the 50 D you are speaking about?

Q. I am asking what that would suggest to you?

A. I know the whole story of that one.

Q. What would it suggest to you? (Objected to).

A. It would suggest that that clutch had been slipping and was overheated.

Q. That it was an incompetent clutch, in other words? A. No, it is still working, the same clutch.

20

Q. But if you had that story after about five or six days' work, would not that suggest to you it was something very wrong with the clutch? A. No. Those things can happen with improper use.

Q. You say you know this particular case I am putting? A. This is the 50 D.

Q. Is it? A. Yes.

Q. Quite certain of that? A. Yes, the 50 D, I have in mind ---

30

Q. Was that due to improper use? A. You are suggesting use; that is the sole reason for that clutch going? A. Yes, it heated up and burnt the facing.

Q. The sole reason for that was the improper use?

A. The clutch heated; the operator should know.

Q. It was improperly used? A. Yes.

Q. And the improper user created this trouble?

A. Yes.

Q. There was nothing about this particular history of the clutch which suggested to you that the design or assembly of the clutch caused it at all?

A. No, I thought the cause of that trouble was the slipping.

Q. You thought it was improper use or not?

A. It is improper use, slipping.

Q. That did not give you any cause for concern?

10 A. I did not like it. I think I might have mentioned it to Hedeson on that point.

Q. Do you remember any other trouble with the clutches apart from this one, the 50 D? A. No, I can only remember clutch facings were supplied.

Q. Do you remember getting the translation of that letter from the Broda company? A. Which letter was that?

Q. What they wrote back? A. Ashford's?

Q. Yes, Ashford's? A. Yes.

Q. You read it properly? A. Yes.

20 Q. You paid some careful attention to it, did you?
A. Yes.

Q. You are aware of its contents, in the main?

A. In the main; it is a long while since I have seen that letter.

Q. Well, now, did you not know at the time you sold this tractor to the Ashford Shire Council already there had been trouble with sprocket jumping?

A. Before I sold the tractor?

30 Q. Yes? A. Well, nothing comes to my mind that I can recall on it.

Q. Supposing that there had been sprocket jumping which came to your knowledge? A. Before it was sold?

Q. Before Mr. Bowman came down; supposing there had been sprocket jumping, would you have told Mr. Bowman about it? (Objected to; rejected).

40 Q. I want you to assume that when this tractor was sold or Mr. Bowman came down, that you were then aware that there was sprocket jumping; I want you to assume that? A. Only assume it?

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Q. Yes? A. Yes.

Q. Under those circumstances, you would have told Mr. Bowman, wouldn't you? A. Told him those tracks jumped the sprockets?

Q. Yes? A. No.

Q. Suppose this had clutch trouble before that, before Mr. Bowman came down, would you have told him about that? A. No.

Q. I suppose, for the reason you were extremely anxious to sell the tractor? A. Always anxious to sell them, yes. 10

Q. Are you quite certain you had not had sprocket jumping trouble prior to Mr. Bowman coming down? A. There is only one tractor - again I would feel didn't come to my notice.

Q. Are you quite certain you had --- A. Yes, quite certain.

Q. Of course, when Mr. Black came down, Mr. Black asked you about its capabilities for roadwork, didn't he? A. No, Mr. Black asked me was it suitable for Council work. 20

Q. You knew what that meant? A. Yes, I knew what Council work entailed.

Q. You did not hesitate to reassure him about that? A. No, I said Yes.

(Luncheon adjournment).

AT 2 P.M.

MR. MEARES: Q. You were not only the Managing Director of this Company, but you held at this time, that Mr. Bowman came down, quite a considerable number of shares? A. In Dependable Motors. 30

Q. Yes? A. Yes.

Q. And you and the late Mr. Hill were, substantially speaking half-owners, you each had a half-share in the company? A. Yes.

Q. You told us this morning that on the sale of this 70 D Breda tractor to the Ashford Shire Council, your gross profit was £1,000?

A. Approximately; I have to check the figures to see.

Q. Do you want to alter that at all? 40

A. Not without seeing the figures.

Q. Would you have a look at the figures and tell me what you paid Hedeson for this 70 D Model tractor that you bought? A. Have we got any records here on that or will I have to get that from the office? That was the second shipment, I think, three 70 D's and one 50 D in that shipment that came in.

MR. REYNOLDS: May I hand the witness all the documents I have got here?

10 HIS HONOR: Yes.

(Documents handed to witness; witness examines documents).

WITNESS: There is a lot of figures we worked out in the shipping office, Sterling exchange; I would have them in the office.

MR. MEARES: Q. Give me the price, to you?
A. (Witness examined documents).

20 MR. MEARES: I call on my friend to produce all copies of drafts of any advertisements inserted in any newspaper by defendant in respect of Breda tractors during the period 1950-1951.

MR. REYNOLDS: Are you calling on subpoena?

MR. MEARES: Yes.

MR. REYNOLDS: The subpoena has been answered. You have had access to the documents. As far as I know, there are none. The only advertisement is here.

MR. MEARES: May I have a look at that?

30 MR. REYNOLDS: Certainly. I produce this one on call, Your Honor, as this is not the subject of a subpoena. (Volume handed to Mr. Meares).

WITNESS: We have not all the documents, to get our exact costs.

MR. MEARES: Q. Can you get any rough idea from what you have worked out? A. About £16,000.

Q. For what? A. For four tractors.

40 Q. Can you separate the 50's from the 70's?
A. We have not got all our documents, none of Hedeson's invoices; these are only the shipping documents here.

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Q. You are asked to produce on subpoena all documents from Hodeson's; weren't you? A. Well, is there any one mentioned in that of accounts?

Q. You were asked to produce those documents; have you got them?

MR. REYNOLDS: Which document, do you suggest, covers this subpoena?

MR. MEARES: All records, documents and accounts concerning the transaction between the defendant and Breda and defendant and Hodeson.

10

Q. However, what you tell me at the moment is from the documents in front of you, you cannot give me the faintest idea what those things cost you, landed? A. I cannot give you the exact figure.

Q. The first one you sold for £5,145 to Lloyds?
A. Yes, that was net price, less the commission.

Q. Less what? A. Less commission paid. Net price to them.

Q. The one sold with the blue plate was the
£5,915? A. Yes.

20

Q. Was there any difference in the two tractors?
(Objected to; allowed).

Q. Was this the same type of tractor? A. Yes.

Q. And you sold one to us at about £800 more than the one you sold to Lloyds? A. Lloyds was a previous shipment. Lloyds are tractor distributors for New South Wales - at that time we were an agent.

Q. The price, however, is what you paid for the Lloyd tractor; was the same as the price you paid for the Ashford Shire Council? A. There might have been a little variation between the first and second shipment.

30

Q. The Lloyd tractor you got on the same shipment as you got the Ashford Shire Council? A. No.

Q. Didn't you get two 70 D's in the one shipment?
A. Yes.

Q. Was not one the Lloyd tractor? A. Yes.

Q. The other one you subsequently sold to Ashford?
A. No.

Q. Which was it? A. Price's.

Q. What did you sell it to Price for? A. I do not know without looking at the ----

MR. REYNOLDS: You can answer that from the book.

WITNESS. Mr. Meares has the book.

MR. MEARES: Q. You sold to Price for £5,915?

MR. REYNOLDS: 16175 is the invoice.

10 MR. MEARES: Yes. You may take it that was the price.

WITNESS: Yes.

Q. So Lloyd got a discount of £900? A. I do not ---- (Interrupted).

Q. Are you suggesting that you only made a couple of hundred pounds on the Lloyd tractor? A. Would not be very much more.

Q. Those documents, there may be some more in your office? A. Yes.

20 Q. The documents, you cannot give me any idea what you paid for these various tractors? A. Not work out the exact figure of all costs.

Q. Did not Hedeson's ever say to you - Dr. Hager - say to you that the commission you were getting was 33-1/3% and it was high? Did not Hedeson's ever say that to you? A. He might have made some remark.

Q. That you were getting a profit of 33-1/3%?
A. Yes, I deny we were getting a profit of 33-1/3%.

30 Q. Hedeson's had claimed that? A. Yes, they claimed that.

Q. That you were getting 33-1/3%. A. Yes, I saw that in some correspondence.

Q. That was absolutely untrue? A. Yes.

Q. You are quite certain it was very now - only £1,000 profit? A. Yes.

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Cross-
examination
- continued.

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A. Corney.

Cross-
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Q. This tractor, you were doing your level-best to sell it? A. Yes.

Q. And so advertised it? A. Yes.

Q. You advertised them in the "Power Farming in Australia", did you not? A. Yes.

Q. Did you advertise them there as "The greatest tractor now offered"? A. Whatever you are reading from, the advertisement is ---

Q. Don't you remember as "The greatest tractor now offered"? A. Yes.

Q. I suppose you had a hand in drafting it?
A. Well, I suppose ---

Q. There it is: "The greatest tractor now offered"? A. Yes.

Q. "You cannot go wrong with a Breda"? A. Yes.

Q. Is that what you wrote? A. Yes.

Q. Then you put in another advertisement, didn't you, "The Breda crawler now available in Australia. Europe's best tractor". Is that what you advertised them as? A. Yes.

Q. In that advertisement you said this; "This tractor is known throughout the whole of Europe and in fact most countries of the world as a thoroughly reliable heavy-duty piece of equipment"? Is that what you said? Was that true? A. Yes.

Q. Then you advertised in that advertisement, "Special equipment for use in connection with the tractor", didn't you? A. Yes.

Q. One of the things you advertised was a bulldozer with inclinable blade and hydraulic lifting control? A. Yes.

Q. Incidentally, you advertised in 1950 it as a 75 horse power tractor, did you? A. Yes.

Q. Now we have got another one here: "The Breda 50 or 85 horse power means added power." Did you advertise that? A. Yes, that is one of our ads.

Q. Did you advertise in that advertisement: "The tractor for use in roadwork". Just read it. (Witness reads)

10

20

30

- Q. Do you see that, on the right-hand side of it?
(No answer).
- Q. A little bit hard to see, I concede; it is torn about. Perhaps I can draw your attention to it. Just see here: "Road construction work, etc."?
A. "Road construction".
- Q. "Road construction work" do you see that?
A. Yes.
- Q. Is that what you advertised it as? A. Yes.
- 10 Q. "The greatest tractor now offering, the best in Europe and suitable for road-construction work"? Is that right? A. Yes.
- Q. So you were trying to sell these tractors for road-construction work, is that so? A. Yes.
- Q. Now, have you tried to think, over the lunch-hour, whether or not these people rang you up and complained about the tension springs? A. No, I hadn't thought - cannot recall them ringing up.
- 20 Q. Let me see if I can refresh your memory. Just have a look at this letter, the postscript on it. Is that your letter? A. Yes.
- Q. What is the date of it? A. 12th July, 1951.
- Q. What is the postscript? A. Reference to 70 D Model, 4942.
- 30 Q. 4942, whose is that? A. That is Ashford Council's number: "We have just had telephone conversation with the owners. Their further complaint is tracks are stretching and rapidly necessitating the adjustment of four turns, adjustment not every couple of days. This machine has run 180 hours and they are wanting us to accept the return of the machine and refund money paid;" my postscript --
- Q. Do you recollect the telephone call?
A. I must have when I was writing that letter.
- Q. That was something you had completely forgotten this morning? A. Yes.
- Q. Do you still say you have a very clear recollection of this conversation in March, 1951? A. Yes.

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Q. Would you have any particular reason for re-
calling it before 1954, did you? A. A particu-
lar reason for recalling it?

Q. Yes, before 1954? A. No, not as far as I
can think.

Q. This man was with you for an hour and a half
to two hours? A. Yes, approximately that.

Q. You were with him all that time? A. Yes.

Q. You told His Honor what that conversation with
him was; you can recollect that took place, in an
hour and a half to two hours? A. Yes. 10

Q. I suppose you agree that there was very much
more said that you cannot recall? A. No, there
was not very much said in that conversation at all.
Just Mr. Bowman ---

Q. You were with him all the time? A. Yes. we
were not talking all the while.

Q. But do you seriously say that there was not
very much more said other than that you told us of?
A. No, there would not be a great deal. 20

Q. That is in a period - (Objected to).

Q. Did you want to add anything? A. To that
conversation?

Q. Yes? A. No.

Q. So you were not chopped off in the middle of
it, were you, what you were trying to say? A. No.

Q. Was this a tractor towards the front of the
building, that was shown to Mr. Bowman? A. Yes,
I think it was.

Q. Do you remember him saying to you, "Can you
tell me anything about it?" (Witness hesitates)
A. Yes. 30

Q. And did you proceed then to point out a few
good points about the tractor? A. Yes.

Q. Did you point out to him its robust construc-
tion? A. Yes, we went over that together.

Q. Did you bend down to look at it underneath, to
invite his attention to the frame underneath the

tractor? A. I do not know whether I bent. You can see it without bending down.

Q. As far as you can recollect, you showed him the construction underneath, and the frame on top?
A. Yes.

Q. Did you tell him that the pads and rails were cast in one piece rather than assembled in two pieces, as is usual with tractors? A. I showed him the track.

10 Q. Do you remember him saying this to you: he said "These things seem to be constructed somewhat along unorthodox lines."? A, No.

Q. Do you remember him raising that? A. No.

Q. Do you remember him raising the fact that the tractor construction was somewhat unorthodox, it was, was not it? A. No.

20 Q. Do you remember saying "This is a special construction in this, it is their own particular method." You said something to that effect, did not you? A. No, it would naturally be their own; I don't remember saying that to him.

Q. But you would not deny you said that to him?
A. No, I would not deny it.

Q. Then, did you say that the steel was specially treated to give a very long life and work and that the steel had very high resistance qualities, did you say that? A. No.

Q. What? A. I said the ... pointed out that the working parts were treated, case-hardened.

30 Q. So that was a selling point we might mention?
A. No, just an answer to his question.

Q. Did he ask you what its horse-power was?
A. He would have asked that.

Q. Do you remember him saying: "What about the weight?" A. He asked what the weight was.

Q. You said it was about 7 tons in weight?
A. No, I had the pamphlet; I quoted the poundage at approximately 7 ton.

40 Q. You would not be certain? Would you swear you quoted the poundage? A. Yes, I would.

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- continued.

Q. You would? A. Yes.

Q. What else did you say about the weight?

A. I do not know that I said anything more about the weight.

Q. Do you remember him saying, "Don't you think it is a bit low for the horse power?" A. No.

Q. Would you deny it; you would not do it, would you? A. Yes.

Q. Quite certain? A. No.

Q. Did you tell him any others had been sold anywhere? A. No. 10

Q. Well, they had been? A. He didn't ask me.

Q. Did not you think that was a selling point to know that this was not the only Breda tractor to come out here then? A. This was the only one which was sold then?

Q. Let me put this to you: as a business man, would not you agree with this, that if a purchaser came along and wanted to buy what I term an expensive - I do not mean too highly priced - but a piece of equipment costing some £6,000, that he was going to use, that in this country; it came from overseas? A. Yes. 20

Q. Would you expect him to be interested whether this was the single, lone tractor, or whether others were coming out, or had come out? A. I expect he could be interested.

Q. Don't you think that would be a very important point? A. Not in selling.

Q. Don't you think that an average user of tractors would be interested in whether or not this was the only tractor of its kind coming out here; would not you think they would be interested? A. Someone has got to be the first one. 30

Q. I mean, future deliveries? A. Yes.

Q. You did not tell him? A. Yes.

Q. Did not you tell him you had the agency and you had sold some? A. We had sold some; we sold two to Lloyd Tractors.

Q. Did not you tell him that? A. No. 40

Q. Did not you think it would be a selling point?
A. No.

Q. Did not you think it would have interested him?
A. No.

Q. Never occurred to you to mention it? A. No.

Q. You have been a person interested in selling,
altogether 50 years? A. Yes.

Q. This was a tractor you were going to make over
£1,000 commission on? A. Yes.

10 Q. And you tell us you never told him you had
sold any tractors in any shape or form? A. No.

Q. Never mentioned it? A. No.

Q. This chap never made any inquiries in that
form at all? A. No.

Q. Did you tell him anything about the Manufac-
turers who made this Breda? A. Yes, I told him
they were manufactured in Italy at the Breda Works.

Q. Did you tell him they manufactured locomotives?
A. Yes, locomotives, ships, aeroplanes.

20 Q. Did you tell him it was quite an outstanding
firm in Italy? A. Yes, I told him.

Q. Did not make any mention of that this morning
did you? Had you forgotten it? A. No, I did
not make any mention of that this morning.

Q. Had you forgotten? A. Yes, I had forgotten
it.

30 Q. Now, do you remember some particular conversa-
tion about the bulldozer? A. Yes, he requested
Council to decide whether they wanted a bulldozer
blade fitted.

Q. For roadwork? A. Naturally, it would be for
road work.

Q. That is what he told you? A. No, he did not
mention anything specific.

Q. Are you certain? A. Yes, quite certain.

Q. You knew he wanted it for road work? A. Yes.

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Q. Did he say this; "The Council requires a 'dozer blade"? Did he say that to you?
A. I don't know whether he put it in those exact words, but it would amount to that.

Q. Did you say this: "Yes, I know something about that."? A. No, I would not have said those exact words.

Q. Did he say that "They want the 'dozer blade fitted on to the tractor"? A. Yes.

Q. So you then knew, did you not, that he was buying, or he wanted a tractor with a 'dozer blade fitted on to it for Council work? A. Yes. 10

Q. You knew that the Council work would include road work? A. Yes.

Q. You remember him asking you: "Do you know any reputable firm which is capable of building a good blade?" A. No.

Q. Do you remember you mentioned to him you could get a blade? A. Yes.

Q. Did you mention Brown & Bunyan? A. Yes. 20

Q. Did he then say to you, "Look, do they build a good blade?" A. Yes.

Q. He did? A. Yes.

Q. Do you remember that now, do you? A. Yes.

Q. You had forgotten it this morning? A. Had a good blade.

Q. You had forgotten that this morning?
A. I don't remember.

Q. You never mentioned it this morning: had you forgotten? A. If I did not mention it, I had forgotten. 30

Q. Might I suggest, you have forgotten some other things in this conversation over the last six years; what do you say to that? A. Yes, I could not relate a lot of it.

Q. It is quite possible, in fairness to you, that you could have forgotten a lot of this conversation?
A. A lot of side-lines; would have probably; yes.

- Q. As far as him mentioning he wanted this for roadwork, that was a side-line, it would never have been impressed on your mind? A. Yes, well, that would have been.
- Q. That would have been a side-line? A. Yes.
- Q. Did he say this to you: "Do they build a good blade?" A. Yes. Not in those words.
- Q. You said, "Yes", did you? A. Yes.
- 10 Q. Then did he say, "A welded iron?" A. A welded iron?
- Q. Yes? After you said "They build a good blade", did he then query it, "Welded iron?" like that?
- A. No, I don't know.
- Q. You would not deny it? A. No.
- Q. It was a welded iron you supplied to him?
- A. They all were.
- Q. How do you know they were good blades?
- A. They had a good reputation.
- 20 Q. Had you ever dealt with them before? A. No.
- Q. So you did not hesitate to make that representation to him, that they made a good blade; you never bought any blades from them before? A. No.
- Q. You then rang them up? A. Yes.
- Q. Did you say to him, "I will see the proper-sized blade is fitted to the machine"? A. Well, it has to be a certain sized blade fitted to the machine.
- Q. Why? A. Well, they wanted an angle 'dozer.
- 30 Q. Did he tell you that? A. Yes.
- Q. Did he mention the size of it? A. Had to be approximately 10 ft. 6 ins.
- Q. Was that mentioned? A. After checking the specifications.
- Q. You mentioned that to him? A. Yes.
- Q. That it had to be 10ft.6ins.? A. I mentioned it had to be approximately 10ft. 6ins.

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examination
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Q. So you discussed with him the size of the blade that had to be fitted on it? A. Yes.

Q. And you made no mention of that at all this morning? A. No, I don't think I did.

Q. Had you forgotten that? A. Yes.

Q. Do you still put yourself forward as being a person with a good memory? A. Yes.

Q. You do? A. Yes.

Q. Did he tell you this: "I will tell the Clerk about this interview and he will probably send you an order for the tractor," or words to that effect? 10
A. No, he said, "I will submit my report to the Council."

Q. Did he say "You might get an order."? A. He did not say we would get an order or would not.

Q. Were you anxious to know? A. I do not know that he had the final judgment.

Q. Was he asking you questions about the suitability of the 'dozer blade? A. Yes.

Q. And relying on you? A. No, he knew more 20
about it than I did.

Q. Did not he ask you if you knew the people who made a good blade? A. Yes.

Q. And did not he ask you about the size of the blade? A. Yes.

Q. And he accepted it? A. After checking the size of the tractor?

Q. And he accepted that? A. Yes, after checking the size of the tractor.

Q. You worked that out? A. It has got to be --- 30

Q. You worked that out? A. Yes, I worked that out.

Q. When you told him these Brown & Bunyan people were good people, he did not query that at all?
A. No.

Q. He accepted that from you? A. Yes.

- Q. This tractor that you advertised as being "the greatest in the world", did you believe that?
A. Yes.
- Q. Had not doubts about that at all? A. No doubts at all.
- Q. Do you still maintain that? A. Yes, I think that tractor is quite all right.
- Q. Do you still maintain that it is the greatest tractor in the world? A. Yes, in the --- (interrupted).
- 10 Q. You do? As far as this trouble that the Ashford Shire Council has had with it, do you look upon that as being somewhat extraordinary?
A. Yes, a lot of it.
- Q. Let us have a look at your letter of the 8th February, 1950. In 1950 you got your first warning, didn't you, over trouble with this "Breda" - February 1950? A. February 1950?
- Q. Yes? A. February, 1950?
- 20 Q. Yes? (Witness hesitates) A. We did not have any tractors out in February, 1950.
- Q. Did you have any out here in February 1951?
A. Then? Yes, I think.
- Q. Of course, the clutch-type is the same on the 50 D as it is on the 70 D, isn't it? A. No, one is a double plate and one is a single plate.
- Q. But they are both spring-released?
A. Both spring-loaded.
- 30 Q. Do you remember selling one to MacKay, Earl's Court? A. That is one Lloyd sold.
- Q. You advertised this tractor for road work of all sorts, that is right, isn't it? A. Yes.
- Q. Did you have any literature from Breda's at the time? A. We had a blueprint.
- Q. Had Breda's told you it was suitable for road-work? (Objected to; allowed).
- Q. Dealing with the 70 D, did Breda's ever tell you it was suitable for road work? A. We have a blueprint to have fitted, and we have a letter

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and photographs to that effect.

MR. MEARES: I call for a blueprint of that.

MR. REYNOLDS: Which blueprint do you mean?

WITNESS: The blueprint on the plate.

MR. MEARES: Q. It is a blueprint of the blade?

A. Yes.

Q. The blade could be used for agricultural work?

A. They are not usually used for agricultural work with a blade; what do you call agricultural work?

10

Q. Take in the fields, using it in a property. Supposing I am a property owner with a station, like Mr. Black? A. Yes, you could use it on that tank sinking.

Q. Do you suggest the mere fact it has a blade attached to it that it was suitable for heavy roadwork? Did that satisfy you it was suitable for heavy roadwork? A. Yes, in the capacity of a tractor.

Q. And the blade shown there was not a blade of the dimensions you have fitted on the tractor? A. No, I think it was a bit bigger.

20

Q. And a different type? A. Yes, a hydraulic blade.

Q. You told Mr. Reynolds, didn't you, that on the brass plate there was Trattori Agricoli - agricultural tractor in other words? A. Yes.

Q. There was nothing on the brass plates to suggest roadwork or heavy roadwork tractor, was there? A. No.

30

Q. And all this blueprint shows is a dozer blade? A. Yes.

MR. MEARES: I call for the photographs now. (produced).

Q. You see this blade here? A. Yes.

Q. Is that blade suitable for agricultural work? A. Suitable for agricultural or roadwork; it is a heavy duty blade.

Q. You are quite certain of that? A. Yes.

Q. It is a heavy duty blade? A. Yes.

Q. Didn't you see the letter from them, from Breda's, that the tractors were not suitable for anything but agricultural purposes? (Objected to).

HIS HONOR: I thought these questions were directed to Mr. Corney's knowledge at the time. I understand this letter was very much later.

(Letter m.f.i. 1 and covering letter tendered and marked Exhibits 2 & 3 respectively).

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Cross-examination - continued.

10

MR. MEARES: Q. You remember of course Dr. Hegar sending you a copy of this report from the Breda people? A. What is the translated report?

Q. Yes? A. Yes.

Q. And at that time the Ashford Shire Council was endeavouring to get their money back, if I might put it that way, on the tractor? A. Somewhere around that date, yes.

20

Q. And they had come down with this large list of complaints? A. Yes.

Q. And they seemed to be fairly concerned about it? A. Yes.

Q. And I suppose you were too? A. Yes.

Q. So that, I suppose you were interested in this letter which came back from the Breda people concerning these tractors that you were selling?

A. Yes, I was interested to see it.

Q. Very interested? A. I was interested.

30

Q. Very interested? A. It was out of my hands then; I was still interested.

Q. What do you mean it was out of your hands?

A. Well they started dealing with the - the Breda Company or Hedeson & Company and I don't know what transpired in the conversations.

Q. But you have had enough experience over 30 years to realise that you, as the seller of this machine, were liable if the machine was not as warranted? A. No, I did not think so.

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Cross-
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- continued.

Q. Didn't you think that a claim might be made on you? A. No, not at that date.

Q. Well did you read this from the Breda people; "In this connection we would like to point out in the very first place that the tractor you have we supplied for agricultural operating and not for industrial use. Whilst it appears from your report that the machine is being called for mainly operating on roadwork." Did you read that?

A. Yes.

10

Q. Did you read, "Moreover the fitting of the bulldozer may not be very convenient in conjunction with our tractor and may have contributed to have some machine pieces undergo a particular strain, turning out the consequences you complained of"? A. Yes.

Q. Did you agree with that? A. Not entirely.

Q. Did you disagree with that? A. Yes.

Q. Did you write to the Breda People? A. No.

Q. Did you write to the Breda people in any way and say, "Look, you told us it was fit for road-making purposes"? A. No, we had no correspondence with the Breda people.

20

Q. Did you write to Dr. Hegar of Hedeson & Company to that effect? A. No.

Q. Of course at that time you had been selling it for roadmaking purposes? A. At which time?

Q. At this time, October, 1951? A. Yes, we had been selling them for different purposes.

Q. And you continued selling them for roadmaking purposes after this letter, didn't you? A. I think there were two sold after that letter.

30

Q. And you continued advertising them for road-making purposes after this letter? A. I do not think we did any advertising after that.

Q. So that when you got that letter you never wrote and said "You misled us with this blueprint you gave us"? A. No.

Q. "Or the photographs you gave us"? A. No.

Q. Did you think their view, that the fitting of

40

the bulldozer might have contributed to some of the machine pieces undergoing a particular strain, turning out the consequences you complained of - did you agree with that? A. No, not entirely.

Q. Did you disagree with it? A. Yes.

Q. Did you think it might have been a contributing factor to the troubles with this machine?

A. I do not think so.

Q. You disagreed entirely with it? A. Yes.

10 Q. I thought you told me a moment ago you did not disagree entirely with it? A. With what?

Q. That statement. What is it? Did you disagree entirely with it or not? A. Yes, I disagreed entirely with it.

Q. And you did not one thing about it? A. No.

Q. Although you had sold these people this tractor you told me, did you not this morning, that this trouble with the 50 D tractor was because of bad operating? A. Yes.

20 Q. Do you still say it? A. Yes, running it when the clutch was hot.

Q. Do you mention anywhere in your letter, that letter of the 8th February 1950, that it was due to bad operating? (Shown letter). A. It does not appear to be signed; is this the letter to them?

Q. It is on your notepaper, isn't it? A. Yes, it is our notepaper.

Q. You told me you remember that transaction quite well? A. Yes.

30 Q. In that report is there any mention made that the trouble was due to bad clutch operating? A. No.

Q. And the point there is the inefficiency of the clutch, isn't it, in February 1951? A. Yes, that is a report.

Q. And this is a report concerning a tractor you subsequently advertised as the greatest tractor in the world? A. Yes.

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Q. This is what you said concerning it. You tell me if I am wrong. You said, "The delivery was taken on the 12th December 1950"? A. Yes.

Q. And you said that the first time you had to go out there, to Dry Plains via Cooma, was 30 days thereafter, namely on the 11th January? A. Yes.

Q. And they were out there from the 11th to the 14th January? A. Yes.

Q. And they went out again from the 26th to the 29th January? A. Yes. 10

Q. And they went out again from the 31st January to February the 3rd? A. Yes.

Q. And what they did was, there was an oil leak in the air cooled radiator? A. Oil radiator.

Q. They rectified steering clutch adjustments and checked electrical starter? A. Yes.

Q. And of course these tractors gave constant trouble in regard to the electrical starters, didn't they? A. No.

Q. Quite a number of them? A. Initial troubles; 20
it was service work really, a lot of those calls you are referring to now.

Q. The master clutch on the first call - this is 30 days after it was working - was inclined to slip and after adjustment shims were removed. The operation of the clutch was still unsatisfactory and it was arranged with the owner to have the field serviceman return with a new clutch and fit same if necessary? A. Yes, that is what we found.

Q. That is what you found? A. I did not find 30
it, the serviceman did.

Q. And the new clutch was supplied to them free of charge? A. No, that was repaired as far as I can recall.

Q. The second service call was made for the purpose of removing the master clutch assembly? A. Yes.

Q. On dismantling the clutch it was found to be in poor condition generally? A. Yes.

Q. And the clutch plate facings were very badly 40

worn and scored; they had three bad heat cracks in the surface of the plate. The clutch fingers, part No. 36, were very stiff. Two were only operating and one was inoperative. The clutch finger anchoring blocks and adjusting plates were found to be too tightly fitted to the outside assembly. The clutch shaft, part No. 19, was found to be too full on the spigot end and it would not enter the flywheel spigot race and the outside plate assembly would not face up to or enter the flywheel recess without use of considerable force. Part No. 31, the release housing assembly had a small section broken from the collar that accommodates the clutch fingers. The general condition of the clutch made a return to Sydney necessary so that the release housing assembly could be welded and machined and the outside clutch assembly plate could also be machined. Is that what you wrote? A. Yes, I don't know whether I wrote that letter.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.
Cross-
examination
- continued.

10

20 Q. In that report there is no mention whatsoever of that clutch failing due to bad operating?

A. No, in the report -

Q. And this is the report that you were sending to Hedeson's and you were sending it to Hedeson's for transmission to Breda? A. Yes.

Q. And you were sending it by way of complaints as to the efficiency of the clutch, weren't you?

A. Efficiency of the clutch?

Q. Yes? A. Yes.

30 Q. So that you knew in February 1951 that there were doubts concerning the deficiency of the 50 D clutch? A. That clutch has never given any trouble since that day.

Q. Would you answer the question? You knew in February 1951 there were some doubts about the efficiency of the 50 D clutch, didn't you?

A. I would not term it doubts about the efficiency of it, because it could be fixed up.

40 Q. Fixed up? A. Yes, it was fixed up; it was repaired 5 years ago.

Q. Does not this letter suggest to you that for a clutch to fail in the manner you have described, after 30 days' work casts very grave doubts as to its efficiency as a good clutch? A. No, that was picked up in service.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

Q. Whether it was picked up in service or not, would you not agree that that report you send to Hedeson's raised serious doubts in your mind as to the efficiency of that 50 D clutch? A. No, not as regards the efficiency of it.

Q. Is that your standard of the views concerning this machine that there was nothing very untrue about a report of that sort? A. No, just pointing out exactly what happened to the machine.

Q. This is the greatest machine on earth? A. Yes. 10

Q. Now, after 30 days on your first machine, substantially speaking, the clutch folded up? A. Yes, it required service.

Q. And you still advertised it as the greatest machine on earth? A. Yes.

Q. And the best in Europe? A. Yes.

Q. Did you think that was honest? A. I think it is comparable to any other machine.

Q. Did you think it was honest? A. Yes. 20

Q. Have a look at this letter of the 28th February 1951, what does that deal with? (Shown). A. That deals with the auxiliary motor.

Q. Does it deal with the master clutch? A. No.

Q. It deals with the clutch, doesn't it? A. A clutch on the auxiliary motor.

Q. And you found that was misaligned? A. Yes, that was before the machine went out.

Q. From then on, from February 1951 on, you were sending numerous letters to Hedeson's for transmission to the Breda people about troubles that those tractors were experiencing? A. Yes, as reports were sent in so we would pass them on. 30

Q. Let us deal with them. Take June of 1951. (Objected to - question allowed).

HIS HONOR: They are on credit?

MR. MEARES: Yes.

Q. Take this June of 1951. In June 1951, you

wrote a letter dated the 21st June and in that letter you report on the condition of five tractors, five different tractors. You check me and see I am not misleading you. In June 1951 you had only sold five, had you not? A. What date is that?

Q. 21st June? A. I think there were six sold by then.

10 Q. You knew then, didn't you, that the driving sprocket was unsatisfactory? A. I made a report.

Q. Don't worry about what you made; you knew then that the driving sprocket was unsatisfactory? A. I knew there was some trouble with it.

Q. And you knew the reason for the trouble, didn't you? A. The reason?

Q. Yes? A. No I don't know.

Q. Did you have any ideas of it? A. I thought it was incorrect adjustment.

20 Q. You swore to me this morning, didn't you, that you did not know then that the driving sprocket was unsatisfactory? A. I could have.

Q. Was it true? A. Not if I have a record of it.

Q. Something else you have forgotten, is it? A. It is impossible to remember all those things.

Q. Let us deal with them, and this deals with the 70 D, on the 21st June, 1951, "Back driving sprocket," see that? A. Yes.

30 Q. That is the sprocket that we have been talking about in this case, isn't it? A. Yes.

Q. "This sprocket is too shallow in the depth of the teeth causing the sprocket to jump the rollers and the tracks." Did you read that? A. Yes.

Q. Did you agree with it? A. It is a report; I do not know whether I agreed with it. It is a report

Q. Did you write letters to your manufacturers that you did not agree? A. We passed all the reports over to them.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

Q. Reports of who? A. Of any reported complaints of the tractors.

Q. You have written three, haven't you? You are writing this letter, "The sprockets" you say, under your signature, "are too shallow in the depth of the teeth causing the sprocket to jump the rollers". You wrote that, didn't you? A. Yes.

Q. Well is it true? A. It must have been.

Q. Did you not realise at that time that that was causing excessive wear on the tracks; that very trouble? A. No, I did not realise. 10

Q. Did you think it might have been? A. No, I did not think it would cause excessive wear if it jumped the sprocket.

Q. Do you swear that? A. Yes.

Q. No doubt of it? A. Yes.

Q. And that is your recollection of that matter, is it? A. Yes.

Q. Well now we will read your letter. "The tracks have to be worked tighter than most makes of tractors thus causing excessive wear on the track pins and bushes". Did you write that? A. Yes. 20

Q. You might remember this point was raised, a suggestion to make the teeth deeper after we had inspected the Breda. Is that true? A. Yes that is right.

Q. So when you first inspected the Breda you felt, did you, that the teeth were not deep enough? A. Apparently we did.

Q. And did you point that out to Mr. Bowman when he asked you about the tracks? A. No. 30

Q. Do you say that is honest? Did you point out to Mr. Bowman at the time he inspected this tractor that there was trouble you thought, or a defect in regard to the teeth of it? A, I did not.

Q. Did you think it was honest? A. I did not think it was a fault I thought it was a suggested fault.

Q. Don't you say in this letter, "This point", - this is about the tracks having to be worked 40

tighter than most makes of tractors, "This is causing excessive wear on the track pins and bushes. You might remember this point was raised and a suggestion made to have the pins deeper after the inspection we made of the Breda". Did you point that out to Mr. Bowman? A. No.

10 Q. And of course when he asked you of the tracks, your answer in effect was that they were very good, wasn't it? That is what you said to him, wasn't it? A. Yes, he could see what the tractors were like.

Q. See what the tractors were like? A. Yes.

Q. Do you think, as a business man of 30 years' experience, if a man asks you about these tractors that it is a very honourable thing to suggest to him that they are very good, rather than have a defect you are aware of? A. We weren't aware of the defect at that time.

20 Q. Weren't you of the opinion at this time when you first inspected the Breda? A. We were of the opinion it might have done.

Q. And you made no mention of that, did you? A. No.

Q. So we may take it, may we, that so far as you are concerned, you will sell a tractor to the best of your ability? A. Naturally.

Q. And you will say what you can in the advertisement that will be the very best possible persuasion in selling it? A. Yes.

30 Q. Whether it is true or false, that is so, isn't it? Whether it is true or false? A. We believe it true.

Q. You would not be concerned very much if it was not quite true, would you? A. Oh no, I do not think - we would believe it true.

Q. You would believe it true? A. Yes, otherwise it would not go in.

40 Q. Have a look at the next one, 7029, another 70 D, "Similar electrical trouble as described, no report on sprocket jumping, probably working track tightly adjusted", and then you go on to deal with what I think, in fairness to you, are fairly minor matters dealing with the clutches on the auxiliary motors? A. Yes.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

Q. Then we come to model 4942, and that is the Ashford Shire Council's tractor, isn't it?

A. That is true.

Q. You refer there to electrical trouble?

A. Yes.

Q. Similar electrical trouble has been experienced, similar jumping of sprockets? A. Yes.

Q. Connecting rod bearings going? A. Yes.

Q. Now we will come to No. 5148, this is another 50 D, cylinder head cracked in three places?

A. Yes.

10

Q. From the bolt holes of the water jacket; the main clutch linings, fitted with the original linings will not hold as they become hot. Did you write that? A. Yes.

Q. "Suggest different linings be fitted that will stand some heat". You wrote that? A. Yes.

Q. Had to replace linings"? A. Yes.

Q. "Sprocket jumping, track has to be run tightly adjusted." Did you write that? A. Yes.

20

Q. Was it true? A. Apparently it was; it was reported; a lot of it was reported.

Q. That is three of the five. Now let us come to the fourth, No. 4757. "The faults on this machine have been previously reported, the clutch and oil cooler had a similar trouble to the one mentioned above."? A. That is the one you mentioned before.

Q. So that, might it be true to suggest to you that in June of 1951 you had had trouble with four at least out of those five tractors that you had sold? A. Yes.

30

Q. Those tractors that you continued to advertise as the greatest tractors on earth; is that right? A. Yes.

Q. Have a look at this one on the 24th July concerning this very tractor, this Breda you sold to the Ashford Council, 1951, "We have received a further report on the tracks of the 70 model 4942, odd links appear to be soft, a more noticeable wear is shown where the rollers have worn deep into the chain. This makes a gap between the pads at

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the top of about half an inch. Normally they overlap at this section by about half an inch. A number of pads are bent through thus wearing, one pad gets jammed under the following pad and breaks same. We should be glad to have the factory's remarks on this matter." Did you write that?

A. Yes.

Q. Is that true? A. To the best of my knowledge, it was given to me in a report.

10 Q. From Bourke? A. That is to the best of my knowledge, I did not actually see the machine.

Q. So, of those five tractors you have sold, at this stage three of the five of them were having clutch trouble, that is so, isn't it? A. Yes.

Q. And two or three - I am not certain which, were having the sprocket jumping? A. Yes.

Q. And you continued to sell them?

A. I think we sold two since.

Q. And you continued to advertise them?

20 A. We haven't advertised them for years.

Q. You are not the agents any longer, are you?

A. No.

Q. There hasn't been one sold since 1952, has there? A. Yes,

Q. When? A. I would have to look up the date.

Q. How many have been sold between 1952 and 1956? A. Two.

Q. Two altogether? A. Yes.

30 Q. Have you checked up the deposit on that machine of Price's yet? A. Yes.

Q. When was that deposit paid? A. 16th March, 1951.

Q. And you told Mr. Reynolds at the time you had this conversation with Bowman you had not sold any other tractors - I beg your pardon. I put that question unfairly to you. Prior to that you had quite a few dealings with Price prior to the 16th March, hadn't you? A. Our salesman would have, I had not personally.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Cross-
examination
- continued.

Q. And it was, by the time Bowman came, practical-ly sold? A. It was getting close. (Objected to)

Q. When you got on the phone to Brown & Bunyan, what did you say to them on the 13th March?

A. I asked them to supply a dozer blade and approximately how long would it take to make one.

Q. To supply a dozer blade? A. Yes, to fit on a Breda 70, they had previously supplied one for Lloyds I wanted that one for Buckingham.

Q. You had to work the size out, didn't you? 10

A. Yes - I didn't have to work the size out, I discussed the size.

Q. Didn't you tell us you got the blueprints and you and Mr. Bowman worked it out? A. No, the measurement.

Q. You had to do that before you rang them?

A. Yes.

Q. What did you say to them over the telephone, you recall the rest of the conversation that day?

A. Yes, we wanted a dozer blade to suit the Breda 70 fitted, and when could they give us delivery. They said in approximately three to four weeks. 20

Q. Did you ask them the price? A. The price was quoted.

Q. What was it? A. I forget offhand, £900 odd I think it was.

Q. Got any recollection of what it was really?

A. I could see by looking in that book what was charged for it.

Q. Did you charge a little profit on that for the Shire Council at Ashford? A. That would be there perhaps and we would work on 10%. 30

Q. Did you tell them what it was wanted for?

A. It was wanted to fit on to the Breda.

Q. Did you say anything else? A. No, naturally they would know it would be required for roadwork.

Q. For roadwork? A. Any work, for road leveling.

Q. You knew this tractor was required for road work when Mr. Bowman came? A. Naturally, it is Council use and they do road work, 40

Re-examination

MR. REYNOLDS: Q. In your thirty years as a salesman, have you found it is always necessary to talk a lot to sell to a particular customer?

A. Sometimes it is necessary not to talk at all and other people you have to talk a lot.

Q. These letters Mr. Meares has shown you, are they letters which you wrote to Hedeson & Company?

A. Yes.

10 Q. When did you cease to have some distributing rights in respect of the Breda tractor?

A. The latter end of August 1951 I think it was.

Q. Has Mr. Meares shown you all the letters you wrote to Hedeson & Company? (Objected to - allowed). A. I think there are more letters there I have written to them.

Q. Does your company hold an unsatisfied judgment against Hedeson & Company? (Objected to - pressed question disallowed).

20 Q. Did you feel it your duty if purchasers made reports to you - (Objected to).

Q. When you got reports from a purchaser from you who was making complaints, what did you think you should do about it? A. I thought we should pass it over to the people we purchased the tractors from.

(Witness retired).

(Blueprints tendered and marked Exhibit 4).

(Photographs tendered and marked Exhibit 5).

30 (Letters m.f.i. 3).

(Case for defendant concluded).

(Counsel addressed).

(Further hearing adjourned until Wednesday, 21st November, 1956).

In the Supreme
Court of New
South Wales

Defendants
Evidence

No. 16

A. Corney.

Re-examination.

In the Supreme
Court of New
South Wales

No. 17

COUNSEL ADDRESSES JUDGE

No. 17

IN THE SUPREME COURT }
OF NEW SOUTH WALES }
IN CAUSES }

CORAM: FERGUSON J.

Counsel addresses
Judge.

21st November,
1956.

ASHFORD SHIRE COUNCIL

- v -

DEPENDABLE MOTORS PTY. LTD.

SIXTH DAY: WEDNESDAY - 21st NOVEMBER, 1956

(Counsel addressed.)

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(Journal and three advertisements formerly
m.f.i. 2, tendered and marked Exhibit 6.)

(Three letters tendered and marked Exhibit 7.)

(Counsel addressed.)

(Mr. Reynolds indicated that he agreed with
Mr. Meares that the price paid for the tractor in-
volved in the case, was a reasonable price for
such type of tractor, at the time, according to
the market value.)

(During his address Mr. Meares handed a copy
of written submissions up to His Honor.)

20

(Decision reserved.)

No. 18

No. 18

REASONS FOR JUDGMENT

Reasons for
Judgment.

4th December,
1956.

IN THE SUPREME COURT }
OF NEW SOUTH WALES }
IN CAUSES }

CORAM: FERGUSON J.

Tuesday, 4th December, 1956.

ASHFORD SHIRE COUNCIL

- v -

DEPENDABLE MOTORS PTY. LTD.

30

J U D G M E N T

HIS HONOR: In this action the plaintiff is suing

the defendant to recover damages for alleged breaches of contract in connection with the sale to it by the defendant of a Breda 70 D Crawler Tractor equipped with cable dozer. The declaration contains three counts; but as no evidence was offered in support of the third count it is necessary to consider only the first two.

In the Supreme
Court of New
South Wales

—
No. 18

Reasons for
Judgment.

4th December,
1956

- continued.

10 The first count alleges a breach of a condition implied under s.19(1) of the Sale of Goods Act, namely that the goods purchased were reasonably fit for the purposes for which they were required. The second count is for the alleged breach of a condition implied under s.19(2) of the said Act that the goods were of merchantable quality.

20 To each of these counts the defendant, by its pleas, denied the promise and the breach, and to these pleas issue was joined. It was admitted that the goods in question were of a description which it was in the course of the defendant's business to supply.

30 In March 1951 the Plaintiff Council, having purchased a 6 to 8 yard scoop for road work purposes required a tractor to operate it. The Shire Clerk, Mr. Heywood, was informed by Mr. Wilkins that the defendant company (whose Inverell agent he was) had a Breda 70 D crawler tractor for sale. At that time Mr. Bowman who had been appointed Shire Engineer to the plaintiff Council but had not yet taken up his appointment, was in Sydney attending the Local Government Annual Engineers Conference.

40 On the 12th March 1951 Mr. Heywood, acting on instructions from the Shire President, Mr. Black, instructed Mr. Bowman by telephone to go to the defendant's place of business and inspect the tractor to see if he thought it was suitable for the work required by the Council. On the same day, or on the following day, Mr. Bowman went to the premises of the defendant company in Parramatta Road and there saw Mr. Corney, the Managing Director. Having introduced himself he informed Mr. Corney that he was there on behalf of the Ashford Shire Council, which was interested in a tractor the company had for sale and asked to see it. They inspected it together and during the inspection Mr. Bowman asked numerous questions, and it is his recollection that during the conversation he informed Mr. Corney of the particular purpose for which the tractor was required. Mr. Corney says

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In the Supreme
Court of New
South Wales

No. 18

Reasons for
Judgment.

4th December,
1956

- continued.

he was not specifically so informed; but as it was a Shire Council that required it - and with a dozer blade attached - he knew it would be used for Council operations, including road work. On this evidence, and from the terms of the order subsequently sent, I am satisfied that the plaintiff, if not expressly, at least impliedly made known to the defendant the particular purpose for which the tractor was required. Mr. Bowman reported to Mr. Heywood that he had inspected the tractor and that it seemed to him that it would be suitable for the work for which the Council required it. That opinion was conveyed as Mr. Bowman's opinion to all the Councillors who unanimously approved the purchase. Thereupon, on the instructions of the President, Mr. Black, the Shire Clerk prepared a formal order which was forwarded to the defendant. The order was on the Council's order form, dated 16th March 1951, addressed to the Dependable Motors, Sydney, signed A. N. Heywood, Clerk, and was for "1 Breda 70-D Crawler Tractor equipped with cable dozer but not a P.C.U. as quoted by your Inverell Agent, W. C. Wilkins".

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20

It is of interest to note that when the order was sent the members of the Council were unaware of the terms of the conversation between Mr. Bowman and Mr. Corney or indeed that any such conversation had taken place. There is abundant evidence, which I accept, that the tractor, by reason of its design and its inability to do the work required of it (as evidenced by its performance) was unfit for ordinary road work. I am therefore satisfied that it was not reasonably fit for the purpose for which it was required.

30

The first question is whether it was an implied condition of the contract that the goods should be reasonably fit for the purposes set out in the first count of the declaration, which may be compressed into the generic term "road work". That depends upon whether the plaintiff has brought itself within the provisions of s.19(1) of the said Act. To do that it must establish not only that the goods were of a description which it was in the course of the seller's business to supply, which is admitted, but that it made known to the seller the particular purpose for which they were required, but also that it made that purpose known in such a way as to show that it relied upon the seller's skill or judgment. Reliance by the buyer

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on the seller's skill or judgment is a pre-requisite to the implication of the condition (see Medway Oil & Storage Co. Limited -v- Silica Gel Corporation; 33 Com. Cas., 195).

In the Supreme
Court of New
South Wales

No. 18

Reasons for
Judgment.

4th December,
1956

- continued.

10 It seems to me that the evidence is more susceptible to the inference that there was no such reliance than that there was. What the Council required, before purchasing the goods, was a favourable report from its own engineer, which it received, and it seems to me that it was that report and not any reliance upon the seller's skill or judgment that induced the purchase. Indeed, so far as the president is concerned, he said so. When asked whether he relied upon the engineer's report he replied that he had nothing else to rely upon and that it was in view of the favourable report that the tractor was purchased.

20 It must also be remembered that an implied condition as to fitness is contractual in the sense that it must be the intention of both parties that it shall be a term of the contract. This is so whether at Common Law and under the Statute. It is sufficient to say that there is no evidence that satisfies me that that was the mutual intention of the parties.

For these reasons I am of the opinion that the plaintiff must fail on the first count.

30 It must next be considered whether it was an implied condition of the contract that the goods be of merchantable quality. This primarily depends upon whether the goods were bought by description from a seller who deals in goods of that description. Although the order describes the article that the plaintiff wished to buy, I am doubtful whether it was bought by description within the meaning of s.19(2) of the Act. The test in every case, I think, is whether the buyer bought an identified article or whether he bought it only on condition that it conformed to the description given. In the present case I think that it was 40 the particular tractor examined, fitted with a cable dozer, that was bought, and that the defendant was under an obligation to deliver that tractor and no other. I think it was the intention of the plaintiff to do no more than to order the tractor that had been inspected, fitted with a cable dozer.

But on the assumption that there was an implied

In the Supreme Court of New South Wales

No. 18

Reasons for Judgment.

4th December, 1956

- continued.

condition as to merchantability, I am not satisfied that there has been a breach of it. I am not satisfied that the tractor was unmerchantable for agricultural purposes. There was little evidence on the question but there was some. Mr. Lockhart, an expert called by the plaintiff, after expressing the view and giving reasons therefor that the tractor was unfit for heavy dozing work, said that it was a heavy fast tractor more suitable for agricultural work. Mr. Lindsay, another expert called for the plaintiff, also expressed the view that it was more suitable for orchard work or something of that nature. He said that the clutch was not transmitting the horsepower required for the job the Council was doing and for that reason wore out relatively early in its life. He also said that it would be fair to say that the tractor was unfit for heavy work but could do farm work.

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In view of this evidence I find it impossible to say that the tractor was unmerchantable.

20

There will be a verdict for the defendant, and judgment will be entered accordingly.

MR. CASSIDY: Would Your Honor grant a stay?

HIS HONOR: Yes. I grant a stay on the usual terms.

In the Full Court of the Supreme Court

No. 19

Notice of Appeal.

21st December, 1956.

No. 19

NOTICE OF APPEAL

IN THE SUPREME COURT }
OF NEW SOUTH WALES }

No. 1776 of 1954

BETWEEN:

THE COUNCIL OF THE SHIRE OF ASHFORD
Plaintiff (Appellant)

10

- and -

DEPENDABLE MOTORS PTY. LIMITED
Defendant (Respondent)

NOTICE OF APPEAL

TAKE NOTICE that in this action that was tried before His Honor Mr. Justice Ferguson sitting

without a Jury on the fourteenth, fifteenth, sixteenth, nineteenth, twentieth and twenty-first days of November ultimo and wherein a verdict was, on the fourth day of December instant found for the Defendant this Honourable Court will be moved, before the Court sitting at the Supreme Court House Sydney on the first day on which the Court sits in Banco after the expiration of sixteen days from the filing of this notice at ten o'clock in the forenoon or so soon thereafter as the course of business will permit by Counsel on behalf of the above named Plaintiff Appellant for an order that the said verdict and judgment be set aside and that a verdict be entered for the Plaintiff and that the damages be assessed or that in the alternative a new trial be granted and for an order that the Respondent pay the costs of this appeal and of the trial and for such further and other order in the premises as to the Court should seem fit upon the following grounds:-

1. That His Honor was in error in returning a verdict for the Defendant.

2. That His Honor was in error in holding that it was not an implied term or condition of the contract that the goods supplied by the Defendant to the Plaintiff should be reasonably fit for the purposes in the first count of the declaration set forth.

3. That His Honor was in error in holding that the implied condition as to fitness was contractual in the sense that it must be the intention of both parties that the said implied condition should be a term of the contract.

4. That His Honor was in error in holding that it was necessary to raise an implied condition that the goods supplied by the Defendant to the Plaintiff should be reasonably fit for the particular purpose in the first count of the declaration set forth, that the Plaintiff should establish that the Councillors of the Shire of Ashford relied upon the skill or judgment of the Defendant.

5. That His Honor should have held that it was sufficient to raise the condition in the last ground of appeal mentioned for the Plaintiff to establish that it relied upon the report of the Plaintiff's representative who himself relied upon the skill or judgment of the Defendant.

In the Full
Court of the
Supreme Court

No. 19

Notice of
Appeal.

21st December,
1956

- continued.

In the Full
Court of the
Supreme Court

No. 19

Notice of
Appeal.

21st December,
1956

- continued.

6. That His Honor should have held that the Plaintiff's representative Frederick Ernest Bowman, relied upon the skill and judgment of the Defendant

7. That His Honor should have held that the Plaintiff made known to the Defendant the particular purpose for which the goods were required so as to show that the Plaintiff relied upon the Defendant's skill or judgment.

8. That His Honor was in error in holding that the goods supplied were not bought by description. 10

9. That His Honor should have held that it was a term or condition of the contract that the goods supplied should be of merchantable quality.

10. That His Honor was in error in holding that the goods supplied were of merchantable quality.

11. That His Honor was in error in holding that the fact that the tractor supplied was suitable for agricultural purposes made the tractor, in law, merchantable.

12. That His Honor should have admitted for all purposes the letter forming exhibit G and the letter which was marked for identification 1. 20

13. That the verdict was against the evidence and weight of the evidence.

DATED this Twenty-first day of December, 1956.

D. I. Cassidy.

Counsel for the Plaintiff

No. 20

REASONS FOR JUDGMENT

In the Full
Court of the
Supreme Court

IN THE SUPREME COURT)
OF NEW SOUTH WALES }

No. 1776 of 1954

No. 20

Reasons for
Judgment.

BETWEEN:

THE COUNCIL OF THE SHIRE OF ASHFORD
Plaintiff (Appellant)

10th September,
1958.

- and -

DEPENDABLE MOTORS PTY. LIMITED
Defendant (Respondent)

10

REASONS FOR JUDGMENT OF THE FULL COURT
OF THE SUPREME COURT
OF NEW SOUTH WALES

- (a) His Honor Mr. Justice Owen.
- (b) His Honor Mr. Justice Herron.
- (c) His Honor Mr. Justice Hardie.

10th September, 1958.

IN THE SUPREME COURT)
OF NEW SOUTH WALES }

CORAM: OWEN, J.
HERRON, J.
HARDIE, J.

(a) Owen, J.

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WEDNESDAY, 10th SEPTEMBER, 1958.

COUNCIL OF THE SHIRE OF ASHFORD v.
DEPENDABLE MOTORS PTY. LTD.

JUDGMENT

OWEN, J.: This is an appeal from a decision of Ferguson J. in an action tried by him without a

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jury. The declaration contained three counts and on each of them the learned trial Judge found in favour of the defendant. No complaint is made against His Honor's verdict on the third count and this appeal is concerned only with the remaining two counts, the first of which is based upon Section 19 (1) of the Sale of Goods Act, and the second on Section 19 (2) of that Act.

It appears that in March, 1951, the plaintiff Council was minded to buy a tractor for road construction purposes and learnt that the defendant Company, which carries on business in Sydney, had a Breda 70D Crawler Tractor for sale. At all relevant times it was the defendant Company's business to sell these tractors which are built in Italy and are of an unusual design. At this time the plaintiff Council had decided to appoint a Mr. Bowman as its Shire Engineer but his appointment had not then been made. The Council had, however, considered Bowman's qualifications and knew that he was an engineer with experience in local government and similar work and in the use of earth-moving equipment. Bowman was at the time in Sydney attending a conference of local government engineers, and on March 12th 1951, he was asked by the plaintiff's Shire Clerk by telephone to go to the defendant's premises and inspect the Breda tractor and report to the Council on its suitability for the work for which it was required. Bowman went to the defendant's premises and there met a Mr. Corney, the defendant's Managing Director. He told Corney that he was representing the plaintiff which was interested in the possible purchase of the tractor. He then examined the tractor, discussed it and its performance and suitability for the work with Corney, who gave him various assurances that it was suitable for that work. He inquired also from Corney whether a "dozer blade" could be fitted to it and whether Corney knew of a reputable firm capable of building a good blade. Corney stated that such a blade could be fitted and mentioned the name of a firm who, he said, would be able to build a good one. At the close of the interview Bowman told Corney that he would tell the Shire Clerk about "this view and he will probably send you an order for the tractor". There is no doubt, and the learned trial Judge so found, that Bowman made it known to Corney that the tractor was required by the Council for road construction purposes. I think it is equally clear on the evidence that Bowman made known to Corney the purpose for

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which the tractor was required in such a way as to show Corney that he, Bowman, was there as agent of the Council to report to it on the capabilities of the tractor for road construction work and that he was, at least to a material extent, relying upon Corney's skill and judgment as to its fitness for that purpose. Thereafter Bowman reported to the plaintiff's Shire Clerk by telephone that he had inspected the tractor and that it "seemed to him to have plenty of horse-power and was big enough for the work" for which the Council required it. Following receipt of this report, the plaintiff decided to buy the tractor, and on 16th March, 1951, the Shire Clerk sent the defendant a written order for "1 Breda 70D Crawler Tractor equipped with cable dozer.....". Later, the tractor which Bowman had inspected, equipped with cable dozer, was delivered to the plaintiff and the price (£6751.14.0) was paid by it to the defendant. In fact the tractor proved to be quite unfitted for road construction purposes, not because the particular tractor delivered suffered from some defect from which other Breda tractors of the same type were free, but because of its design which rendered it unfitted for that kind of work. In these circumstances the plaintiff sued the defendant for damages, claiming in the first count that it had made known to the defendant the particular purpose for which it required the tractor and cable dozer, namely for road construction work, so as to show that it relied upon the defendant's skill and judgment; that the tractor was of a description which it was in the course of the defendant's business to supply; and that there was therefor an implied condition in the contract of sale that the tractor was reasonably fit for road construction work. In the second count the plaintiff Council alleged that the sale was a sale by description; that the defendant dealt in goods of that description; and that there was therefore an implied condition that the tractor was of merchantable quality. The count went on to allege a breach of that condition.

At the trial and before us the plaintiff relied principally on the first count, but some submissions were directed to the second count and it is convenient first to deal with that count. The implication of the condition that goods bought are of merchantable quality, for which Section 19 (2) of the Act provides arises only if the goods are bought by description from a seller who deals

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in goods of that description. The learned trial Judge was disposed to take the view that this was not a purchase of goods by description but rather a purchase of the particular tractor which Bowman had inspected. On the assumption, however, that it was a purchase of goods by description, he found that the plaintiff Council had failed to satisfy the onus of proving that the tractor was unmerchantable. I think, myself, that the sale was a sale by description and that, if delivery had been made of a Breda 70D Crawler tractor equipped with cable dozer other than the one which had been inspected, the purchaser would not have been entitled on that account to refuse to accept delivery and this was not contested on the appeal. I agree, however, with His Honor that it was not proved that the tractor delivered was unmerchantable. Two experts called by the plaintiff expressed the view that, while this type of Breda tractor was unsuitable for road construction work, it was reasonably capable of use for agricultural tractor work, that being one of the purposes for which such a tractor is ordinarily used. In Canada Atlantic Grain Export Co. v. Eilers (35 Com. Cases 90 at p.102) Wright J. (as he then was) said;

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"It seems to follow that if goods are sold under a description which they fulfil, and if goods under that description are reasonably capable in ordinary user of several purposes, they are of merchantable quality within section 14, sub-section 2, of the Act if they are reasonably capable of being used for any one or more of such purposes, even if unfit for use for that one of those purposes which the particular buyer intended".

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Having regard to the evidence mentioned above and to the fact that this particular tractor was not subject to some defect peculiar to itself but was identical with all other Breda tractors of the same type, I am of opinion that it would be wrong to hold that it was proved that 70D Breda Crawler tractors were unmerchantable. Accordingly, I am of opinion that the learned trial Judge rightly found the second count in favour of the defendant.

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I turn now to the question arising under the first count, as to which I have felt more difficulty. The learned trial Judge's finding that the tractor was not reasonably fit for road construction work is not, and could not be, successfully attacked; nor is any criticism made of his finding

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that Bowman had made known to Corney that the tractor was required by the plaintiff for road construction work. His Honour went on to point out that, to bring Section 19 (1) into operation, the plaintiff must prove that that purpose had been made known to Corney in such a way as to show that the plaintiff was relying on the defendant's skill and judgment. He said:

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10 "It seems to me that the evidence is more susceptible to the inference that there was no such reliance than that there was. What the Council required, before purchasing the goods, was a favourable report from its own engineer, which it received, and it seems to me that it was that report and not any reliance upon the seller's skill or judgment that induced the purchase. Indeed, so far as the president is concerned, he said so. When asked whether he relied upon the engineer's report he replied

20 that he had nothing else to rely upon and that it was in view of the favourable report that the tractor was purchased".

If I may say so, with respect, that statement appears to me to confuse two separate questions. As I see it, the first is whether Bowman, in making known to Corney the purpose for which the plaintiff required the tractor, did so in such a way as to show Corney that reliance was being placed on his skill and judgment. As to that, I am of opinion

30 that the evidence established that issue in favour of the plaintiff. The second question is whether the plaintiff did in fact rely upon the seller's skill and judgment when it decided to purchase the tractor. It is true, as the learned trial Judge said, that the plaintiff relied upon its agent Bowman's favourable report, but does that necessarily end the matter? If that report was made, as I think it was, in reliance to a material extent upon Corney's skill and judgment, and the plaintiff in

40 its turn relied upon the report, can it not be said that it in fact purchased in reliance on the skill and judgment of the seller? If Bowman had reported to the plaintiff that his favourable opinion of the fitness of the tractor for road construction work was based in part on his own inspection of it and in part on what Corney had told him as to its fitness for that purpose, and the plaintiff had acted upon that report, I am of opinion that the plaintiff would have been entitled to a verdict on

50 the first count. The facts, as I see them, are as follows:-

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- (1) Corney knew that Bowman was inspecting the tractor on behalf of the plaintiff which was considering purchasing it.
- (2) Corney knew that Bowman was to make a report to the plaintiff on the suitability of the tractor, for road construction work.
- (3) Corney knew that Bowman, in forming his opinion and reporting on the suitability of the tractor, was relying to a material extent on Corney's skill and judgment. 10
- (4) In making his report to the plaintiff, Bowman did in fact rely to a material extent on Corney's skill and judgment.
- (5) The plaintiff purchased the tractor in reliance on Bowman's report.

In these circumstances I am of opinion that Section 19 (1) operated. If Corney's representations to Bowman had been fraudulent and Bowman had thereby been induced to make a favourable report to the plaintiff which, in its turn, had acted upon that report, it surely would have been held in an action of fraud that the plaintiff had been induced by Corney's fraudulent representations to buy the tractor. (See O'Keefe v. Taylor Estates Co. Ltd. (1916 Q.S.R. 301); Attorney General of N.S.W. v. Peters (34 C.L.R. 146)). In the present case the material issue seems to me to be the same as would have arisen had the count been one of fraud. It cannot be that in a fraud count the plaintiff would be held to have been induced to act by the seller's representations to Bowman, but that under the first count it had not relied on those representations. 20

For the defendant some reliance was placed upon Medway Oil and Storage Co. Ltd. v. Silica Gel Corporation (33 Com. Cases 195 at p.196) in which Lord Sumner, speaking for himself and Lords Atkinson and Warrington, pointed out that the purpose of the Sub-section is to impute to the seller a contractual promise, moving from him to the buyer, that the goods which he is selling are fit for the purpose of which he has been informed and on which his skill and judgment have been sought. Such a promise is not to be imputed to him unless he knows, or unless a reasonable man in his position would 40

know, that his skill and judgment are relied upon by the person who later becomes the buyer. But no contractual promise moving from the buyer is imputed by the Sub-section. In my opinion it is sufficient for present purposes if the buyer relies upon the advice of his agent, whom he has appointed to examine the goods which he later buys, provided that agent's advice is itself based, to a material extent, on the seller's skill and judgment. Accordingly, I am of opinion that in the present case the plaintiff can properly be said to have relied upon the seller's skill and judgment since that skill and judgment was a material factor in influencing Boyman to make the report on which the plaintiff acted. The position is the same as it would have been had the plaintiff in person had the discussion with Corney.

I am of opinion therefore that there should be a verdict for the plaintiff on the first count. The question then arises as to the amount of damages to which the plaintiff is entitled. The price paid by it for the tractor and cable dozer was £6751.14.0. In September, 1951, when it ceased to operate the tractor after prolonged but unsuccessful efforts to use it for road construction work, its value for agricultural purposes without the dozer blade was from £800 to £1000. The plaintiff claims that the difference between the price paid and the disposal value in September, 1951, when it was finally decided to cease using it, affords an appropriate measure of damages and relies on what was said by Evershed M.R. in Cullinane v. British "Rema" Manufacturing Co. Ltd. (1954 1 Q.B. 292 at p.303) that:

"As a matter of principle also, it seems to me that a person who has obtained a machine, such as the plaintiff obtained, being a machine which was mechanically in exact accordance with the order given but which was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may say, when he discovers its incapacity, that it was not what he wanted, that it is quite useless to him, and he may claim to recover the capital cost he has incurred, deducting anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. In other words he is back where

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he started; and, if it were shown that the profit-earning capacity was in fact very small, the plaintiff would probably elect so to base his claim....."

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Applying that principle I would assess the plaintiff's damages in the present case at £4915, that being the difference between the cost of the tractor without the dozer blade and its disposal value without that blade.

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I am of opinion that the verdict and judgment for the defendant on the first count should be set aside and in its place a verdict and judgment entered for the plaintiff for £4915. The costs of appeal should be paid by the respondent, which should have a certificate under Section 6 of the Suitors' Fund Act.

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(b) Herron, J.

IN THE SUPREME COURT)
)
OF NEW SOUTH WALES)

CORAM: OWEN, J.
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 HARDIE, J.

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WEDNESDAY, 10th SEPTEMBER 1958

COUNCIL OF THE SHIRE OF ASHFORD v.
DEPENDABLE MOTORS PTY. LTD.

JUDGMENT

HERRON, J.: In this case I have had the advantage of reading the judgment by my brother Owen. I concur, if I may say so, in his conclusion that the appeal should be allowed and with his reasons. I desire however to add shortly something for myself.

The principal question raised in this appeal is whether the appellant is entitled to the benefit of an implied condition that the Breda Crawler Tractor, which it purchased from the respondent, was reasonably fit for the purpose of road construction. In particular the appellant claims that there was also implied in the contract a condition that in connection with such road construction the tractor was fit for the purpose of pushing

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the "dozer" blade attached to it, drag a 6 to 8 yard carry-all scraper scoop and to clear land.

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The appellant's case on this issue depended on satisfying the terms of Section 19(1) of the Sale of Goods Act, 1923. It is in the following terms.

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10 "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

20 Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

30 This sub-section made no change in the common law. The rule at common law was caveat emptor and this rule is enunciated in general words in the opening provisions of Section 19. Sub-section (1) is introduced by way of an exception by which it has been said the old rule has been changed to the rule of caveat vendor, a change rendered necessary by the conditions of modern commerce and trade. But before the implication arises there must be proof of certain elements without which the condition will not be implied by force of the statute. Before Section 19(1) operates the buyer must be shown to have relied on the seller's skill and judgment. The buyer has to make known expressly or by implication the particular purpose for which the goods are required. He has to do this so as to show that he trusts the seller's skill and judgment and to supply something reasonably fit for the purpose. When the sub-section uses the phrase "to show that the buyer relies on the seller's skill and judgment" it does not define for what purpose or in what respect or to what extent the buyer relies on the skill and judgment of the seller or whether wholly or partially. The reliance need not be exclusive although it must be substantial and effective. However, it is clear

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that there must be a reliance by the buyer. The buyer's reliance is a question of fact to be answered by examining all that was said and done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase. The purpose to which the article is to be put often enters into the very description under which it is sold. In other cases the reliance is a matter of reasonable inference to the seller and to the Court. Ultimately the buyer's reliance is a question of fact and is one that may be, and often is, decided by implication from the circumstances surrounding the making of the contract.

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The foregoing principles are, I think, well established by an examination of some of the cases in which this sub-section or its English or South Australian counterpart has been analyzed both in England and by the High Court in Australia; Medway Oil and Storage Co. v. Silica Gel Corporation (1928) (33 Com. Cas. 195); Manchester Liners Ltd. v. Rea Ltd. (1922 2 A.C. 74); Cannell, Laird and Company v. Manganese Bronze and Brass Co. Ltd. (1933 2 K.B. 141) (1934 A.C. 402); Grant v. Australian Knitting Mills (54 C.L.R. 49), (1936 A.C. 35).

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It is clear that the buyer's reliance must be brought home to the mind of the seller expressly or by implication. This must be affirmatively shown. The reliance will seldom be expressed, it will usually arise by implication from the circumstances. The nature of the purpose disclosed is one important circumstance to consider in estimating whether reliance was in fact placed on the judgment of the seller; H. Beecham and Co. v. Francis Howard and Co. (1921 V.L.R. 428). Writings or conversations between the parties outside the contract, or other circumstances known to the parties involving the inference that at or before the date of the contract the particular purpose for which the buyer wanted the goods was brought to the mind of the seller, may be proved in evidence in order to ascertain the parties' intention. In Manchester Liners Ltd. v. Rea Ltd. (1922 2 A.C. at pp. 84 and 85) Lord Atkinson dealt with the question of the buyer's reliance upon the skill and judgment of the seller in selecting the goods to be supplied. His Lordship posed two questions:-

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"(1) Does not the buyer by (as in the present case) expressly stating in the contract of

10 purchase the purpose for which he requires the goods, prima facie at all events, show to a seller whose business it is to supply goods of the description required, that he relies upon the latter's skill and judgment sufficiently to satisfy the provisions of this sub-section? And (2) Would not the same result follow if the seller was before or at the time of purchase by implication made aware by the buyer of the purpose for which he (the buyer) required the goods?"

20 His Lordship concluded that these questions should be answered in the affirmative. He examined the judgment of Lord Russell, C.J.; Gillespie Brothers & Co. v. Cheney, Eggar & Co. (1896 2 Q.B. 59). In that case the plaintiffs gave to the defendants a letter which they had received from their principals setting out the purpose for which the goods, in that case a cargo of coal, were required. About a month later the appellants entered into a written contract with the respondents for the purchase of 500 tons of coal. The coal was found to be quite unfit for the purpose for which it was bought. The Lord Chief Justice admitted in evidence the letter from the appellant's principals and said that the buyers by showing the respondents the letter from the principals stating what was wanted and for what purpose it was wanted did by clear intimation make known to the defendants the particular purpose for which the coals were required and His Lordship concluded that there was in that statement the further consequence involved that the buyers were relying upon that intimation to the sellers and relying on the seller's skill and judgment to deliver an article which would be reasonably suitable for the purpose in question. Lord Atkinson, in Rea's case, confirmed the decision of the Lord Chief Justice, speaking of the facts in Rea's case Lord Atkinson said that the statement of the principals that the coals were required was, on the authorities, prima facie, sufficient to show that the buyers relied upon the skill and judgment of the sellers so as to satisfy Section 14, sub-section (1) of the Sale of Goods Act.

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Lord Sumner, in Rea's case, said that the buyer has to make known expressly or by implication the particular purpose for which the goods

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are required. He has to do this, said His Lordship, so as to show that he trusts the seller's skill and judgment to supply something reasonably fit for the purpose. He continued that he could not see that this involves an express statement of the buyer's reliance in any form, though sometimes, as in Gillespie's case, this actually occurs. His Lordship held that Frost's case (1905 1 K.B. 608) and Preist's case (1903 2 K.B. 148) were instances in which communication of the reliance was inferential. He continued:-

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"The words of s.14(1) are "so as to show", not "and also shows". They are satisfied, if the reliance is a matter of reasonable inference to the seller and to the Court".

The trial Judge in Rea's case was Salter, J. and in his judgment, in speaking of Gillespie Brothers & Co. v. Cheney, Eggar & Co. (1896 2 Q.B. 59) he said:-

"Lord Russell seems to clearly say that the mere disclosure of the purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller".

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Lord Dunedin in Rea's case said that he agreed with Salter, J.'s. view and stated:

"That disclosure of purpose we have in this case; the contract clearly discloses it: "Please supply 500 tons South Wales coal for the S.S. Manchester Importer". And this was confirmed by the seller. This, as it stands, fulfils the requirements of the section...."

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Applying those principles to the present case it is clear that on the 12th March, 1951, the Shire Clerk, acting on instructions from the Shire President, instructed Mr. Bowman to go to the defendant's place of business and inspect the tractor to see if he thought it was suitable for the work required by the Council. The inference to my mind is clear that Mr. Bowman was the agent of the Council to introduce the question of the purchase of the tractor to the defendant and to initiate the transaction although he was not an agent to purchase the tractor. Acting on these instructions Mr. Bowman went to the premises of the defendant company and there saw Mr. Corney the defendant's Managing Director. I think it was implicit in the

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instructions given to Mr. Bowman, if it became appropriate that he could interview someone in the position of a salesman for the defendant in order to satisfy himself that the tractor was suitable for the work required by the Council. In fact Mr. Bowman inspected the tractor together with Mr. Corney and, as His Honor found, during the interview Mr. Bowman asked numerous questions and informed Mr. Corney of the particular purpose for which the tractor was required. Mr. Corney says that he was not specifically so informed but as it was a Shire Council that required it and as it was to have a dozer blade attached he says that he knew that it was to be used for Council operations including roadwork. Mr. Bowman in evidence says that he told Mr. Corney that he was there on behalf of the Ashford Shire Council. I have examined the evidence given by Mr. Bowman as to his interview with Mr. Corney and having regard to the evidence of Mr. Corney, I accept it as substantially correct.

Mr. Corney knew that Mr. Bowman was required to report on the machine and pointed out to Mr. Bowman any qualities that he, Mr. Corney, thought were good "selling points" in the machine. Mr. Corney at the trial maintained the attitude that he believed that the tractor was in fact most suitable for road work. I am satisfied on the evidence that he held out this 70D tractor as being suitable for road work using a dozer blade of the size that was fitted to it. The evidence given by Mr. Corney at pages 169 to 174 of the transcript confirms the evidence of Mr. Bowman so that there is no doubt that he made known to Mr. Corney the particular purpose for which the tractor was required. Having regard to Mr. Bowman's position in the transaction and the fact that within some four days after the interview an order was sent by the appellant to the respondent for the purchase of the tractor I hold that there was, in fact, a reliance by the buyer on the seller's skill and judgment. We were invited by Counsel for the respondent to hold that there could have, in fact, been no reliance on the skill and judgment of the seller as Mr. Bowman was not a servant of the appellant and moreover the conversation he had had with Mr. Corney was not reported to the appellant. In light of the facts to which I have referred these submissions provide no answer to the appellant's contention that there was here a reliance within the meaning of the sub-section. In fact that Mr. Bowman had no authority to purchase the machine is in my view not in point. He

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was authorised to make known to the seller the purpose for which the buyer required the tractor. Nor do I think that this is a case where the buyer relied wholly upon the opinion of its own expert. No doubt there are cases in which an expert appointed by the buyer makes his own decision as to the fitness of goods purchased for a particular purpose without relying at all on the seller's skill or judgment but this is a question of fact in each case. Here Bowman obviously relied in part on the judgment of the seller in coming to the conclusion that the tractor was suitable for the Council's purpose and it is not a case of a buyer committing himself to the purchase solely on the advice of an expert. The circumstances of this case make it apparent that the terms of the sub-section were satisfied.

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As to the second count, in view of the decision to which the other members of the Bench have come, I do not wish to dissent but would add something by way of addition to express some of the difficulties that I felt as to Section 19(2) of the Sale of Goods Act. Sub-sections (1) and (2) overlap; merchantable means that the goods sold, if meant only for one particular use, are fit for that use. The question whether the goods are meant for a particular use depends on the description of them in the contract, but in order to construe the contract the Court may have recourse to matters of necessary implication. In Priest v. Last (1903 2 K.B. 148) the sale was of a "hot water bottle" and the Court held that this description had reference to an article capable of holding hot water for the purpose of applying heat to the human body. So also in Drummond v. Van Ingen (12 A.C. 284) the House of Lords held that the word "coatings" meant material capable of being made up into garments. In each case it was held that the goods as so described were not merchantable as they were not fit for that particular purpose. In the latter case Lord Herschell said:-

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"It is true that the purpose for which the goods were required was not.....stated in express terms, but it was indicated by the very designation of the goods, "coatings"."

Isaacs, J. (as he then was) in Lubrano v. Gollin & Co. Pty. Ltd. (27 C.L.R. 113) spoke of the meaning of the word "implication" when he said:-

"An implication is included in and part of

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that which is expressed: an inference is something additional to what is stated."

These principles were applied by this Court in The Westminster Trading Company Pty. Ltd. v. Pardale Trading Co. Pty. Ltd. (50 S.R. 44) where it was held that a sale of "full cream milk powder" referred to an article for human consumption; c.f. Collyer Watson Pty. Ltd. v. Riverstone Meat Co. Pty. Ltd. (46 S.R. 52).

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10 In this case the form of the order showed that the purchaser was the Ashford Shire Council. There was a statement in the order form that the goods were for Council's use and were not for resale, this statement being placed there for the purpose of sales tax exemption. The description in the body of the form was:-

"1 Breda 70D Crawler tractor equipped (sic) with cable dozer but not a P.C.U. as quoted by your Inverell agent, W.C. Wilkins."

20 I think insufficient attention was paid in the argument to the description "equipped with cable dozer". In his evidence at p.172 of the transcript Mr. Corney, the Joint Managing Director of the respondent company, gave the following evidence.

(Record pages 203-204)

Q: Had you ever had a 'dozer blade fitted to the machine before? A. No, I had not, but Lloyd Tractors had, the one that was sold previous.

30 Q: When he said to you could you get a 'dozer blade fitted, I suppose you were concerned to know the purpose for which he wanted the blade? A. Naturally, would know if he wanted a blade.

Q: How would you know? A. There is only one purpose.

Q: What is that? A. Road work.

Q: Levelling ground? A. Levelling ground and pushing-up work".

40 The point which has given me so much difficulty is as to whether the description, with its permissible implications, does not show that the tractor which was bought was a tractor fit for road work. It was this very work which the tractor, by reason of its design, was wholly unfit to perform,

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as the evidence clearly shows, and as the learned trial Judge found. If these observations are correct then it may well be argued that the appellant was entitled to succeed on the second count as well as upon the first. However, I refrain from expressing any concluded opinion about the matter having regard to the decision to which I have come on the first count.

I agree with the order proposed by Owen, J.

(c) Hardie, J.

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THE COUNCIL OF THE SHIRE OF ASHFORD v.
DEPENDABLE MOTORS PTY. LIMITED

JUDGMENT

HARDIE, J: This is an appeal by the Council of the Shire of Ashford against a decision given in an action brought by it as plaintiff against the respondent, Dependable Motors Pty. Limited as defendant for damages, arising out of the sale by the defendant to the plaintiff early in 1951 of a tractor and attached earth-moving equipment. The declaration contained three counts, the first being based upon the warranty implied by s.19(1) of the Sale of Goods Act 1923 (as amended), the second being based upon the warranty implied by s.19(2) of that Act, and the third being based upon an express warranty. The hearing commenced before Mr. Justice Ferguson and a jury, but at an early stage the parties, by consent, dispensed with the jury and the trial proceeded before the judge sitting alone.

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In a reserved judgment dated 4th December 1956 His Honor set out his reasons for finding, as he did, against the plaintiff on all three counts.

The notice of appeal challenged specifically

the decision of the trial judge on the first and second counts, and also contained a general ground that the verdict was against the evidence and the weight of evidence. At the commencement of the hearing of the appeal counsel for the appellant plaintiff indicated that he was not seeking to disturb the decision of the trial judge on the third count, being that based on an express warranty as to the fitness of the equipment in question.

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The sale of the machine was made pursuant to an order in writing dated 16th March 1951 placed by the plaintiff with the defendant. It was stated from the Bar table that the order was forwarded by post by the plaintiff to the defendant under the cover of a short formal letter of the same date, which covering letter does not appear to have been tendered in evidence.

20 The order, which was on the Council's printed form, was expressed to be for:-

"1 Breda 70D Crawler tractor equipped with cable dozer but not a P.C.U. as quoted by your Inverell agent, W.C. Wilkins".

30 No acceptance in writing of the Council's order appears to have been made. The defendant procured from another supplier a cable dozer suitable for attachment to the tractor specified in the order, fitted it to a tractor which it had in stock, and dispatched the machine to the plaintiff. Invoice dated April 1951 sent by the defendant to the plaintiff stated the subject matter of the sale and the price as:-

"One (1) only New Breda Crawler tractor Model 70D
Serial No.4924. £5915

One (1) only Cable controlled Trailbuilder
fitted to Tractor. £830

P.C.U. not supplied.

Net price ex store £6745

Sales tax extra if applicable".

40 It will be observed that the attachment referred to in the order as a cable dozer was

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described in the invoice as a cable controlled trailbuilder; in the oral evidence it has been referred to as a dozer blade. The reference in the order and the invoice to a P.C.U. signifies a power-control unit.

The Council in due course forwarded to the defendant its cheque dated 25th April for £6751.14.0 being the net price shown in the invoice with the amount of £6.14.0 added in respect of exchange. The defendant's receipt, which was dated 2nd May, 1951, was stated to be "for Breda 70 D Serial No.4942".

The exercise of the Council's power to make contracts, conferred in general terms by s.516 of the Local Government Act 1919 (as amended), is governed by the provisions of Local Government Ordinance No.25. Being a contract for the purchase of goods of the value of more than £10, the Ordinance (Cl.3) required it to be in writing signed by the Shire President or by the Shire Clerk or by some other servant of the Council acting by the authority and on behalf of the Council. The order in question, having been signed by the Shire Clerk with the requisite authority, complied with this provision of the Ordinance. However, the procedure of calling for tenders prescribed by Clause 6 of the Ordinance - this being a contract involving an expenditure in excess of £1000 - was not adopted. The view was apparently taken that the proviso to that clause to the effect that its provisions did not apply "in a case of emergency" was applicable.

It is convenient to deal at the outset with the decision of the trial judge on the second count, that is to say, on the claim of the plaintiff that the machine was bought by description within the meaning of s.19(2) of the Sale of Goods Act from a seller who dealt in goods of that description, that accordingly there was an implied condition that the goods should be of merchantable quality and that the goods were not of such quality. The trial judge was of the opinion that the goods were not sold by description and also that, in any event, the plaintiff had not made out its case that the goods were not of merchantable quality. On the hearing of the appeal counsel for the defendant conceded that there was a sale of goods by description and that his client was a seller who dealt in goods of that description, but joined issue with

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the submission of counsel for the plaintiff that the evidence established that the goods were not of merchantable quality.

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10 Having regard to the principles established by the authorities on the relevant provision of the Sale of Goods legislation and particularly those stated and applied in the recent judgment of the High Court in George Wills & Co. Ltd. v. Davids Pty. Ltd., 31 A.L.J. 30, I am of the opinion that the trial judge did misdirect himself on this branch of the case; further, I am satisfied that his decision on the facts that a breach of the condition in question had not been established was correct.

20 I will now deal with the first count in the declaration, around which the bulk of the argument on the hearing of the appeal centred. The plaintiff's case was that it had made known to the defendant the purpose for which the equipment was required by the plaintiff so as to show that the plaintiff relied on the defendant's skill or judgment, that the equipment was of a description which it was in the course of the defendant's business to supply, and accordingly that there was an implied condition that the equipment should be reasonably fit for such purpose.

30 It was not disputed by the defendant that the equipment in question was of a description which it was in the course of its business to supply nor that the plaintiff had made known to the defendant the purpose for which the equipment was required. The defendant did, however, dispute that the plaintiff made that purpose known to the defendant under such circumstances as to show to the defendant that the plaintiff was relying on the defendant's skill or judgment.

40 S.19(1) of the New South Wales Act is identical with s.14(1) of the English Sale of Goods Act 1893, which section was a codification of the common law stated in the judgment in Jones v. Just (L.R.3 Q.B. 197 at 202-203). The text of the subsection is:-

"19. (1) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies

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on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose".

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The first condition specified in the sub-section by the words "where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment" had been the subject of a number of decisions of the English Courts. Those decisions indicate that there has been a marked divergence of view between the higher appellate courts as to the proper application of the sub-section. The meaning and effect of the portion of the sub-section quoted above and the principles to be applied in determining whether in a particular case the condition stated therein has been satisfied are dealt with at length in the judgments of the House of Lords in Manchester Liners Ltd. v. Rea Ltd. (1922) 2 A.C. 74, Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation (1927-8) 33 Comm. Cases 195, Cammell Laird & Co. v. The Manganese Bronze & Brass Company Limited (1934) A.C. 402 (see also the judgment of the Privy Council in Grant v. Australian Knitting Mills Limited (1936) A.C. 85).

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In the first of those cases the House of Lords held, reversing the decision of the Court of appeal, that the disclosure in the contract itself of the purpose for which the goods were required was prima facie evidence of the buyer's reliance upon the seller's skill or judgment (see per Lord Atkinson supra p.84-6). In the Medway Oil case (supra) Rowlatt J. appears to have taken the view, probably because of what was said in the Manchester Liners case, that "reliance on the buyer's part follows almost as a matter of course from the communication of his purpose whenever he knows less than the seller does about the substance which he is minded to buy." This view was held by the House of Lords to be erroneous. The judgment of that tribunal, delivered by Lord Sumner on behalf of himself, Lord

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Atkinson and Lord Warrington, is not fully reported. However the extract from it in 33 Comm. Cases (supra) makes it clear that there is no general rule or principle that disclosure by a buyer of the purpose for which the goods are required is evidence of reliance by the buyer on the seller's skill or judgment, that each case must be decided on its own facts, and that "the buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase". The extract also points out that the warranty of fitness, though an implied one, is contractual and that, therefore, the seller cannot be treated as assuming the implied contractual liability unless the buyer's reliance on him is disclosed to him.

The same point was dealt with in the judgment of Lord Wright in the Cammell Laird case (supra at p.423) - a case in which the House of Lords reversed a majority decision of the Court of Appeal. It was there stated:-

"The more difficult question remains whether the particular purpose for which the goods were required was not merely made known, as I think it was, by the appellants to the respondents, but was made known so as to show that the appellants as buyers relied on the sellers' skill and judgment. Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is the basis of a contractual obligation."

It will thus be seen that in the instant case the onus was on the plaintiff to show (1) reliance in fact by it upon the skill or judgment of the defendant and (2) disclosure by the plaintiff to the defendant of such reliance. The trial judge found against the plaintiff on the first question and accordingly did not find it necessary to deal with the second one.

The trial judge took the view that the evidence before him was more susceptible to the inference that there was no reliance by the plaintiff upon the skill or judgment of the defendant

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than that there was, and accordingly held that the plaintiff had not established one of the conditions precedent to the cause of action sued on. It is apparent from His Honor's short statement of reasons on this point that he was of the opinion that the plaintiff, in making the decision that the tractor in question was suitable for and would meet its requirements, relied on the report made to it by Mr. Bowman and that such report, and not any reliance upon the defendant's skill or judgment, was the decisive matter which induced the purchase.

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As stated earlier, the order placed by the plaintiff with the defendant, after specifying the tractor and other equipment required, used the words "as quoted by your Inverell agent, W. C. Wilkins". This is apparently a reference to a conversation which the Shire Clerk of the plaintiff had with Mr. Wilkins, the defendant's Inverell agent, some little time before the placing of the order. The evidence does not disclose which party initiated this conversation, nor its terms. It does appear, however, from the Shire Clerk's evidence that in his discussion with Mr. Wilkins he ascertained that a Breda tractor - a tractor of Italian origin - could be purchased from Dependable Motors, i.e. the defendant; it also appears from the Shire Clerk's evidence that, following upon that discussion, he spoke to the various members of the Council on the telephone "concerning this Breda tractor". The evidence discloses that at this time tractors of American manufacture were unprocurable and that the tractors of English manufacture were difficult to obtain and, in addition, that the Council urgently required a heavy tractor. It could well be that the conversation which the Shire Clerk had with Mr. Wilkins and those which he then had with the Council members could have thrown much light on the issue now under consideration, had those conversations been brought out in the evidence. However, both parties apparently conducted the action on the basis that neither those conversations nor the illustrated pamphlet referred to later were of any materiality.

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Following upon the conversation with the Shire Clerk, Mr. Wilkins forwarded to him a printed illustrated pamphlet showing in a prominent position the name of the defendant as the distributor for Australia and New Guinea of Breda Crawler Tractors and naming an Italian company as the

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manufacturers of the tractors. The pamphlet contained photographs of the two models of the Breda tractors handled by the defendant, the larger model (70D) which was powered by a 6-cylinder diesel engine and the smaller model (50DR) which was powered by a 4-cylinder diesel engine, and set out the characteristics, qualities, capacity, and suitability for various uses and purposes of the tractors. Although this pamphlet was tendered as an exhibit in the plaintiff's case, no part of the case sought to be made against the defendant under the first or second counts was based upon it, nor was the question investigated as to what effect or influence, if any, it had on the minds of the Shire Clerk or the President of the Council or its members and, in particular, whether it brought about or contributed to the decision to have an inspection made of and a report obtained on the Breda tractor. This being so, it is unnecessary to quote from the pamphlet or to advert to the many claims made in it for Breda tractors.

The plaintiff sought to establish its claim that it relied upon the defendant's skill or judgment as to the suitability of the tractor for its Requirements and purposes, from the evidence of a Mr. Bowman as to the conversation he had with the defendant's sales manager, Mr. Corney, shortly before the order for the tractor was placed by the plaintiff with the defendant.

The Shire Clerk, some little time after his conversation with Mr. Wilkins and following a conversation with the Shire President, telephoned Mr. Bowman, who was then in Sydney, and asked him to have a look at the tractor at the premises of the defendant and let him know whether or not it was suitable for the Council's purposes. Mr. Bowman was given the name of Mr. Corney as "the man to see". At this point of time Mr. Bowman was not an employee of the Council, but the Council had some little time before decided, after an interview between the Shire President and Mr. Bowman, to appoint him as its shire engineer; this appointment did not become operative until some weeks after the events now being considered. Mr. Bowman was an engineer with considerable experience in road construction work and plant. Following upon his conversation with the Shire Clerk, Mr. Bowman went to the premises of the defendant Company in Sydney, and inspected and examined the tractor. Whilst this inspection and examination was proceeding, Mr. Bowman asked Mr. Corney a number of questions relative to the

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tractor and its features and performances.

There was a substantial conflict between Mr. Bowman and Mr. Corney as to what was said on this occasion, but His Honor the trial Judge did not find it necessary to resolve that conflict; he was satisfied, on any view of the evidence as to that conversation and from the terms of the order subsequently placed with the defendant, that the plaintiff made known to the defendant, either expressly or by implication, that the equipment was required by the Council for road construction and maintenance purposes.

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Mr. Bowman did not report to the Council or to the Shire Clerk in writing. He telephoned the Shire Clerk and informed him he had inspected the tractor that it seemed to have plenty of horsepower and that it was big enough for the work the Council required. He did not pass on to the Shire Clerk any of the information supplied by Mr. Corney, nor did he even report that he had interviewed Mr. Corney or any representative of the defendant. In fact, he gave no indication as to the reasons why he held the view which he expressed to the Shire Clerk. The Shire Clerk in due course informed the Shire President and the other members of the Council of the favourable report he had received from Mr. Bowman, and thereupon received instructions from the Shire President to place an order for the equipment. The Shire Clerk then prepared, signed and forwarded to the defendant the order in writing referred to earlier.

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The short point that arises on this branch of the case is whether the conclusion of the trial Judge that the evidence before him was more susceptible to the inference that there was no reliance by the buyer upon the skill and judgment of the seller than that there was, was erroneous either because the trial Judge had misdirected himself as to the principles to be applied or because it was based upon an unsound and unjustified interpretation of the facts established by the evidence.

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The Shire President gave unequivocal evidence that all he had before him when he made, or rather participated in, the decision to buy the machine, was the report from Mr. Bowman. No other member of the Council who participated in the decision was called as a witness, and the Shire Clerk's evidence on the point was along the same lines as that of the Shire President.

It is thus apparent that the trial Judge had before him ample evidence for the finding made by him that the Council, in making the decision to purchase the equipment, relied upon the verbal report of Mr. Bowman. Counsel for the plaintiff did not challenge this finding.

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10 Counsel for the defendant contends that the conclusion that the Council relied upon the report of Mr. Bowman is destructive of any claim that the Council relied upon the skill or judgment of the seller. Counsel for the plaintiff, on the other hand, contends that there is no inconsistency between these two propositions, but on the contrary one assists the other. He argued that the plaintiff has established the reliance by it upon the skill or judgment of the seller by proving that it relied upon the verbal report of Mr. Bowman and that Mr. Bowman on his part relied, in reaching the opinion expressed in his verbal report, upon infirmation supplied by the defendant and representation made by the defendant and thus, it is claimed, upon the skill or judgment of the defendant. The submission is shortly stated in Ground (5) of the notice of appeal, which is that "His Honor should have held that it was sufficient..... for the plaintiff to establish that it relied upon the report of the plaintiff's representative who himself relied upon the skill or judgment of the defendant."

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Reasons for
Judgment.
10th September,
1958.

(c) Hardie, J.
- continued.

30 As already indicated, the opinions expressed and representations made by Mr. Corney and Mr. Bowman were not passed on to the Council or any of its members or officers in any shape or form; further, they were expressed and made to a person who had not been asked by the Council to obtain the opinion or view of the defendant, but to inspect the tractor and report his opinion to the Council. His opinion was in fact reported to the Council, but not the grounds for it. He was not at the relevant date an officer or employee of the Council; unlike the Shire Clerk, he took no part in the discussions with the Shire President and the other members of the Council which led to the decision of the Council to purchase the tractor. His knowledge as to what the defendant's sales manager had said relative to the capacity and performance of the tractor could not, in any relevant sense, be treated as knowledge of the Council; much less could it be treated as knowledge of the Council upon which the Council relied or acted.

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In my opinion neither the language of the section under consideration nor any of the principles laid down in the authorities require or justify an interpretation of the section which would permit of a buyer's reliance upon the skill or judgment of the seller being shown by evidence such as that relied upon in this case. The first condition set out in the sub-section is not, in my opinion, satisfied by some sort of notional or imputed or vicarious reliance; it requires an actual reliance. 10

For the reasons given above I am of the opinion that no ground has been made out for setting aside the conclusion of the trial Judge that the plaintiff had not made out its case that it had relied upon the skill and judgment of the seller within the meaning of the sub-section. The trial Judge, in my view, neither misdirected himself as to the appropriate principles to apply, nor drew any unsound or unjustified inference from the facts proved in evidence. On the contrary he reached, in my opinion, the only conclusion open to him on the evidence. 20

As I have come to the conclusion that the plaintiff's case, as based on the conversation between Mr. Bowman and Mr. Corney, fails at the threshold because neither the terms nor the substance of that conversation were brought under the notice of the Council and because knowledge of that conversation cannot be imputed to the Council, it is unnecessary to deal with the other difficulties which in my view, would have stood in the plaintiff's way, if it had surmounted that one. In that event and assuming the trial Judge had accepted in toto Mr. Bowman's evidence as to the conversation, a substantial question would have arisen as to whether the information supplied and representations made by Mr. Corney were any more than representations of a non-contractual nature (cf. Heilbut Symons & Co. v. Buckleton (1913) A.C. 30 at 47-51). 30 40

There is a very real difference between conversations between a prospective seller and a prospective buyer during which representations are made by the seller for his own purposes to induce a sale, and conversations which indicate that the buyer is seeking from the seller and the seller is giving to the buyer the benefit of the seller's skilled and/or informed judgment as to the suitability for the buyer's purpose of goods offered for sale by the seller. Conversations in the 50

10 first-mentioned class give rise to no contractual rights or obligations, and only confer upon disappointed purchasers a cause of action when the representations are made fraudulently. Conversations of the latter type, however, are capable of giving rise to contractual rights and obligations of the type provided for in s.19(1) of the Sale of Goods Act. There is much to be said for the view that in the instant case the conversation deposed to by Mr. Bowman would fall into the first mentioned category and thus would not, on any view of the facts, bring into operation the provisions of s.19 (1) of the Sale of Goods Act.

20 Related to the point adverted to in the preceding paragraph is the question as to whether, even if the conversation established reliance in fact by the plaintiff upon the skill or judgment of the defendant, there was such disclosure of that reliance that the seller should be taken to have contracted (i.e. on his acceptance of the order) on that footing. (See *Cammell Laird Case* - supra at 423). This is another difficulty which the plaintiff would have to surmount in order to establish the cause of action now under consideration.

30 As already indicated, the case presented in argument on behalf of the appellant was based upon the conversation between Mr. Bowman and Mr. Corney some short time before the placing of the order. No independent argument based upon the terms and language of the order was submitted. It will have been observed that the order was for a tractor of the type named and "equipped with cable dozer". The evidence discloses that a cable dozer is used solely for road work, i.e. for levelling ground and pushing-up work. In view of the terms of the order and the fact that the order was placed by a Shire Council it is reasonably clear that the order itself by implication, made known to the defendant the purpose for which it proposed to use the tractor. However, I see no ground for inferring that the making known to the defendant of the purpose for which the plaintiff was purchasing the tractor, i.e. by the language of the order, was such as to show that the buyer relied upon the seller's skill or judgment as to the fitness or suitability of the tractor named for such work. The order itself naming, as it did, the particular tractor which the plaintiff wished to purchase, if

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10th September,
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considered without regard to the other facts brought out in evidence, would point either to the Council having satisfied itself previously that the tractor was suitable for the purpose in mind or to the Council being prepared to accept the risk of the tractor being suitable for that purpose. Considering the order in the light of the facts disclosed in evidence - which, in my view, is the correct approach - the proper inference is that the Council had already satisfied itself that the tractor was suitable for the purpose it had in mind. 10

The order did not specify the size or the type of the cable dozer to be fitted to the tractor. This being so, it may well be that there was an implied obligation on the seller to procure and affix a cable dozer of a size and shape suitable for attachment to the tractor and of a size, shape and strength suitable for roadway work, such matters being "within the particular province entirely left to the seller's skill and judgment" (Cammell Laird case, supra at p.428 and (1933) 2 K.B.141 at 193-4). However, it is not necessary to pursue this point, as no case was sought to be made before the trial Judge or on the hearing of this appeal along those lines. The complaint was not that the cable dozer was in any way unsuitable for the particular tractor or for the work proposed, but that the tractor was not sufficiently robust to stand up to road construction work of the type referred to in the first count, i.e. pushing the cable dozer, dragging a large scraper scoop and clearing land. In this connection it is to be observed that, although all three counts in the declaration alleged the sale of the tractor equipped with a cable dozer - as was the fact - the case appears to have been fought before the trial Judge and was argued on appeal on the basis that the subject matter of the contract was a tractor, without attachments, purchased by the plaintiff for use, with or without attachments, in road construction and maintenance work. 20 30 40

The order described the tractor as a Breda 70D Crawler tractor, which was the name or description of the tractor used in the illustrated pamphlet referred to earlier. As no argument was addressed to the Court on behalf of the defendant that the proviso to s.19(1) of the Act was applicable on the ground that the sale was "of a specified article under its patent or other trade name" it is not necessary to pursue this point further. 50

For the reasons indicated above I am of the opinion that no ground has been shown for interfering with the decision of the trial Judge and that accordingly the appeal should be dismissed with costs.

No. 21

RULE OF THE SUPREME COURT

In the Supreme
Court of New
South Wales

IN THE SUPREME COURT
OF NEW SOUTH WALES

)
)

No.1776 of 1954

No. 21

Rule of the
Supreme Court.

BETWEEN

THE COUNCIL OF THE SHIRE OF ASHFORD
Plaintiff (Appellant)

10th September,
1958.

- and -

DEPENDABLE MOTORS PTY. LIMITED
Defendant (Respondent)

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WEDNESDAY the 10th day of SEPTEMBER, 1958.

THIS APPEAL coming on to be heard on the 31st day
of July, 1958 and the first day of August, 1958
WHEREUPON AND UPON READING the Appeal Book filed
herein AND UPON HEARING what was alleged by Mr.C.L.
D. Mears of Queens Counsel with whom appeared Mr.
D.I. Cassidy of Counsel on behalf of the Appellant
AND UPON HEARING Mr. R.G. Reynolds of Counsel with
whom appeared Mr.J.B. Sinclair of Counsel on behalf
of the Respondent IT WAS ORDERED on the 10th day
of September, 1958 that a verdict and judgment for
the Defendant on the first count of the Plaintiffs
Declaration be set aside and in its place a verdict
and judgment entered for the Plaintiff for £4915.00.
and IT WAS FURTHER ORDERED that the costs of the
Appeal should be paid by the Respondent which
should have a Certificate under Section 6 of the
Suitors Fund Act.

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By the Court

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For the Prothonotary

CHIEF CLERK.

In the
High Court of
Australia

No. 22

NOTICE OF APPEAL

No. 22

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY)

No. 67 of 1958

Notice of
Appeal.
18th September,
1958.

ON APPEAL from the Supreme Court of New
South Wales

BETWEEN

DEPENDABLE MOTORS PTY. LIMITED Appellant

- and -

THE COUNCIL OF THE SHIRE OF ASHFORD Respondent

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NOTICE OF APPEAL

TAKE NOTICE that the Appellant herein appeals to the High Court of Australia from the whole of the order and judgment of the Full Court of the Supreme Court of New South Wales pronounced herein on the 10th day of September 1958 in which the present Appellant was the Respondent (Defendant) and the present Respondent was the Appellant (Plaintiff).

ORDER APPEALED FROM: That a verdict and judgment for the Defendant on the first count of the Plaintiff's declaration be set aside and in its place a verdict and judgment entered for the Plaintiff for £4915. The costs of the appeal to be paid by the present Appellant which should have a Certificate under Section 6 of the Suitors Fund Act.

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GROUND RELIED UPON IN SUPPORT OF THE APPEAL:

1. That upon the evidence there was no term in the contract sued upon that the tractor sold was reasonably fit for the purposes assigned in the first count of the declaration.
2. That the Court was in error in holding that the buyer made known to the seller the purposes for which it required the goods so as to show that the buyer relied on the seller's skill and judgment.

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- 3. That the Court was in error in holding that the buyer in fact relied on the seller's skill and judgment.
- 4. That the inferences drawn by the majority of the Full Court of New South Wales were incorrectly drawn.
- 5. That the facts and inferences from the facts were correctly found and drawn by the learned trial Judge.

In the High Court of Australia

No. 22

Notice of Appeal.

18th September, 1958

- continued.

10 JUDGMENT THAT THE APPELLANT SEEKS: That the order of the Full Court of New South Wales be set aside and that in lieu thereof the judgment of the trial Judge be restored and a verdict and judgment be entered for the Appellant and that the Respondent do pay the costs of this appeal and of the appeal to the Full Court of the Supreme Court of New South Wales.

DATED this 18th day of September 1958.

Sgd. R.G. REYNOLDS.

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COUNSEL FOR THE APPELLANT.

No. 23

REASONS FOR JUDGMENT

DEPENDABLE MOTORS PTY. LTD.

- v -

COUNCIL OF THE SHIRE OF ASHFORD

REASONS FOR JUDGMENT

- (a) SIR OWEN DIXON, C.J. 8th May 1959
- (b) McLEHANNAN, J. 8th May 1959
- (c) KITTO, J. 8th May 1959
- (d) TAYLOR, J. 8th May 1959
- (e) MENZIES, J. 8th May 1959

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Judgment delivered at Sydney on Friday, 8th May 1959.

No. 23

Reasons for Judgment.

8th May, 1959.

No. 23

In the
High Court of
Australia

REASONS FOR JUDGMENT

No. 23

DEPENDABLE MOTORS PTY. LTD.

- v -

Reasons for
Judgment.

THE COUNCIL OF THE SHIRE OF ASHFORD

3th May, 1959.

(a) Sir Owen
Dixon, C.J.

The view I take of this case may be thought too simple but to me it appears to be no more than the result of a proper interpretation of the facts and a due application of the material rules of law. I say rules of law, although the case arises under sec.19(1) of the Sale of Goods Act 1923-1953 which corresponds with sec.14(1) of the English Sale of Goods Act 1893. In doing so I may not use the most appropriate expression because perhaps the rigidity of the text, apparently an unavoidable feature of codification, and the consequent inadmissibility of any resort to principle may account in part for the difficulty to which the case has given rise.

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The appeal comes to this Court from an order of the Full Court of the Supreme Court of New South Wales (Owen and Herron JJ., Hardie J. dissenting) allowing an appeal from a judgment given by Ferguson J. at the trial of an action without a jury. Ferguson J. entered judgment for the defendant but that judgment was reversed upon one count in the declaration. The action was brought by the purchaser of a tractor against the vendor and the count alleged an implied warranty of fitness for the purpose for which the tractor was purchased and claimed damages for breach of the warranty. It is the only count with which it is necessary for me to deal. Ferguson J. held that the count was not made out because it was not shewn that the buyer relied upon the skill and judgment of the seller. The majority of the Full Court were of the contrary opinion.

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The story of the tractor can be told briefly. In the early part of the year 1951 the Council of the Shire of Ashford, which is the plaintiff in the action and the respondent in this Court, found itself in need, more or less immediate need, of an additional piece of road-making equipment. What it needed was a crawler tractor fitted with a "dozer blade". It possessed a power control unit and did not want another for the machine. But it needed a tractor with a capacity to draw a scraper scoop or

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the like. At that time any of the well-known American or English machines of the kind the Council required was unprocurable, at all events it could not be obtained without waiting a long time. But an agent for motor vehicles and machinery at Inverell brought under the notice of the Shire Clerk and President the fact that there was or might be available a tractor made in Italy and called by the name Breda. The agent represented the Dependable Motors Pty. Ltd., a company which is the defendant in the action and the appellant in this Court. At its premises in Sydney the defendant Company had one or two Breda tractors on hand, Model 70D. They had been obtained for "distribution" from another company which doubtless was the importer. The tractors were in fact produced by the Societa Italiano Ernesto Breda. When complaints reached the Italian Societa later about the failure of the performance of the tractor as a road implement, they wrote that it was supplied by them for agriculture and not for industrial use. In fact there was a brass plate upon the tractor bearing the words "Trattori Agricoli" and it is now common ground that it was not fit for the heavy work of road making and maintenance, the only purpose for which the Council wanted it. When the agent at Inverell told the Shire Clerk of the Breda Tractors at Dependable Motors Pty. Ltd., he gave him a pamphlet depicting them and some further particulars. The Shire Clerk discussed the matter with the President and over the telephone with some councillors. It was a country shire, the councillors lived in different places many miles apart and notwithstanding that the purchase of so costly a machine can scarcely have been regarded as a small matter, that was the way of doing business. With their approval and perhaps at the instance of the President the Clerk took the next step. Very shortly before this time the Council had appointed a new engineer. He was to take up his duties on 2nd April 1951, that is in about three weeks time. He was the engineer of another shire and the time of his service with that municipality had not quite come to an end, but he had gone down to Sydney to attend the Annual Conference of Local Government Engineers. The step which the Shire Clerk took was to telephone to the engineer designate in Sydney and request him to go to the showrooms or shop of the Dependable Motors Pty. Ltd., ask for a Mr. Corney, inspect the tractor and see if it was suitable for the work required. The

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engineer designate followed his instructions and then telephoned to the Shire Clerk. The visit to Dependable Motors Pty. Ltd. seems to have been on Monday, 12th March 1951, and the Clerk says that the engineer telephoned back within a day or two of his message. The witnesses were deposing to conversations which took place nearly six years before and it would not be surprising if they gave only a condensed account of what was said. At all events the account of the Clerk of the telephone report was simply that the engineer told him that he had inspected the tractor and that it seemed to him to have plenty of horse-power and was big enough for the work required. On this being communicated, doubtless by telephone, to the President and the Councillors, the Clerk was instructed to purchase the tractor. The Shire Clerk on 16th March 1951 sent an order, on the Shire Council's order form, to Dependable Motors Pty. Ltd. in Sydney; the order was expressed to be for "1 Breda 70D Crawler Tractor equipped with cable dozer but not a P.C.U. as quoted by your Inverell agent" naming him. P.C.U. stands for power control unit. The fact that the order was from a Shire Council and that the tractor was to be equipped with a cable dozer necessarily meant that the implement was bought for road work. Indeed Mr. Corney in his evidence said that there could be only one purpose for the dozer blade and that was road work and the fact that a Shire Council wanted the tractor for its operations meant that it was going to be used for road construction and the like. Moreover he said that his company had advertised the Breda 70D tractor as suitable for road work and tried to sell that model for road work.

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In due course the machine was invoiced and delivered to the Council. The invoice described the implement and gave the price under two headings, first a "New Breda Crawler tractor model 70D Serial No.4942; £5915": second a "cable-controlled trail-builder fitted to tractor: £830". The invoice stated that a P.C.U. was not supplied and the net price ex store was £6745. For this price a cheque was sent by the Council. The invoice, as will be seen, shewed that a tractor equipped for road work was the subject of the sale. There is no doubt that the machine was not fit for that work. This was shewn by the hard experience of the Council in its attempts to employ the tractor for the purpose and the fact is no longer denied by the defendant.

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I would imagine that if the liability of the seller in such circumstances were governed by the common law and not by the statutory formula a simple finding that the vendor sold the implement for the purpose of road making by the vendee would spell a warranty of fitness for that purpose. At all events that is what Best C. J. thought. "If a man sells an article, he thereby warrants that it is merchantable, - that it is fit for some purpose If he sells it for a particular purpose, he thereby warrants it fit for that purpose." : Jones v. Bright 1829 5 Bing. 533 at p.544: 130 E.R. 1167 at p. 1172. Best C.J. stated the position simply. While the rule was affirmed without much loss of its simplicity of form, the underlying principle was expounded by Brett L.J. for the Court of Appeal in Randall v. Newson 1877 L.R. 2 Q.B.D. 96. With perhaps more flexibility than the code allows, the law, so it appeared, sought the intention of the parties by determining the real commercial or business description of the thing forming the subject-matter of the transaction. "If the subject-matter be an article or commodity to be used for a particular purpose the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose." L.R. 2 Q.B.D. at p.109. It is, of course, a matter of fact but I should say with some confidence that the true sense of the transaction as it appears from the facts stated so far was the sale of a tractor for the particular purpose of road work, that is, road making and maintenance. It was never necessary that the purpose should, so to speak, be written out large. It was enough if the intention clearly appeared from the circumstances and the spoken and written word, the contract not being wholly reduced to writing. But the provision of the Sale of Goods Act sets a criterion which is not necessarily the same, though it may be more exact in its application and it is that criterion which must govern the matter. It requires that the buyer shall expressly or by implication make known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill or judgment. It is said that the buyer, the Shire Council, never did this; and it was upon that ground that judgment passed for the defendant Dependable Motors Pty. Ltd. at the trial before Ferguson J. There is, of course, an additional condition prescribed by the

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provision of the Sale of Goods Act, viz. the goods must be of a description which it is in the course of the seller's business to supply, but that condition was undeniably fulfilled.

The reason why it was held that the first condition was not satisfied was not because the particular purpose was not made known to the seller, dependable Motors Pty. Ltd., but because it was not made known so as to shew that the buyer, the Shire Council, relied on the company's skill or judgment and perhaps also because in any case it was not the Shire Council that so made it known.

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Now there is very strong ground in the evidence of the engineer designate for concluding that at the interview on 12th March 1951 between the engineer designate of the Shire Council and Mr. Corney at the premises in Sydney of Dependable Motors Pty. Ltd., the engineer did make known to that gentleman the particular purpose for which the implement was required by the Shire Council and made it known so as to show that reliance was being placed on his skill and judgment. Mr. Corney was managing director of the company and there could be no question of his authority to speak for it on such a subject. But what is said is that when he spoke he did not speak to an agent of the Shire Council authorised in that behalf. Any reliance on his skill and judgment or on that of his company was the reliance of the engineer designate not of the Shire Council; the President and Councillors had obtained what guidance they needed from the Shire Clerk's report of what the engineer designate had said to the latter over the telephone, not from Mr. Corney.

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This view of the matter I am unable to accept. It appears to me to depend upon distinctions between the capacities of the persons by whom the corporation's part of the business was transacted which reflects nothing that the provision of the Sale of Goods Act requires, still less the law of agency. In effect it means a transfer of the responsibility for every step in the transaction to the President and Councillors and regards them as the persons who must exhibit a reliance, which is their own personally, upon the skill and judgment of Mr. Corney or of his company. Or if it does not do that it treats the engineer designate as a stranger to the corporation who did not represent it in his discussion with Mr. Corney and could

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not speak on its behalf. In neither of these views can I agree. After all, when we speak of the Council of the Shire of Ashford and so name the plaintiff in the proceedings we are naming the corporate body not the President and the Councillors. If there were no provisions in the Local Government Act such as sec.516 such a transaction as that in question might go through and none of the latter might ever be called upon even to give their assent to it. The corporation must act by servants and agents. In any transaction carried through by a corporation different steps may be taken by different persons on its behalf and it often may be that it is only by combining their various actions that legal completeness can be given to a transaction. I see no reason why this should not be so in the negotiation of a contract for the purchase of goods and why the process should not be thus accomplished of making it known to the seller that the corporation as buyer relies by its servants and agents upon the seller's skill and judgment. As to the capacity in which the engineer designate went to Dependable Motors Pty. Ltd. to inspect the tractor and to see Mr.Corney, I can feel little doubt notwithstanding the brevity of the account given of his instructions from the Shire Clerk over the telephone. He was an engineer about to take over the office for the Shire Council involving the responsibility for road construction and maintenance. If he had assumed office he would be the natural, the inevitable, person to go into the proposal to purchase a tractor, to discuss the technical or engineering aspects with the suppliers, to inspect the implement and to advise the Shire Council. That is how he understood his commission, if one is to judge by what he did, and I should infer that that is what he was meant to do. According to his own account when he saw Mr.Corney on 12th March 1951, he gave him his name "and so on" and said that he was there on behalf of the Ashford Shire Council. Mr.Corney says that he introduced himself as the Shire Engineer. The evidence of the engineer is that he inspected the tractor with Mr.Corney and that they had a long discussion about its various features including its weight and horsepower. Then the engineer's evidence proceeded: "he said, 'It is a very reputable firm. It is a very big firm engaged in the manufacture of locomotives as well as tractors. It is quite an outstanding firm in Italy,' and he added that there was no doubt about the quality of

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the machine or the quality of the tracks. Then I said to him, "Will this machine do the work we expect it to do." and he replied "What do you expect it to do." I said, "It will be engaged entirely on road construction work", and he said, "What does that entail." I said, "Clearing, some clearing and a lot of dozer work, and quite a lot of scoop work. The Council had already purchased a 6-8 yard scraper scoop". ... I then said, "this tractor will be required to haul that scoop. Will it be capable of doing that." and he replied, "Yes. That is the type of work the tractor is built for. It is just the type of work to suit it." I then said, "The Council does require a dozer blade", and he said, "Yes. I know something about that. They want the dozer blade to fit on to the tractor". I then said, "That is right. Do you know a reputable firm which is capable of building a good blade". Mr. Corney named the firm he would employ and the conversation ended with a question from the engineer about the blade being capable of doing the work and being suitable for the machine, to which Mr. Corney gave an affirmative reply, adding that he would see that a proper sized blade was fitted to the machine.

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Evidence as to the engineer's beliefs, as to the result upon his mind of this conversation, was shut out but there can be no doubt that his reliance on Mr. Corney's skill and judgment was sufficient to satisfy the standard set by the provision of the Sale of Goods Act. There is no point in discussing in this case the precise degree of actual reliance required, how it must be exhibited and what presumptively shews it. As Hardie J. pointed out in his dissenting judgment a divergence of view about some matters affecting the application of the provision may be found in utterances of high authority; among such matters are those I have mentioned. Cf. the cases cited by his Honour, Manchester Liners Ltd. v. Rea Ltd. 1922 2 A.C. 74; the extract from the opinion of Lord Sumner in Medway Oil and Storage Co. Ltd. v. Silica Gel Corporation reported in 33 Com. Cases 195 and set out in 50 C.L.R. at p. 415, and Cammell Laird & Co. v. Manganese Bronze & Brass Co. Ltd. 1934 A.C. 402. There is no point here in discussing these matters because so far as the engineer designate is concerned plainly his evidence means that he exhibited an ample reliance on the seller's skill and judgment and in respect of the very

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matters which in the result involved the unfitness
 of the implement. A real difficulty arises because
 Mr. Corney in his evidence denied that the critical
 statement was actually made that the implement was
 to be used for road making or that the question was
 asked whether it would do the work. He says that
 he knew that that was the purpose for which the
 Shire Council wanted the tractor and the dozer
 blade, it was the only purpose for wanting an im-
 10 plement so equipped, and he says that he would not
 have hesitated to tell the engineer that the imple-
 ment was suitable for the Shire Council's road work
 had he been asked, but he denies that he was asked.
 Unfortunately in his judgment Ferguson J. does not
 explicitly resolve the conflict. His Honour, re-
 ferring to the evidence that Mr. Corney was informed
 of the purpose for which the tractor was required,
 said: "Mr. Corney says he was not specifically so
 20 informed; but as it was a Shire Council that re-
 quired it - and with a dozer blade attached - he
 knew it would be used for Council operations,
 including road work. On this evidence, and from
 the terms of the order subsequently sent, I am
 satisfied that the plaintiff, if not expressly, at
 least impliedly made known to the defendant the
 particular purpose for which the tractor was re-
 quired." Any course is to be preferred to sending
 this case down for further hearing after all the
 30 years that have passed since the transaction took
 place and in the Supreme Court Herron J. after a
 full examination of the record felt that he was
 justified in going beyond the precise statement of
 Ferguson J. and carrying the findings of fact to
 their full conclusion. It is indeed difficult to
 believe that in the interview in question one way
 or another the purpose for which the implement was
 required was not made known to Mr. Corney so as to
 shew that reliance was being placed on his skill
 or judgment or that of Dependable Motors Pty. Ltd.
 40 speaking through him. In the circumstances, I
 think that the appeal should be decided on this
 basis of fact.

The case seems to me on that footing to come
 down not so much to a question of the effect of
 Sec. 19(1) of the Sale of Goods Act 1923-1953
 (N.S.W.) as to one's conception of how a corpora-
 tion or any other business organization may proceed
 through its servants and agents in negotiating an
 important purchase. True the engineer designate
 50 was only proleptically the servant of the corpora-
 tion. But that did not prevent his being its

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agent for the purpose of dealing with the fitness of the implement and moreover, he held himself out as the engineer. There was no reason why he should distinguish, for the purpose in hand, between his then position as a designate and his position when three weeks later he should enter upon his duties. Nor does there seem to me to be any reason to trouble about the scope of his authority. Of course he had no authority to conclude a contract. But for purposes of ascertaining the suitability of the implement for the Shire Council's purposes he "represented" the corporation on that occasion. Doubtless his instructions, as deposed to by the Shire Clerk, may read as compendious to the point of casualness. It is not however the custom of the country to expatiate upon what is obviously involved in the competent performance of a commission, particularly when it is entrusted to a man who is on his own ground in executing it. He himself was not asked about his instructions. But in any case he performed his mission in the manner he described and all he did has been adopted by the corporation.

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In my opinion the appeal should be dismissed.

(b) McTierman,
J.

DEPENDABLE MOTORS PTY. LTD.

v.

THE COUNCIL OF THE SHIRE OF ASHFORD

The contract of sale now being considered resulted from the acceptance and completion by the appellant of a written order, specifying a "Breda 70D Crawler tractor" equipped with a cable dozer. The order was sent by the respondent's shire clerk with the approval of the President and the other members of the Council. The tractor was the product of the Breda company in Italy. The manufacturer's label indicated that it was a farm tractor. This tractor is an automotive vehicle provided with a crawling tread. It seems that its use in agriculture would be to draw or haul agricultural implements. A cable dozer fitted to a tractor is a permanent attachment. In the combination, the tractor is a prime mover for working the bulldozer, backwards and forwards. The tractor however may still be used to drag an earth-moving implement.

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such as a scraper scoop. The combination of tractor and dozer blades purchased by the respondent from the appellant was used, by the respondent, in the course of making roads, to clear trees from land and to drag a scraper scoop to shift soil. The tractor was an efficient machine of its type. Its power but not its weight was adequate for the road-making operations, and its tracks were not strong enough. The result was that in a short time the tractor became unserviceable.

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In the action the respondent alleged under s.19 subs.(1) of the Sale of Goods Act 1923 (N.S.W.) that it was an implied condition of the contract of sale that the tractor should be fit for the purpose of operating the dozer blade fitted to it and a scoop, in the course of making roads.

The first question is whether the respondent expressly or by implication made known to the appellant the particular purpose for which the tractor was required. The principles governing the application of the opening words of s.19(1) on which this question depends, are explained in Manchester Liners Limited v. Rea Limited (1922) 2 A.C. 74 and Cammell Laird & Company Limited v. The Manganese Bronze and Brass Company Limited (1934) A.C. 402 at pp.422-423. The order as expressed was not merely for a tractor, but for the tractor of the type specified, made, in effect, into a bulldozer. I am of the opinion that the appellant as a trader in tractors and bulldozing equipment must have known that the making of roads was a responsibility of a shire council. I think that the right conclusion to draw from the terms of the order, and the identity of the buyer, is that the particular purpose for which the respondent wanted the tractor was for roadwork, which necessitated bulldozing and the shifting of earth by a scoop drawn by the tractor. Mr. Corney, the appellant's managing director, admitted in cross-examination that the wording of the order suggested that the purpose for which the tractor was required was roadwork, because the order included the dozer blade.

The tractor was inspected by Mr. Bowman before the order was given. He was then not in the service of the respondent, but the Council had decided to appoint him as its shire engineer, a position

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which was then vacant. He said in evidence that at the inspection he told Corney that the respondent required the tractor for bulldozing and shifting soil, by means of a scraper scoop, in the course of making roads. Corney denied this, and the conflict of evidence was not resolved at the trial. It was contended for the appellant that if Bowman's evidence on the point is correct he, and not the respondent, made known the purposes for which the tractor was required, because Bowman's only part in the transaction was that of an expert advising the buyer, and he had no authority from the respondent to negotiate a sale. However, his inspection of the tractor and interview with Corney were connected with the proposed sale. If Bowman, in fact, told Corney that the respondent required the tractor for the particular purposes which have been mentioned, that fact was relevant to the issue whether the buyer had made known those purposes to the seller. Before the inspection took place, the appellant's agent at Inverell, whose name was Wilkins, had in effect offered the tractor for sale to the respondent. The inspection was a sequel to the agent's communication of the offer to the shire clerk. Lord Sumner said in Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation (1927-8) 33 Comm. Cases 195; "the buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase". I think that if Bowman mentioned the particular work which the respondent wanted to carry out with the tractor, that fact would be relevant to the issue whether the respondent made known to the appellant, before it purchased the tractor, the particular purpose for which it was required. I think it is not necessary to resolve the conflict of evidence to see whether the respondent's case as to making the purpose known was supported by that fact, because in my opinion its case on that point is made out upon the terms of the order and by the fact that the buyer was a Shire Council. It must be assumed, as I have said, that the appellant knew that it is a responsibility of a Shire Council to make and maintain roads.

The next question is whether the respondent made known the particular purpose for which the tractor was required so as to show that, as buyer, it relied on the skill or judgment of the appellant as seller. Lord Wright said in Cammell Laird

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& Company Limited v. The Manganese Bronze and Brass Company Limited (supra) at p. 423: "Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation."

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10 The circumstances in which the appellant's agent, Wilkins, notified the shire clerk that his principals had a Breda tractor for sale were that the respondent was in urgent need of a tractor to operate a scraper scoop which it had in its possession. The respondent was apparently more used to tractors of English and American manufacture than to those of the type offered by Wilkins. The respondent had decided to appoint Bowman as its shire engineer, and knew that his experience extended to road construction and to the use of

20 tractors and other machinery for that purpose. The respondent had no shire engineer of its own. Bowman had not yet resigned from the service of another Council, but he was away attending an engineers' conference in Sydney. Bowman's appointment by the respondent as shire engineer took effect after the order for the tractor was given. He did not make the inspection of the tractor in the capacity of a temporary servant of the respondent. His mission

30 to the appellant's premises was to have a look at the tractor spoken of by Wilkins, and see if he thought it was suitable for the respondent's purposes. Bowman met Corney, and said that he came on behalf of the respondent, and that he understood the respondent was interested in a tractor which the appellant had for sale. According to Bowman's evidence, he said to Corney: "Can you tell me anything about it", and Corney said that it was made of special steel with "high wear-resistance qualities". Bowman said that he pointed out to

40 Corney that its tracks were "unorthodox" and both of them inspected it underneath; also that he asked Corney whether the tractor's weight was "a bit low", compared with its high horse-power, and Corney said it was not. Then, according to Bowman, he told Corney that the respondent required the tractor for use in making roads and in answer to Corney's questions, gave details of what that involved. The last thing which Bowman said to Corney was "I will tell the clerk about this view and he

50 will probably send you an order for the tractor".

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This statement would have conveyed to Corney that Bowman intended to tell the shire clerk about what he himself observed at the inspection rather than what Corney said about it. Bowman did not, in fact, report to the shire clerk anything which Corney told him. His report was an oral one. It stated that the tractor "seemed to have plenty of horsepower and was big enough for the work we required". The report was communicated by the shire clerk, Mr. Heywood, to all the members of the Council. Subsequently, he received instructions from the President, Mr. Black, to purchase the tractor. The order was then sent by Mr. Heywood to the appellant. Mr. Black gave this evidence:

"Q. Do you remember the Shire Clerk ringing up concerning the possibility of purchasing a Breda tractor: A. Yes.

Q. Did you give him certain instructions so far as Mr. Bowman was concerned: A. He was to see the tractor. He came down to the Engineer's conference in Sydney and he was to look at the tractor while he was down here and to report on it - to tell us whether it was suitable or not.

Q. Subsequent to that conversation with the Shire Clerk did he contact you on the telephone again - subsequent to Mr. Bowman's visit to Mr. Corney: A. I cannot remember any other subsequent conversation, except that he rang me up at one period and asked for Council's - that was a later date, when I asked him to ring Council and get their approval.

Q. That is what I want: A. He rang me up and I instructed him to ring other councillors. We had a report from Mr. Bowman, apparently, that the tractor was suitable for the work which we required it for.

Q. Had the Shire Clerk told you that: A. Yes. I instructed him to ring the other Councillors. Those Councillors live from 30 to 40 miles apart. It is not possible to call a meeting at all times. We ring them up. When he rang back and said the rest of the Councillors were quite in accordance with the buying of the new tractor I instructed the Shire Clerk to put in a formal order for the tractor.

Q. Did you rely on the Engineer's report: A. I had nothing else to rely on.

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Q. Did you rely on it: A. Yes. I did.

Q. Was that the reason why you purchased the tractor: A. Yes."

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10 Mr. Justice Ferguson, who tried the action, was of the opinion that the respondent did not affirmatively show that it relied on the appellant's skill or judgment. His view was that the evidence was "more susceptible to the inference that there was no such reliance than that there was". He found that it was Bowman's report" and not any reliance upon the seller's skill or judgment that induced the purchase". Mr. Justice Ferguson added "Indeed so far as the President is concerned, he said so".

20 The Full Court had power in the appeal, which the present respondent brought, to make findings of fact, and to assess damages: Supreme Court Procedure Act 1900 s.5. The Court, by a majority, reversed the decision of Mr. Justice Ferguson on the question whether the respondent had relied on the appellant's skill or judgment. Mr. Justice Owen with whom Mr. Justice Herron, in a separate judgment, agreed said: "It is true, as the learned trial Judge said, that the plaintiff relied upon its agent Bowman's favourable report, but does that necessarily end the matter:" Both learned judges thought not. Their view was that Bowman relied on what Corney told him, and as the respondent relied on Bowman's report, made as it was after his inter-
30 view with Corney, it followed that the respondent relied through Bowman on Corney's skill or judgment.

40 Dixon J. (as he then was) pointed out in Australian Knitting Mills Ltd. v. Grant 50 C.L.R. 416 that the propositions of Lord Sumner in Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation (supra) emphasize that the words of s.14 (1) of the Sale of Goods Act 1893 require "actual reliance upon the skill or judgment of the seller as a material inducement to the buyer". S.19 (1) is identical with s.14(1). Reliance by the buyer on the seller's skill or judgment may be shown to have been made vicariously. In that case the reliance is actual.

Lord Sumner said in the Medway Oil and Storage Co. Ltd. v. Silica Gel Corporation that the words of s.14(1) do not mean that "reliance on the seller's skill or judgment is to be exclusive of all

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reliance on anything else, on the advice, for example, of the buyer's own experts ... Indeed it would not be possible to be sure that the element of reliance on the seller entered into the matter at all unless the buyer made some statement to that effect. It follows that the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity." By sending Bowman, an expert, to look at the tractor the respondent scarcely exhibited to Corney that it was relying upon the seller's skill or judgment and nothing else. If independently of Bowman, the respondent relied at all on the appellant's skill or judgment, the evidence of Mr. Black proved that such reliance was not the substantial and effective inducement that led to the purchase. Even though Bowman was not familiar with the tractor, and by asking Corney questions appeared to be relying on his skill or judgment, Bowman was exhibiting his own reliance, not that of the respondent, as buyer. I cannot infer from the evidence that the respondent showed reliance by the agency of Bowman on the appellant's skill or judgment. It seems to me to be a contradiction to say that an expert appointed by a person proposing to buy a commodity, to advise him whether or not he should do so, is an agent by whom that person manifests to the person who has the commodity for sale that the former relies on his skill or judgment. If he does rely on the seller's skill or judgment such reliance is not exhibited by the agency of the expert. It cannot be supposed that any signs of reliance by Bowman on Corney's skill or judgment were manifestations to Corney that the respondent relied on his skill or judgment.

Lord Sumner said in Medway Oil and Storage Co. Ltd. v. Silica Gel Corporation (supra): "This warranty though no doubt an implied one is still contractual; and just as the seller may refuse to contract except upon terms of an express exclusion of it, so he cannot be supposed to consent to the liability which it involves, unless the buyer's reliance on him, on which the liability rests, is shown and shown to him." Whatever reliance on Corney's skill or judgment Bowman exhibited was, in fact, his own reliance, not the respondent's. It is not in my opinion a correct application of the subsection to impute Bowman's reliance, if any, to the respondent. If his reliance is imputed to

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the respondent on the footing that it was induced by Bowman's report, the reliance would be only notional or suppositional so far as the respondent was concerned. But the words of the subsection require, as stated above, an actual reliance by the buyer on the seller's skill or judgment operating as the material inducement. It is clear that the respondent's intention was to rely upon Bowman's advice. He had no instructions to report what

10 Corney or any salesman said. Indeed, Bowman was asked to base a report on what he observed, not on what he was told. The respondent expected that Bowman would make up his own mind about the tractor, not merely gather information from the appellant on which the respondent would make a decision. In fact, Bowman did not report anything that Corney said to him. Bowman's report was the product of his own skill and judgment as an expert, not of

20 Corney's skill or judgment. In my view, Mr. Justice Ferguson in referring to Bowman as the council's own engineer" meant by that expression that Bowman was present in the capacity of an independent expert and not as an officer or servant of the respondent. I am of the opinion that the respondent was not led by reliance of the appellant's skill or judgment to purchase the tractor and the decision of Mr. Justice Ferguson was right.

It was contended for the respondent that Bowman's instructions were limited to matters by

30 looking at the tractor, and that the instructions left room for sufficient reliance by the respondent on the appellant's skill or judgment in respect of matters intrinsic to the design; and that these matters were the cause of the failure of the tractor. In regard to these contentions, it is sufficient to say that the evidence does not admit of any such limitation being placed upon the instructions.

I would allow the appeal and restore the

40 verdict and judgment for the defendant on the first count of the declaration at the trial.

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This appeal relates to the sale of a tractor by the appellant to the respondent, and the only question on the appeal is whether there was in the contract of sale an implied condition as to the fitness of the tractor for a particular purpose. That depends on s. 19(1) of the Sale of Goods Act, 1923 (N.S.W.). The appellant, a company dealing in motor vehicles, does not deny that to supply goods of a description which comprehends such a tractor as it sold to the respondent was within the course of its business. The respondent, the Council of a local government area, required a tractor fit for the particular purpose of road construction work involving clearing and the dragging of a scoop. Before the sale, this purpose was made known to the appellant, for an engineer named Bowman, in the course of inspecting the tractor at the request of the Council, explained to the appellant's managing director, a man named Corney, for what work the tractor was required, and Corney assured Bowman that the tractor was fit for that purpose. (At the trial there was a conflict of evidence as to this between Bowman and Corney, but in the Full Court of the Supreme Court Bowman's evidence on this point was treated as correct, and in this Court the appellant's counsel, no doubt because the prospect of a new trial was uninviting, agreed that we should do likewise. Moreover, Bowman's evidence on the point accords with the probabilities). But the terms of s.19 (1) were not satisfied unless the evidence established (1) that the making known of the purpose to the appellant by Bowman was a making known (a) by the Council and (b) so as to show that the Council was relying on the appellant's skill and judgment, and (2) that the Council in buying the tractor did in fact rely on the appellant's skill and judgment.

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I shall not go through the details of the evidence for they appear sufficiently in the judgments of other members of the Court. It is clear, I think, that the explanation of the purpose which Bowman gave to Corney was given in such terms and in such a context that a reliance at least by

Bowman upon Corney's skill and judgment was a matter of reasonable inference to Corney and is a matter of reasonable inference to the Court - to adapt the language of Lord Sumner in Manchester Liners Limited v. Rea Limited 1922 2 A.C. 74 at p. 90. The explanation was given in reply to a question which Corney asked in order to be in a position to answer the question put him by Bowman, whether the tractor would do the work which the Council expected of it; and that question Corney could not have supposed that Bowman was asking for any other reason than that he was placing reliance on Corney's knowledge of the capabilities of the tractor and his judgment of their sufficiency for the contemplated work. And why should the Court take a different view: We were invited to do so on the ground that Bowman had large experience both of tractors and of the relevant type of work, and that he had no reason to suppose that Corney knew as much about either as he did himself. But this particular type of tractor was new to Bowman, whereas it was the business of Corney, as the dealer, to know for what purposes he was justified in supplying his goods. There was nothing to suggest that in this respect Corney had less knowledge than Bowman might fairly have expected him to have or than he purported to have in fact.

But was Bowman's position such that his making known to Corney the purpose for which the tractor was required was a making known by the Council; And, if so, was it a matter of reasonable inference to Corney, and is it a matter of reasonable inference to the Court, that a reliance was placed upon Corney's skill and judgment, not by Bowman alone but by the Council: The first question depends upon the interpretation to be placed upon the conversation between Bowman and the Shire Clerk which led Bowman to interview Corney. Bowman, of course, was not yet on the staff of the Council, but he had been appointed its Shire Engineer as from a date about three weeks ahead. The Shire Clerk knew that the appellant had a Breda tractor for sale at its premises in Sydney; and he had ascertained where the premises were and that Corney was the appropriate person in the appellant's organization to interview about the tractor. All this information he communicated to Bowman, and, having authority to do so, he made on behalf of the council a request which he described in evidence as being that Bowman should "go to Dependable Motors and have a look at the tractor, and see if he thought that it

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was sufficient for the work we required". Bowman understood, and the Shire Clerk obviously knew that he understood, the nature of the work referred to.

What was the task which the Council thus entrusted Bowman: The answer contended for by the appellant is, in effect, that Bowman was to qualify himself to express a personal opinion as to the fitness of the tractor for the Council's purposes, and was to express that opinion to the Council, and that is all. It was no doubt contemplated, says the appellant, that Bowman, besides inspecting the machine, might also discuss it with Corney; but whatever he might do was to be done on his own account only, and for the sole purpose of making up his own mind as to how he should reply to the Shire Clerk's question. To give a reply with which he was himself satisfied, and that alone, was what the Council wanted him to do.

I would not deny the possibility that a request to a consulting engineer to make an expert examination of a piece of machinery and to report whether he thought it fit for a particular purpose might in some circumstances have such a limited meaning, but the terms of the request and the circumstances surrounding it would need to be very different from those which we have here to consider. The Shire Clerk's words as recounted in the evidence were terse in the extreme. But by concentrating too much on the limited terms in which he is said to have expressed himself and not enough on the situation as a whole, it is possible to miss, as I think the appellant's argument has missed, the true significance of the occasion. The Council, being a corporation, had to get someone to carry out for it that portion of the transaction which consisted in interviewing the sellers and inspecting the tractor for the purpose of deciding whether the councillors should consider the sale on the footing that the machine was fit for the contemplated work. The fact that Bowman was being sent off to inspect the machine at the seller's premises as the Council engineer ad hoc, was enough, I should think, to convey to anyone, in the absence of anything to suggest otherwise, that this, and no less, was what the Council wanted him to do. The appellant's argument seizes upon the portion of the Shire Clerk's request which invited Bowman to report what he himself thought; it insists that what Bowman might think and what the Council might

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think were two different things, and the Shire Clerk was keeping them quite distinct for the reason that Bowman's opinion, when communicated to him, was to constitute simply the material, or some of the material, on which the Council would make up its own mind as to the fitness of the tractor. In my judgment, that is not the natural sense of the matter. Obviously the Council was not contemplating that anyone but Bowman should look at the tractor in the Council's interests, or should discuss with the seller its technical features or its adequacy for the work in view, or should sit in judgment on Bowman's opinion. To Bowman, the implication must have been clear, unless more was said than the evidence suggests, that the question of the fitness of the tractor for the Council's purpose was being handed over to him, so that he should have the responsibility of acting in all respects as a prospective buyer would act, up to the point of making up his mind - and that would mean for all practical purposes the Council's mind - whether the tractor was a suitable machine for the Council to buy.

From this it must follow that the making known by Bowman to the appellant of the particular purpose of the Council was a making known by the Council itself so as to show a reliance by it on the appellant's skill and judgment. And Corney could not have thought otherwise. Bowman had introduced himself as the Council's engineer, and Corney, as he acknowledged in giving evidence, dealt with him as such. Bowman, in speaking to Corney of what the Council expected, referred to the Council as "we"; and that entirely natural use of language provides a straw which shows exactly how the wind was blowing: they were dealing with one another on the basis that Bowman was to be identified with the Council so far as considering the fitness of the tractor for its work was concerned.

Again, it follows from the interpretation which I have placed on the telephone conversation between the Shire Clerk and Bowman that the latter's reliance on Corney's skill and judgment was the Council's reliance. But, it is said, the Council's reliance, if it is to be sufficient for the purposes of s.19 (1), must continue up to the making of the contract of sale, and Bowman's reliance ceased with the making of his report to the Shire Clerk. The report is described in the evidence in language as

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sketchy as that of the Shire Clerk's request. Bowman is said to have told the Shire Clerk that he had inspected the tractor, that it seemed to him to have plenty of horse-power, and that it was big enough for the work that was required. There was, so far as appears, not a word about Corney's assurance as to its fitness, or about any reliance by Bowman on Corney's judgment. But if the Shire Clerk's original request to Bowman had the meaning which I have ascribed to it, the report made in answer to it must necessarily have been intended to convey, and must have conveyed in fact, much more than it said. In terms it gave reasons but no conclusion; it left to inference even the answer to the precise question that had been asked, whether the tractor was suitable. But, considered in all the circumstances, it must have been intended and must have been understood, to imply that Bowman had done what he considered a prudent buyer would do in order to satisfy himself on the subject of fitness, and that in the light of all that had happened in the course of his attending to the matter he had decided to report in favour of the purchase. The councillors, of course, did not interrogate him about the foundations of his opinion; they took them on trust without inquiry. Bowman had handled the matter as he had thought the occasion required, and it was on the basis which his handling of it had provided that the order for the tractor was given.

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Taking this view of the case, I think that the decision of the Supreme Court was correct, and that the appeal should be dismissed.

(d) Taylor, J.

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On the 16th March 1951 the respondent Shire forwarded to the appellant a written order for a "Breda 70 D Crawler Tractor equipped with cable dozer.... as quoted by your Inverell agent, A.V.C. Wilkins". The order was signed by one, Heywood, who was the Shire Clerk and he was authorized by the council to forward it to the appellant. The

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10 tractor and so-called dozer were duly supplied by
the appellant and paid for by the respondent but
at a later stage it was found that some parts of
the equipment were not sufficiently robust for the
purpose for which it was required, that is to say,
heavy and constant operation in connection with
road construction work. Thereafter, on the 30th
March 1954, the respondent Shire instituted pro-
ceedings against the appellant to recover damages
for breach of contract. The action was heard by a
judge of the Supreme Court without a jury and he
directed that judgment in the action should be
entered for the appellant. Subsequently, on appeal
to the Full Court, the present respondent succeeded
in having the order of the learned trial judge set
aside and, in lieu thereof, obtained judgment for
24,915. Damages in this amount were awarded in
respect of the cause of action disclosed by the
first count of the declaration and it is that cause
20 of action with which we are concerned upon this
appeal from the order of the Full Court.

30 It is alleged by the first count that the
respondent made known to the appellant that it re-
quired the tractor and dozer for road construction
work and that in such road construction work the
tractor would be required to push a "dozer" blade,
to drag a 6-8 yard capacity "carry-all scoop" and
to clear land. Further it was alleged "that the
respondent relied on the appellant's skill and
judgment" and other matters were set forth in a
somewhat imperfect attempt to allege that the
agreement sued upon was made in circumstances cal-
culated to attract the operation of s.19(1) of the
Sale of Goods Act, 1923-1937. The case has, how-
ever, at all times been contested on the basis
that the pleadings were sufficient to raise the
appropriate issues of fact which require investi-
gation where the provisions of that section are
invoked.

40 The question which has been debated upon the
appeal lies in a very small compass. There is no
question that the contract goods were of a descrip-
tion which it was in the course of the appellant's
business to supply and the appeal has been con-
ducted on the assumption that it was made known to
the appellant that the equipment was required for
the purposes specified in the first count. The
questions which do arise, however, are whether,
upon the evidence, the purposes for which the goods

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were required were made known to the appellant by the respondent, whether these purposes were made known so as to show that the respondent relied upon the appellant's skill and judgment and, finally, whether it is possible to say that the respondent did, in fact, rely upon the appellant's skill and judgment. The learned trial judge, whilst of the opinion that the seller did either expressly or by implication make its purpose known to the respondent, took the view upon the facts that the respondent did not rely upon the appellant's skill and judgment. This view was rejected by a majority of the Full Court for reasons which will presently appear.

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The Shire of Ashford is situated in the north-western part of New South Wales and, prior to March 1951, the council was desirous of acquiring a tractor for use in connection with road making operations but there were difficulties in the way of obtaining prompt delivery of well-known English or American tractors which would have suited its purposes. But early in 1951 the Shire Clerk, Heywood, communicated with one, Wilkins, at Inverell concerning the possibility of obtaining a Breda tractor. This was an agricultural tractor of Italian construction and Wilkins was the local agent for the appellant company. After some discussion with Wilkins - the nature of which is not revealed by the evidence - Heywood informed a number of members of the council that such a tractor was available for purchase and he was instructed to make further inquiries concerning it. Shortly before the occurrence of these events the council had resolved to appoint a new Shire engineer and it had informed one, Bowman, that he would shortly be so appointed. But at this time he had not been appointed and he was not then ready to take up the duties of such an appointment. In fact at the relevant time he was in Sydney attending a conference of local government engineers and, since he was said to have a "sufficient" knowledge of earth-moving equipment, the president of the Shire council instructed Heywood to communicate with Bowman and to ask him to look at the tractor in question while he was in Sydney and "to report on it - to tell us whether it was suitable or not". This Heywood did. He telephoned Bowman in Sydney and asked him if he would "go to Dependable Motors and have a look at the tractor and see if he thought that it was suitable for the work we required". According to Bowman, Heywood asked him

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whether he "would be so kind as to go and have a look at the tractor. It could be seen at Dependable Motors, Parramatta Road". This Bowman said he would do and he, in fact, inspected the tractor within a day or two and then telephoned to Heywood and made his so-called report. The only evidence concerning the character of the report made by Bowman is that contained in Heywood's evidence and according to this witness, Bowman said that he had inspected the tractor and that "it seemed to him to have plenty of horse-power and was big enough for the work we required". Thereupon the council decided to purchase the tractor and upon the evidence of the president of the Shire council this decision was made in reliance upon Bowman's report.

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If the evidence went no further it would be quite impossible to say that the allegations made in the first count were supported by the evidence. But evidence was led concerning discussions which took place between Bowman and one, Corney, the managing director of the appellant company, on the occasion when Bowman inspected the tractor. Bowman was present at the appellant's premises for a considerable time and, not unnaturally, there was a good deal of conversation between him and Corney. Further, it may be said that in spite of the fact that Bowman spent some time examining the machine, it was not possible for him to acquaint himself with all of the details of its construction though, doubtless, if he had cared to do so, he might have made a much more extensive examination than he did. However, he says that during the course of the conversation with Corney he asked the latter whether the machine would "do the work we expect it to do". In reply Corney said: "What do you expect it to do?" and Bowman answered "It will be engaged entirely on road construction work". To Corney's inquiry "What does that entail:" Bowman's answer was, "Clearing, some clearing and a lot of dozer work, and quite a lot of scoop work." Then, having informed Corney that the council had already purchased a 6-8 yard scraper scoop" and that the tractor would be required to haul that scoop, he inquired whether the tractor would be capable of doing that. Corney's answer was "Yes. That is the type of work the tractor is built for. It is just the type of work to suit it". For the purposes of this appeal this evidence was not challenged and it seems fairly obvious that Corney must be taken to have become aware, at this stage, of the fact

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that the tractor was required for the purposes alleged in the first count of the declaration. Upon this evidence the question arises whether the circumstances of the sale were such as to attract the operation of s. 19 (1) of the Sale of Goods Act.

Upon the trial the learned trial judge was not prepared to find that the buyer had, in fact, relied upon the skill and knowledge of the seller (see Medway Oil and Storage Company Limited v. Silica Gel Corporation 33 Com. Cas 195). Indeed it seemed to him that the evidence was "more susceptible to the inference that there was no such reliance than that there was". "What the Council required, before purchasing the goods, was" he said, "a favourable report from its own engineer, which it received" and it seemed to him "that it was that report and not any reliance upon the seller's skill or judgment that induced the purchase". Thereafter his Honour pointed out that, as far as the Shire President was concerned, his evidence was expressly to that effect. Indeed, as his Honour so clearly indicated, there was no evidence whatever that the respondent council, by any servant or agent, had the slightest knowledge of the conversation which had taken place between Bowman and Corney and, therefore, no grounds upon which it could be held that the council, in making the purchase, had relied upon Corney's statements. In passing it should be observed that it is obvious that his Honour's reference to the "Council's own engineer" was not intended to characterize Bowman as a servant or agent of the council; the relevant passage is intended to denote only that his Honour thought that the facts established that what the council desired was a report from an engineer of its own selection.

Upon appeal, neither, Owen, J. nor Herron J. considered it fatal to the present respondents case that no person other than Bowman (except of course Corney) had any knowledge of the material conversation. Those learned judges, however, differed somewhat in their approach, firstly, to the question whether the evidence showed that the respondent had made known to the appellant the particular purpose for which the goods were required so as to show that the respondent relied upon the appellant's skill and judgment and again, to the question whether the respondent had in fact relied upon the appellant's skill and knowledge.

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Herron J. thought the inference clear that Bowman "was the agent of the Council to introduce the question of the purchase of the tractor to the defendant and to initiate the transaction although he was not an agent to purchase the tractor". "It was" he said, "implicit in the instructions given to Mr. Bowman, if it became appropriate that he could interview someone in the position of a salesman for the defendant in order to satisfy himself that the tractor was suitable for the work required by the Council". Of course, if Bowman was the agent of the council for these purposes there would be little difficulty in the matter and considerable justification might be found for the proposition that Bowman was "authorised to make known to the seller the purpose for which the buyer required the tractor". But the fact is that Bowman was not invested with any authority to represent or act for the respondent; he was an engineer, he was said to have considerable knowledge of earth-moving plant and, since his appointment as Shire engineer was imminent and his qualifications were known to the respondent and he happened to be in Sydney at the time, the respondent sought the benefit of his advice in the matter. He was merely asked to inspect the tractor whilst he was in Sydney and to report on it. In his own words he was asked "if he would be so kind as to go and have a look at the tractor" I am quite unable to understand how this request could constitute Bowman an agent of the Council for any purpose; it gave him no authority to speak for the council or to engage in discussions concerning, or negotiations with respect to, the purchase of the tractor though, perhaps, if he had reported to the respondent the substance of his conversation with Corney, the initial foundation might have been laid for the assertion that the respondent, in some substantial measure, relied upon the skill and judgment of the appellant, as appears from the evidence Corney thought that he was dealing with the Shire engineer and there would be much to be said for the proposition that Corney intended that the substance of the discussion should be passed on to those whose responsibility it was to make the decision to purchase. But this did not occur and, since Bowman did not in any sense represent the council and had no authority to speak or deal on its behalf, it is impossible to conclude that the respondent relied upon the appellant's skill or judgment unless that conclusion ought to be reached upon the line of reasoning which appealed to Owen J.

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Before proceeding to consider that line of reasoning, however, it is convenient to add that the considerations already mentioned are, in my opinion, also sufficient to dispose of the antecedent question whether the respondent made known to the appellant the particular purpose for which the goods were required so as to show that the former relied upon the latter's skill or judgment. The plain fact is that the respondent did not make its purpose known to Corney. What is sought was the benefit of Bowman's knowledge and experience and what steps he took upon the occasion of the inspection to satisfy himself concerning the suitability of the tractor were a matter for his own independent judgment and when he discussed the tractor with Corney he did so on his own behalf and not on behalf of the respondent.

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Each of these conclusions rests ultimately upon the view that the critical discussion did not form part of the "dealings" or "negotiations" of the parties antecedently to or concurrently with the making of the contract and it is, of course, to such dealings or negotiations that s.19 is directed. I do not, however, understand Herron J. to suggest otherwise. Rather, he took the view that the evidence disclosed that Bowman was invested with authority to act for the respondent in making known its purpose to the appellant. But with respect to the learned judge the evidence falls far short of this.

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In his approach to the problem in the case Owen J. referred to Bowman as the "agent of the Council to report to it on the capabilities of the tractor for road construction work". But his final conclusion does not depend upon this characterization of Bowman. That conclusion he reached by a series of steps which are set out in His Honour's reasons. According to his Honour there were two questions in the case, the first being whether "Bowman, in making known to Corney the purpose for which the plaintiff required the tractor, did so in such a way as to show Corney that reliance was being placed on his skill and judgment" and, the second, whether the respondent "did in fact rely upon the seller's skill and judgment when it decided to purchase the tractor". The first of these two questions is, however, stated in a form which, to my mind, tends to obscure the critical problem. The critical problem was whether there was a "making known" by the respondent in such a way as

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to show that it relied upon the appellant's skill or judgment. Perhaps in the circumstances of the case it may be said that the real question was whether the "making known" took place in the course of antecedent or concurrent dealings between the parties and, if so, whether the circumstances were such as to show that the respondent relied upon the appellant's skill and judgment in deciding to purchase the tractor. The second question his Honour resolved in the following manner. He said:

"It is true, as the learned trial Judge said, that the plaintiff relied upon its agent Bowman's favourable report, but does that necessarily end the matter: If that report was made, as I think it was, in reliance to a material extent upon Corney's skill and judgment and the plaintiff in its turn relied upon the report, can it not be said that it in fact purchased in reliance on the skill and judgment of the seller: If Bowman had reported to the plaintiff that his favourable opinion of the fitness of the tractor for road construction work was based in part on his own inspection of it and in part of what Corney had told him as to its fitness for that purpose, and the plaintiff had acted upon that report, I am of the opinion that the plaintiff would have been entitled to a verdict on the first count. The facts, as I see them, are as follows:-

- (1) Corney knew that Bowman was inspecting the tractor on behalf of the plaintiff which was considering purchasing it.
- (2) Corney knew that Bowman was to make a report to the plaintiff on the suitability of the tractor, for road construction work.
- (3) Corney knew that Bowman, in forming his opinion and reporting on the suitability of the tractor, was relying to a material extent on Corney's skill and judgment.
- (4) In making his report to the plaintiff, Bowman did in fact rely to a material extent on Corney's skill and judgment.
- (5) The plaintiff purchased the tractor in reliance on Bowman's report.

In these circumstances I am of opinion that Section 19 (1) operated".

This latter conclusion is not in any way based upon the notion that Bowman was the agent or servant of the respondent. It is reached merely by asserting that because Bowman relied upon Corney's statements

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(d) Taylor, J.
- continued.

relied upon the report, it must be taken to have relied upon Corney's skill or judgment. With respect to Owen J. I do not agree. The report expressed Bowman's opinion only and it is, in my opinion, impossible to say that the respondent, which was not a party to and had no knowledge of what had passed between Bowman and Corney, relied upon the skill and judgment of the latter in deciding upon the purchase. For the reasons already given I am of the opinion that both of the questions raised by Owen J. should have been answered adversely to the respondent. But, additionally there are reasons for doubting the validity of some of the propositions involved in the steps by which the learned judge reached his conclusion on the second question as stated by him. Proposition (3) is that Corney knew that Bowman, in forming his opinion and reporting on the suitability of the tractor, was relying to a material extent on Corney's skill and judgment. I doubt very much if such a conclusion is possible upon the facts. No doubt there was considerable discussion between Corney and Bowman but it does not appear from the evidence that Corney was aware of the nature of the report which Bowman proposed to make or that he knew that Bowman - himself an engineer with considerable experience of earth-moving equipment - would rely to any extent upon Corney's skill or judgment. The next proposition in his Honour's series of steps is that in making his report to the respondent Bowman did, in fact, rely to a material extent on Corney's skill and judgment. Again I doubt whether such a conclusion is possible upon the evidence. The report which Bowman made was that "... he had inspected the tractor. It seemed to him to have plenty of horse-power and was big enough for the work we required". It is, of course, true that he said that in making this report, he did rely upon the statements made to him by Corney but the condition for breach of which the respondent sought to recover damages was based upon Corney's alleged assertions that the tractor was reasonably fit for road construction work and reasonably fit to push a "dozer" blade, to drag a 6-8 yard carry-all scoop and to clear land. It seems to me that these assertions cannot fairly be said to have played any part in inducing the report which Bowman, in fact made. His report dealt with his own conclusions based, apparently, upon a consideration of the horse-power and the size or weight of the tractor and not upon the subject matter of the claims which Corney had made for it. To my mind these constitute additional reasons for thinking that the respondent did not make out a case.

For the reasons given I am of the opinion that the appeal should be allowed, the order of the Full Court set aside and that of the trial judge restored.

No. 23

REASONS FOR JUDGMENT

DEPENDABLE MOTORS PTY LIMITED

v.

THE COUNCIL OF THE SHIRE OF ASHFORD

In the
High Court of
Australia

No. 23

Reasons for
Judgment.

8th May, 1959.

(e) Menzies, J.

10 The appellant ("Dependable Motors") sold the respondent ("The Council") a Breda 70 D crawler type tractor equipped with a cable dozer blade for £6,751.14.0d. When it was discovered that the tractor was not suitable for road work the Council brought an action for damages for, inter alia, breach of an implied warranty of reasonable fitness for the purpose of road work, arising, so it was alleged, under s.19(1) of the Sale of Goods Act of New South Wales. The action was heard by Ferguson J. and at the trial it was admitted that it was in the course of the business of Dependable Motors to supply goods of the description of tractors so equipped and it was not contended that the

20 sale was of a specified article under its trade name. The learned trial Judge found that the tractor was not reasonably fit for road work and that the Council had made known to Dependable Motors that it required the tractor for that purpose. He found however that it had not done so in such a way as to show that it relied upon the seller's skill or judgment; accordingly he gave judgment for Dependable Motors. From this judgment the Council appealed to the Full Court which

30 by a majority (Owen and Herron JJ., Hardie J. dissenting) allowed the appeal and entered judgment for the plaintiff for £4,915. It is from that judgment that Dependable Motors appeals to the Court. The only question in issue is whether the buyer made known to the seller that it required the tractor for road work so as to show that it relied upon the seller's skill and judgment sufficiently for the purposes of the section.

40 The evidence upon this issue was that the Council required a heavy tractor for road work and the Shire Secretary, A.N. Heywood, communicated with one Wilkins of Inverell, who, it seems, was the local agent of Dependable Motors and from whom Heywood found out that a Breda tractor could be

In the
High Court of
Australia

No. 23

Reasons for
Judgment.

8th May, 1959.

(e) Menzies, J.

- continued

purchased from Dependable Motors. Wilkins provided Heywood with one of Dependable Motors' pamphlets relating to the Breda tractor and this pamphlet showed it fitted with a dozer blade. No more is known of what passed between Heywood and Wilkins nor is there any evidence of the use that was made of the pamphlet. Heywood then telephoned some members of the Council including the Shire President, J.R. Black, and on the 12th March 1951, in accordance with the instructions given to him, he telephoned F.E. Bowman who was then in Sydney attending the Local Government Engineers' Annual Conference and asked him to "go to Dependable Motors and have a look at the tractor and see if he thought that it was suitable for the work we required." This could not have been the whole of the conversation because apart from anything else it is clear that Heywood gave Bowman the name of Albert Corney as the man to see at the premises of Dependable Motors in Parramatta Road but beyond this, what was said is matter only for speculation. Bowman was an engineer with experience of earth moving equipment who had by this time been appointed Shire Engineer to the Council but his appointment had not become effective and he was still employed by another municipality; he did not take up duty with the Council until early in April. Bowman without loss of time went to the premises of Dependable Motors and there saw Corney. Bowman's account of what took place was that he told Corney that he was there on behalf of the Ashford Shire Council which he understood was interested in a tractor that Dependable Motors had for sale and asked to see it. Corney pointed the tractor out and there was conversation in the course of which he told Corney that the tractor was required for road work with a dozer blade and a scraper scoop, and in response to his enquiry whether it would do such work, Corney told him that the tractor was built to do just that sort of work. Corney's account of what happened was that Bowman introduced himself as the Shire Engineer from the Ashford Council and asked to see a Breda tractor 70 D Model. He was shown the tractor and asked a number of questions and was given a pamphlet. This was another copy of the pamphlet that Wilkins had previously given Heywood. Corney's evidence was that he was not asked whether the tractor was suitable for road work and that he did not say that it was, although he gave evidence that he knew it was wanted for road work, that he believed it

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was suitable for road work and had advertised that it was. It is common ground that part of the conversation related to getting a firm called "Brown and Bunyan" to fit a blade to the tractor. Bowman stated that at the end of the conversation he said "All right, I will tell the clerk about this view and he will probably send you an order for the tractor". After this visit Bowman rang Heywood and Heywood's evidence of what Bowman said was "He told me that he had inspected the tractor. It seemed to him to have plenty of horse-power and was Big enough for the work we required." Heywood then spoke to various members of the Council including the President and was told to buy the tractor. On the 16th March an order from the Council was addressed to Dependable Motors in these terms: "1 Breda 70 D Crawler Tractor equipped with cable dozer but not a P.C.U. as quoted by your Inverell agent, A.V.C. Wilkins." Dependable Motors then sent an invoice for £6,745 made up of two items as follows:

One New Breda Crawler Tractor Model 70 D	
Serial No. 4942	£5,915.
One Cable controlled Trailbuilder	
fitted to Tractor	£830.

The Council paid Dependable Motors £6,751.14.0d by cheque on the 28th April and received a receipt dated 2nd May. The tractor equipped with the cable dozer was delivered to the Council by Wilkins in about the middle of May.

It is only necessary to add that the Shire President gave the following evidence:

"Q. Do you remember the Shire Clerk ringing up concerning the possibility of purchasing a Breda tractor. A. Yes.

Q. Did you give him certain instructions so far as Mr. Bowman was concerned. A. He was to see the tractor. He came down to the Engineer's conference in Sydney and he was to look at the tractor while he was down here and to report on it - to tell us whether it was suitable or not.

Q. Subsequent to that conversation with the Shire Clerk did he contact you on the telephone again - subsequent to Mr. Bowman's visit to Mr. Corney.

In the
High Court of
Australia

No. 23

Reasons for
Judgment.

8th May, 1959.

(e) Menzies, J.

- continued

In the
High Court of
Australia

No. 23

Reasons for
Judgment.

8th May, 1959.

(e) Menzies, J.

- continued

A. I cannot remember any other subsequent conversation, except that he rang me up at one period and asked for Council's - that was a later date, when I asked him to ring Council and get their approval.

Q. That is what I want. A. He rang me up and I instructed him to ring other councillors. We had a report from Mr. Bowman, apparently, that the tractor was suitable for the work which we required it for.

Q. Had the Shire Clerk told you that. A. Yes. I 10
instructed him to ring the other Councillors. Those Councillors live from 30-40 miles apart. It is not possible to call a meeting at all times. We ring them up. When he rang back and said the rest of the Councillors were quite in accordance with the buying of the new tractor I instructed the Shire Clerk to put in a formal order for the tractor.

Q. Did you rely on the Engineer's report. A. I 20
had nothing else to rely on.

Q. Did you rely on it. A. Yes. I did.

Q. Was that the reason why you purchased the tractor. A. Yes."

In Medway Oil and Storage Co. Ltd. v. Silica Gel Corporation (1928) 33 Com. Cas. 195, the judgment of the House of Lords delivered by Lord Sumner stresses that actual reliance by a buyer upon the seller's skill or judgment must be proved or inferred. Without this it could not be said that the buyer made known its reliance to the seller; it could not make known something which did not exist. In this case, Ferguson J. said:- "It seems to me that the evidence is more susceptible to the inference that there was no such reliance than that there was". The evidence which the learned Judge had in mind in making this observation was not merely the evidence of the Shire President quoted earlier but, more importantly, the terms of Bowman's instructions from Heywood and his report to Heywood. As to these latter 40
matters, which I regard as of critical importance, I am ready enough to believe that the evidence is not a complete record of what occurred and I acknowledge the possibility that, in doing what he says he did at Dependable Motors, Bowman did what he was

10 told by Heywood to do. If I could be satisfied that this was the case, I would have no difficulty in concluding both that the Council relied upon Dependable Motors and that this reliance was communicated to Dependable Motors when Bowman told Corney the purpose for which the Council required a tractor and asked whether the Breda would do such work, because to tell Bowman to find out from Dependable Motors whether the Breda tractor was suitable for the roadwork for which the Council required a tractor would betoken reliance by the Council to some extent upon Dependable Motors. I have, However, come to the conclusion that the evidence does not warrant my substituting such a finding for that of the learned Trial Judge. Indeed, I agree with him that the evidence, as it stands, points to the inference that the Council was relying upon Bowman to the exclusion of Dependable Motors. Nor do I think, having regard to the instructions that the evidence shows he received, is it possible to treat Bowman as part of the Council so that his reliance can be regarded as that of the Council itself. His job was to inspect and report his own opinion, and that was all.

20
30 It is then necessary to decide whether, because Bowman relied upon what Corney told him, and I have no doubt he did, and the Council in turn relied upon Bowman's opinion, that, as the Full Court decided, is sufficient to bring the section into operation.

40
50 As to this, I do not think it is sufficient to bring the case within the section to show that Bowman, in making known to Corney the purpose for which the Council required the tractor, did so in such a way as to show Corney that he was relying upon the skill or judgment of the vendor for the purpose of making a report and then to find second hand reliance by the Council upon Dependable Motors by saying that the Council, in turn, relied upon Bowman's report. The section, as I read it and understand its exposition in Medway Oil and Storage Co. Ltd. v. Silica Gel Corporation (*supra*) requires that the seller should have communicated to it not merely that reliance was being placed upon its skill or judgment but that the reliance was that of the buyer, and that this communication should follow from the making known to the seller of the buyer's purpose. It is such a communicated reliance by the Council that appears to me to be lacking on the evidence as it stands.

It is for these reasons I would allow the appeal.

In the
High Court of
Australia

No. 23

Reasons for
Judgment.

8th May, 1959.

(e) Menzies, J.

- continued

In the
High Court of
Australia

No. 24

ORDER ON APPEAL

No. 24
Order on Appeal.
8th May, 1959.

IN THE HIGH COURT OF AUSTRALIA }
NEW SOUTH WALES REGISTRY }
ON APPEAL from the Supreme Court of New South Wales

BETWEEN: DEPENDABLE MOTORS PTY. LIMITED
(Respondent) Appellant

AND

THE COUNCIL OF THE SHIRE OF ASHFORD
(Appellant) Respondent

10

O R D E R

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN
DIXON MR. JUSTICE McTIERNAN, MR. JUSTICE KITTO, MR.
JUSTICE TAYLOR AND MR. JUSTICE MENZIES.

Friday the 8th day of May, 1959.

THIS APPEAL from the judgment and order of the Full
Court of the Supreme Court of New South Wales given
and made on the 10th day of September, 1958 allow-
ing an appeal from a judgment and order of the
Supreme Court of New South Wales given and made by 20
His Honour Mr. Justice Ferguson on the 4th day of
December 1956 coming on for hearing before this
Court at Sydney on the 26th and 27th days of
November, 1958 UPON READING the transcript re-
cord of proceedings herein AND UPON HEARING Mr.
Reynolds of Queen's Counsel and Mr. J.B. Sinclair
of Counsel for the Appellant and Mr. Jacobs of
Queen's Counsel and Mr. Cassidy of Counsel for the
Respondent THIS COURT DID ORDER on the said 27th
day of November, 1958 that this appeal should stand 30
for Judgment and the same standing for judgment
this day accordingly at Sydney THIS COURT DOTH
ORDER that this appeal be and the same is hereby
allowed AND THIS COURT DOTH FURTHER ORDER that the
said Order of the Full Court of the Supreme Court
of New South Wales be and the same is hereby dis-
charged And in lieu thereof THIS COURT DOTH ORDER
THAT the appeal to that Court be dismissed and
that the verdict and judgment in the action for
the defendant with costs be confirmed AND THIS
COURT DOTH FURTHER ORDER that it be referred to the 40
proper officers of the respective Courts to tax and

certify the costs of the Appellant of the proceedings in the Supreme Court of New South Wales and in this Court and that such costs when so taxed and certified be paid by the Respondent to the Appellant or to its Solicitors, Frank A. Davenport and Mant, AND THIS COURT DOETH BY CONSENT ALSO ORDER that the sum of £50 paid into Court as security for the costs of this appeal be paid out to the Appellant or to its said Solicitors,

In the
High Court of
Australia

No. 24

Order on Appeal.
8th May, 1959.

- continued

10

BY THE COURT

(Sgd.) N. Gamble.

DISTRICT REGISTRAR

No. 25

ORDER GRANTING LEAVE TO APPEAL TO
HER MAJESTY IN COUNCIL

(L.S.)

AT THE COURT AT BUCKINGHAM PALACE

The 21st day of December, 1959

PRESENT

20

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

EARL OF PERTH

MR. SECRETARY WARD

MR. BROOKE

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 16th day of December 1959 in the words following, viz.:-

30

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Council of the Shire of Ashford in the matter of an Appeal from the High Court of Australia between the Petitioner Appellant and Dependable Motors Pty. Limited Respondent setting forth (amongst other matters): that on the 30th March 1954 the Petitioner commenced an action in the Supreme Court of New South Wales claiming damages from the Respondent for breaches of the implied conditions for fitness for

In the
Privy Council

No. 25

Order granting
leave to appeal
to Her Majesty
in Council.

21st December,
1959.

In the
Privy Council

No. 25

Order granting
leave to appeal
to Her Majesty
in Council.

21st December,
1959.

- continued

purpose under S.19(1) of the Sale of Goods Act 1923-1953 (New South Wales) and for breach of the implied condition of merchantable quality under S.19(2) of the aforesaid Act and for breach of an express warranty all of these alleged breaches being in respect of the sale to the Petitioner by the Respondent of a tractor and fittings including a cable dozer: that on the 4th December 1957 the Court delivered Judgment in favour of the Respondent: that 10
the Petitioner appealed to the Full Court of the said Supreme Court which on the 10th September 1958 entered Judgment for the Petitioner in the sum of £4,915.0s.0d.: that the Respondent appealed to the High Court of Australia which by its Order dated the 8th May 1959 allowed the Appeal: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Order of the High Court of Australia dated the 20
8th day of May 1959 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and 30
prosecute its Appeal against the Order of the High Court of Australia dated the 8th day of May 1959:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon 40
payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer
administering the Government of the Commonwealth
of Australia for the time being and all other
persons whom it may concern are to take notice
and govern themselves accordingly.

W. G. AGNEW.

In the
Privy Council

No. 25

Order granting
leave to appeal
to Her Majesty
in Council.

21st December,
1959.

- continued

Plaintiff's
Exhibits

PLAINTIFF'S EXHIBITS

A
Order Form.
16.3.1951

EXHIBIT A
ORDER FORM

Goods Order No.....
Job Order No..... 803

ORDER FORM

ASHFORD SHIRE COUNCIL

16/3/51

To Mr. DEPENDABLE MOTORS
SYDNEY

10

(Requisition No.....)

1 Breda 70 D Crawler Tractor equipped with cable dozer but not a P.C.U. as quoted by your Inverell agent, A.V.C. Wilkins.

SALES TAX LKEMPTION
The above Goods are for Council's use and are not for re-sale.

A.N. HEYWOOD Clerk

To be forwarded to Chargeable toFund 20
At.....Account

Vouchers for payment should be rendered to the Clerk. Above Order Nos. to be quoted on voucher, or order to be attached thereto. Quote the order Nos. on the Delivery Ticket and Invoice.

321.

EXHIBIT A

I N V O I C E

Plaintiff's
Exhibits

A

Invoice.

- . 3. 1951

STATEMENT April 1951

Parramatta Branch
Cnr. Church & Early Streets
PARRAMATTA

Phones: UW 9966-7

DEPENDABLE

82a-90 Parramatta Road, Camperdown.

M. The Shire Clerk

ASHFORD.

10

DEPENDABLE MOTORS PTY. LTD.

Phones LA 5134 (3 Lines)

GENERAL MOTOR MERCHANTS

To Account Rendered

To Goods

Proforma Invoice

One (1) only New Breda crawler
tractor Model 70D Serial
No. 4942 £5915.0.0

20

One (1) only Cable controlled
Trailbuilder fitted to
Tractor. £ 830.0.0

P.C.U. not supplied

Net price ex store £6745.0.0

Sales Tax extra if applicable.

Terms Strictly Net cash 30 days.

Plaintiff's
Exhibits

EXHIBIT A

PASSING OF ACCOUNT

A
Passing of
Account.
28.4.1951.

THE COUNCIL OF THE SHIRE OF ASHFORD VOUCHER NO.262
CHEQUE NO.4759

Period of Supply or Date of Service.	NAME OF CLAIMANT } (Address).....	DEPENDABLE MOTORS. Rate	AMOUNT		
			£	S	D
1951					
		To Goods or Services, as per Order No.....			
		Particulars:-			
April 28		<u>TRACTOR & DOZER BLADE</u>	6745	-	-
		<u>EXCHANGE</u>		6	14
			6751	14	-

10

Signature of Claimant..... TOTAL £

I certify that the Service or Supply has been rendered or delivered according to order, and (in case of Accounts for Goods Supplied) that the goods particularised have been supplied in good order and condition.

I certify that the Castings and Computations, and the Rates (if any) have been checked by me, and that same are correct.

20

F.E. BOWMAN

A.N. HEYWOOD

Engineer or other Receiving Servant.

Shire Clerk.

Passed the Finance Committee on J.R.B. and recommended to Council for payment.....
..... J.R. BLACK Vice Chairman

30

RECEIVED on this the day of19
from THE COUNCIL OF THE SHIRE OF ASHFORD

the sum of Pounds Shillings
and pence, in full payment and satisfaction of the above account.

(WITNESS)

.....
Signature of person receiving payment.

40

EXHIBIT A
C H E Q U E

Plaintiff's
Exhibits
A
Cheque,
28.4.1951

ASHFORD SHIRE COUNCIL

NO. 04759

BANK OF NEW SOUTH WALES
Established 1817

C

ASHFORD

28th April 1951

N.S.W.

PAY DEPENDABLE MOTORS PTY. LTD. OR ORDER

10

THE SUM OF Six Thousand and Seven Hundred and
Fifty One Pounds 14/ £6751.14.0

J. R. BLACK PRESIDENT

A. N. HEYWOOD SHIRE CLERK

EXHIBIT A

R E C E I P T

A
Receipt,
2. 5. 1951

DEPENDABLE

PHONES:

NO. 5014

LA 5134
(3 Lines)

DEPENDABLE MOTORS PTY. LTD.

20

82a-9C PARRAMATTA ROAD, CAMPERDOWN

2nd May 1951.

Received from ASHFORD SHIRE COUNCIL the sum of
Six thousand seven hundred and fiftyone Pounds
fourteen Shillings and . . . Pence by ..Chq...
for BREDA 70D SERIAL NO. 4942

With Thanks
Dependable Motors Pty. Ltd.

£6751:14:-

per P. CALLAGHAN

30

This is our only recognised form of receipt and
becomes valid upon Cheque No. 04759 being cleared
through bank.

Plaintiff's
Exhibits

EXHIBIT E

E

LETTER - PLAINTIFF'S SHIRE CLERK TO DEFENDANT

Letter -
Plaintiff's
Shire Clerk to
Defendant.
4. 7. 1951

All communications to be
addressed to THE SHIRE
CLERK, ASHFORD.

TELEPHONE 15
ASHFORD EXCHANGE.

ASHFORD SHIRE COUNCIL

ASHFORD 4th July 1951.

Dependable Motors.,
Parramatta Road.,
CAMPERDOWN.

10

Dear Sirs,

The "Breda" tractor purchased from yourselves by this Council some weeks ago is giving cause for very serious concern. Although the power output appears adequate for the weight of the machine, it is using at least two gallons of oil for every eight hours worked. This must be considered very excessive.

Every endeavour has been made to ascertain the reason but to date no leaks have been detected, nor has there been any trace of oil on the ground where the machine has stood. It must therefore be assumed that the oil is being consumed in the cylinders. This is borne out by the fact that where the machine is under load the exhaust shows some smoke and the characteristic smell of burning oil is quite apparent.

20

I would be pleased if you would give this matter very earliest attention and reply within the next few days.

30

Yours faithfully,

A.N. HEYWOOD

SHIRE CLERK.

EXHIBIT FLETTER - DEFENDANT'S SOLICITORS TO
PLAINTIFF'S SOLICITORSPlaintiff's
Exhibits

F

Letter -
Defendant's
Solicitors to
Plaintiff's
Solicitors.

1. 9. 54.

FRANK DAVENPORT & MANT
Solicitors, &c.JOHN F. MANT LL.B.
KEITH B. CAMPBELL LL.B.CITY MUTUAL LIFE
ASSURANCE BUILDING
60-66 HUNTER STREET
SYDNEY.

1st September, 1954.

10

TELEPHONES (BW 8756
(BW 8757
CABLE ADDRESS "DAVENPORT"
SYDNEY.ADDRESS TO
G.P.O. Box NO.
1429 SYDNEYKEITH B. CAMPBELL
COMMISSIONER FOR AFFIDAVITS
JM. AJ.Messrs. Campbell & Melville,
Solicitors,
46 Pitt Street,
SYDNEY.

20

Dear Sirs,

Re: DEPENDABLE MOTORS PTY. LTD. AND ASHFORD
SHIRE COUNCIL.We refer to the declaration filed and served
herein and would be glad if you would furnish us
with the following further and better particulars:-

A. As to the first count.

30

(a) is the agreement referred to oral or in
writing or partly oral and partly written.(b) if oral or partly oral, when, where and
between whom were the conversations had.(c) if in writing or partly in writing,
please identify the documents.(d) was the making known of the purpose oral
or in writing or partly oral and partly
written.(e) if oral, when, where and between what
persons did such conversation take place.(f) if in writing or partly in writing, please
identify the documents.

Plaintiff's
Exhibits

F

Letter -
Defendant's
Solicitors to
Plaintiff's
Solicitors.

1. 9. 54.

- continued

(g) please specify precisely in what respects
it is alleged that the goods were not fit
for the purposes specified in the count.

B. As to the second count.

(a) is the contract for purchase referred to
the same as in the first count.

(b) if not, please give similar particulars
as in A (b) and (c) above.

(c) please specify precisely in what respects
it is alleged that the goods were not of
merchantable quality.

10

C. As to the third count.

(a) is the contract of purchase referred to
the same as in the first count.

(b) if not, please give similar particulars
as in A (b) and (c) above.

(c) please specify in respect of the promise
sued upon whether it is alleged to have
been made orally or in writing.

(d) if orally, when, where, by whom on behalf
of the Defendant and to whom is it al-
leged such promise was made.

20

(e) is it alleged that such promise was a
term and condition of the agreement.

(f) if in writing, please identify the
document.

Upon receipt of your reply we shall proceed
to file our Pleas.

Yours faithfully,

FRANK A. DAVENPORT & MANT.

30

EXHIBIT FLETTER - PLAINTIFF'S SOLICITORS TO DEFENDANT'S
SOLICITORS IN REPLYCAMPBELL & MELVILLE
SOLICITORSERIC CAMPBELL
W.S. MELVILLE LL.B.Fourth Floor
"Endeavour House"
46 Pitt Street,
(near Bridge Street)
SYDNEY.

PHONES BU 6432-3

WSM:EL.

10

TELEGRAMS "ECOM", SYDNEY

22nd November, 1954

Messrs. F.A. Davenport & Mant,
Solicitors,
60 Hunter Street,
SYDNEY

Dear Sirs,

Re: ASHFORD SHIRE COUNCIL v DEPENDABLE
MOTORS PTY. LIMITED.We are in receipt of your letter of the 1st
September last and reply thereto as follows:-

20

A. (a) In writing.

- (c) Order form forwarded on or about 16th
March, 1951.
Letter plaintiff to defendant, 16th
March, 1951.
Defendant's acceptance by letter, 27th
March, 1951.

(d) Oral and by letter.

30

(e) Between Mr. Corney of the defendant
Company and F.E. Bowman from the Council
at the defendant's premises in approxi-
mately the middle of March, 1951.(f) The order and the letter of 16th March,
1951, referred to in sub-paragraph (c).

(g) (i) The tracks spun under load.

- (ii) The tracks jumped the driving
sprockets when the tractor was under
load, especially when turning or
reversing, indicating that

Plaintiff's
Exhibits

F

Letter -
Plaintiff's
Solicitors to
Defendant's
Solicitors in
Reply.

22.11.1954

Plaintiff's
Exhibits

F

Letter -
Plaintiff's
Solicitors to
Defendant's
Solicitors in
Reply.

22.11.1954

- continued

- (a) the track tensioning springs were of insufficient strength.
- (b) the sprockets did not grip the tracks properly or a combination of (a) and (b).
- (iii) The tracks were unsuitable in that they
 - (a) showed signs of excessive wear, being marked or scored after very short period of operation.
 - (b) they became bent and distorted.
 - (c) they appeared to stretch or elongate as indicated by the number of times it was found necessary to adjust them, i.e. tighten them to normal operating tension.
- (iv) The track tensioning springs and sprockets were unsuitable.
- (v) Excessive oil consumption.
- (vi) Overheating and seizing of clutch.
- (vii) The weight of the machine was insufficient to provide the tractive resistance necessary to take full advantage of the power output.
- (viii) Lack of adequate protection for radiator grill.

10

20

- B. (a) Yes.
- (c) See answers to A. (g) (supra).
- C. (a), (b), (c), (d) and (f).

The plaintiff will rely on the agreement particularised in A(a) and on the oral conversations particularised in A. (e) (supra).

30

(e) The pleading speaks for itself.

We are at a loss to see why these particulars should have been necessary before pleading, but the same are, nevertheless, furnished upon that basis and we should be pleased if you would have the pleas filed without further delay.

We reserve the right to supply further particulars should the occasion arise.

40

Yours faithfully,
CAMPBELL & MELVILLE.

EXHIBIT F

LETTER - PLAINTIFF'S SOLICITORS TO
DEFENDANT'S SOLICITORS IN REPLY

Plaintiff's
Exhibits

F

Letter -
Plaintiff's
Solicitors to
Defendant's
Solicitors in
reply.

5.10.1956

CAMPBELL & MELVILLE
SOLICITORS

ERIC CAMPBELL
W.S. MELVILLE LL.B.

Fourth Floor
"Endeavour House"
46 Pitt Street,
(near Bridge Street)
SYDNEY

WSM:EL. 5th October, 1956.

PHONES BU 6432-3
TELEGRAMS. "ECOM" SYDNEY

10

Messrs. Davenport & Mant,
Solicitors,
60 Hunter Street,
SYDNEY

Dear Sirs,

Re: ASHFORD SHIRE COUNCIL v. DEPENDABLE
MOTORS PTY. LTD.

We refer to your letter of 22nd November, 1954,
requesting further and better particulars.

20

We wish to add to our answer to paragraph A.(g)
the following:-

"(ix) No adequate provision was made for con-
tinuity of supply of spare parts and
spare parts have not been and are not
now available."

Yours faithfully,

CAMPBELL & MELVILLE.

Plaintiff's
Exhibits

EXHIBIT F

F

Letter -
Defendant's
Solicitors to
Plaintiff's
Solicitors in
reply.

11.10.1956

LETTER-DEFENDANT'S SOLICITORS TO
PLAINTIFF'S SOLICITORS IN REPLY

FRANK A. DAVENPORT & MANT
SOLICITORS, &c.

JOHN F. MANT LL.B.
KEITH B. CAMPBELL LL.B.
K.H. KINNIMONT

CITY MUTUAL LIFE
ASSURANCE BUILDING
60-66 HUNTER STREET,
SYDNEY.

11th October 1956

TELEPHONES (BW 8756
(BW 8757
(BW 7940

ADDRESS TO G.P.O.
Box No.1429 SYDNEY

10

CABLE ADDRESS "DAVENPORT"
SYDNEY.

IN REPLY PLEASE
QUOTE: JFM.WW.

Messrs. Campbell & Melville,
Solicitors,
46 Pitt Street,
SYDNEY.

Dear Sirs,

Re: DEPENDABLE MOTORS PTY. LTD. ATS
ASHFORD SHIRE COUNCIL

20

Thank you for your letter of the 5th October.
With reference to your proposed paragraph A. (g)
(ix) would you please give details of the spare
parts required by the Plaintiff and the dates on
which such spare parts were requested to be sup-
plied by the Defendant to the Plaintiff. Also
please give details of what spare parts were sup-
plied and what spare parts were not supplied.

Yours faithfully,

FRANK A. DAVENPORT & MANT.

30

EXHIBIT F

Plaintiff's
Exhibits

LETTER - PLAINTIFF'S SOLICITORS TO
DEFENDANT'S SOLICITORS

F

Letter -
Plaintiff's
Solicitors to
Defendants
Solicitors.

30.10.1956

CAMPBELL & MELVILLE
SOLICITORS

Fourth Floor
"Endeavour House"
46 Pitt Street
(near Bridge Street)
SYDNEY

ERIC CAMPBELL
W.S. MELVILLE LL.B.

PHONES: BU 6432-3

30th October, 1956.

10 TELEGRAMS "ECOM" SYDNEY
PTG:SR

Messrs. F.A. Davenport & Mant,
Solicitors,
60-66 Hunter Street,
SYDNEY

Dear Sirs,

Re: ASHFORD SHIRE COUNCIL v DEPENDABLE
MOTORS PTY. LIMITED

20 We acknowledge receipt of your letter of the
11th instant and wish to advise that the parti-
culars requested by you are, in the opinion of our
Counsel herein, matters of evidence.

To avoid misunderstanding, however, we would
point out that the main burden of our complaint
under A(g) (ix) is, generally, that had the tractor
remained in service, it would have been necessary
from time to time to obtain spare parts and that
such spare parts were not, and are not now, avail-
able, if and when they were or are required.

30 Yours faithfully,

CAMPBELL & MELVILLE.

Plaintiff's
Exhibits

EXHIBIT F

LETTER - PLAINTIFF'S SOLICITORS TO
DEFENDANT'S SOLICITORS

F
Letter -
Plaintiff's
Solicitors to
Defendant's
Solicitors.

13.11.1956

CAMPBELL & MELVILLE
SOLICITORS

ERIC CAMPBELL
W. S. MELVILLE LL.B.

PHONES: BU 6432-3

TELEGRAMS: "ECOM" SYDNEY

Fourth Floor
"Endeavour House"
46 Pitt Street
(near Bridge Street)
SYDNEY.

13th November 1956.

10

Messrs. Davenport and Mant,
Solicitors,
60 Hunter Street,
S Y D N E Y.

Dear Sirs,

Re: ASHFORD SHIRE COUNCIL v DEPENDABLE
MOTORS PTY. LTD.

Take notice that at the Hearing of this case
leave will be sought to amend the Declaration here-
in by making the following deletions and insertions:- 20

On the 12th line after the word "fittings"
inserting the words "including a 10 feet 10 inch
cable Dozer".

On the 18th line by deleting "A" before the
word "dozer" and inserting instead "the said".

On the 19th line inserting between the letter
"a" and the word "scraper" the words "6-8 yards
Carry-all."

On the 20th line the word "of" after the words
"skill" should read "and". This appears as though 30
it could be only a typing error and we are not sure
whether the word "of" appears in the original
Declaration.

In the third count of the Declaration on the
14 and 15th lines by deleting the words "which
included pushing a dozer blade" and inserting in
the 14th line the words "using the said cable
dozer" and inserting in the 15th line between the
letter "a" and the word "scraper" the words "6-8
Carry-all". 40

On the 16th line after the word "land" and between the word "and" by inserting the words "and the same was an 85 horse power Tractor".

Deleting from the 20th line after the words "with" the letter "a" and inserting thereof "the said".

On the 23rd line by deleting the letter "a" after the word "pushing" and inserting the words "the said cable".

10 On the 24th line by deleting the word "blade" and deleting the letter "a" after the word "dragging" and inserting instead of such letter the words "the said" by inserting further in the 24th line after the word "land" the following "nor was the said Tractor an 85 Horse Power Tractor".

20 At the Hearing leave will also be sought to amend the particulars by inserting "that the Tractor is not of the Horse Power as alleged by the Defendant at the time of sale" and further "that the said tractor is not of sufficient Horse Power as alleged in the three counts of the Declaration".

Yours faithfully,
CAMPBELL & MELVILLE.

EXHIBIT G

COPY LETTER FROM PLAINTIFF TO BREDA
COMPANY AND COPY ENGINEER'S REPORT

4th September 51

30 The Breda Company,
ITALY

Dear Sirs,

Recently this Council purchased from Dependable Motors Pty. Ltd. of Sydney one of your "Breda" 70", crawler tractors.

40 Very soon after placing it in service and on several subsequent occasions Councils Engineer reported that its condition and performance were very unsatisfactory. Complaints were lodged with Dependable Motors who serviced the machine and made adjustments to it on several occasions.

Plaintiff's
Exhibits

F

Letter -
Plaintiff's
Solicitors to
Defendant's
Solicitors.

13.11.1956

- continued

G

Copy letter
from Plaintiff
to Breda
Company and
copy Engineer's
Report.

4. 9. 1951

Plaintiff's
Exhibits

G

Copy letter
from Plaintiff
to Breda
Company and
copy Engineer's
Report.

4. 9. 1951

- continued

Continued dissatisfaction was reported by the Engineer and on 13th July 1951 Council resolved that Dependable Motors be asked to take the machine back and refund the purchase money. This was done, but in reply Dependable Motors stated that they were not in a position to refund the purchase money without authority and financial guarantee from your Company. Upon a request from Dependable Motors a report by the Engineer, setting out the specific nature of complaints regarding the machine was furnished to them. A copy of this report, the perusal of which will leave you in no doubt as to the gravity of the position, is attached for your information and consideration.

10

This tractor was purchased primarily for use with bull-dozer equipment and to operate a six cubic yard carryall scoop for road making purposes. To date it has not on any occasion demonstrated its ability to handle either piece of equipment to the satisfaction of this Council.

20

The following comparison illustrates this point very clearly.

When filling the scraper scoop referred to above the tracks of the "Breda" spun very badly. This same scoop is now attached to, and is handled very comfortably, with power to spare by another tractor, which, although $1\frac{1}{2}$ tons heavier is rated at twenty (20) horse power less than the Breda.

It is quite apparent that added efficiency in the engine would be quite useless unless the overall weight of the tractor were considerably increased. Therefore it is maintained by this Council that were the track assemblies completely renewed and the clutch and engine restored to new condition the tractor would still be unsatisfactory in that its weight is not great enough to transmit a draw bar horse power comparable with that produced by the engine.

30

Obviously the Breda Company wishes to sell large numbers of its tractors in this country and to maintain its excellent reputation by extending the very best service and satisfaction possible to all its customers. The damaging effect on such a reputation of the unsatisfactory performance of such a machine as this Council owns is equally obvious.

40

In view of all the circumstances this Council considers that it's duty to the rate-payers demands

that it ask your company to take the tractor back and refund the purchase money. This it does, secure in the knowledge that it is dealing with a very reputable company which has always jealously guarded its good name and that this occasion will not prove an exception to that rule.

Your earliest possible consideration and favourable reply will oblige.

Plaintiff's
Exhibits

G

Copy letter
from Plaintiff
to Breda
Company and
copy Engineer's
Report.

4. 9. 1951

- continued

10 All communications to be
addressed to THE SHIRE
CLERK, ASHFORD

TELEPHONE 15
ASHFORD EXCHANGE.

ASHFORD SHIRE COUNCIL

ASHFORD 15th August 1951.

SHIRE ENGINEERS REPORT TO COUNCIL

10th August, 1951

"Breda" Crawler Tractor

The President & Councillors,

Gentlemen,

20 These features of the new "Breda" tractor
recently purchased from Dependable Motors of Sydney
which appear to me to be unsatisfactory are listed
in the following report.

At the time of writing this report the tractor
had completed 170 hours of work as registered on
the hour meter fitted to it.

(1) Operating instruction and spare parts list.

30 No operating instructions or spare parts list
of any kind has been provided. Surely with such
an intricate and expensive machine as this, manu-
factured overseas, and practically unknown in
Australia it is extremely important that the fullest
possible instructions and advice as to its proper
care and servicing should be made available to every
customer. Were it not for the fact that this
Council has the services of a competent diesel
mechanic any adjustments found necessary from time
to time would be impossible. Admittedly Mr. Burke
has given valuable advice but this has been verbal
only and consequently incomplete and inadequate as
40 any such advice must be.

Plaintiff's
Exhibits

G

Copy letter
from Plaintiff
to Breda
Company and
copy Engineer's
Report.

4. 9. 1951

- continued

(2) Oil Consumption.

Ever since the machine commenced work it has consistently used at least two gallons of oil for every eight hours worked. This, in a new machine, in my opinion, must be considered very excessive and indicative of some fundamental fault in its assembly or adjustment.

During his recent visit, Mr. Burke made certain adjustments to the engine and enlarged the ports in the breather tube from the engine sump. After these adjustments had been made and while the machine was being used to draw a carryall scoop some improvement was noticed in the oil consumption. Since then however it has again been used as a bulldozer and two gallons of oil per day is being used as before.

10

(3) Tracks.

Since the machine has been in service the track assemblies have developed the following faults.

20

(a) The pad and grip sections of the tracks are of very light construction and of very soft metal. Three of the pads have already split and ten others have bent. The edges of the grips are showing very considerable wear.

(b) The tracks appear to have become considerably elongated due to either wear or bending at the track joints. This is so pronounced that in a number of cases the track plates no longer lap over each other. Some of these plates have come into contact with their neighbours and serious bending and buckling has occurred. In order to maintain reasonable tension in the tracks it has been found necessary to tighten them four times to date.

30

(c) Those sections of the track castings which come into contact with the rollers and driving sprockets appear to be faulty. Large numbers of small pieces of metal continue to chip off the edges of these.

40

(d) The moulding of some of the track castings appears to have been faulty in that several distinct flaws or patches of "honey comb" have shown up at the edges of the plates and near the track pin bearings.

(e) The track tensioning springs appear to be insufficient rigidity for the work required of them. On several occasions when working in soft ground, mud has accumulated on the tracks between the overlapping sections of the plates causing them to arch up and on one occasion strike the mud guard plates above, the springs thereby being compressed at least 6" more than normal. When the machine is under load or when turning, the driving sprockets frequently "jump" the track pins.

Plaintiff's
Exhibits

G

Copy letter
from Plaintiff
to Breda
Company and
copy Engineer's
Report.

4. 9. 1951

- continued

10 (4) Clutch.

When the machine is under load the clutch frequently becomes overheated and seizes, rendering it impossible to stop the movement of the machine without switching the engine off. Every time this happens half an hour or more of working time is lost waiting for the clutch to cool sufficiently to free itself. On two occasions serious accidents have been narrowly avoided when such a seizure occurred.

Advice given by Mr. Burke regarding grease has been carefully followed without any noticeable improvement.

Adjustment of the clutch has been found necessary on three occasions to date. This appears to indicate excessive wear on the clutch facings.

20 (5) Power weight Ratio.

It would appear that quite a large proportion of the power output is wasted. When the machine is under load the tracks "spin" excessively. This would indicate that the total weight of the machine is insufficient to provide the tractive resistance in the tracks necessary to take full advantage of the power produced.

30 (6) Radiator.

No adequate protection is provided for the radiator grille. This is very important when the machine is being used for clearing timber etc. One radiator core has already been pierced by a log during clearing operations.

40 Sgd. F. E. Bowman.

SHIRE ENGINEER.

Plaintiff's
Exhibits

EXHIBIT J

REPORTS WITH WRITTEN PRECIS

J
Reports with
written
Precis.

	ROAD	TRACTOR HOURS	Breda Tractor 85 H.P.	REMARKS & Cable Dozer	
MON. 14th May 1951	Wallangra Coolatai Road	8	Dozing gravel pit and formation		
TUES. 15th		8	Formations.		
WED. 16th		8	Formations.		10
THURS.		x			
FRI.		x			
	Summary Wall. Cool. 3 days & off			£15.--.	
MON. 21st May 1951	Wallangra Coolatai Road	8	Dozing filling to formations		
TUES. 22nd May		x	Out engine trouble.		
WED. 23rd May		x	" " "		
THURS.		x			20
FRI.		x			
	Summary Coolatai 1 day			£5.--.	
MON. 28th May		x	At work shop for P.C.U. Modifications		
TUES.		x			
WED.		x			
THURS.		x			
FRI.		x			
MON. 11th June			Holiday		
TUES.		x			30
WED.		x			
THURS.		x			
FRI. 15th June	Wallangra Ashford Road.	x 8	Wallangra Ashford Road-Drainage		
	Summary Ash Wall 1 day			£5	
			G. Kramer.		

Plaintiff's
Exhibits

	ROAD	TRACTOR HOURS	Breda Tractor 85 H.P.	REMARKS & Cable Dozer
MON. 18	M.R.187 Item 21 June	8		Tracting being travelled to job.
TUES. 19	M.R.187 Item 21 June	8		Clearing gravel site.
WED. 20	Coolatai Wallangra June Road	8		Dozing fillings to formation.
10 THURS. 21		x		Idle owing to oil trouble.
FRI. 22	June	x		Being repaired.

J
Reports with
written
Precis.
- continued

G. Kramer.

Summary: M.R.187 Item 21
 Breda 2 days £7.10.-
 P.C.U. 2 days 1.10.-
 Dozer 2 days 1.-.-
 £10.-.-

Coolatai 1 day £ 5.-.-

20

O I L C O N S U M P T I O N

The oil level in the tank on the head of the radiator. The checking may be confined to ensuring that there is enough oil; if necessary, the oil should be partly topped up in such a manner that, with the engine standing still, the topped-up level in not more than at one third of the full tank. As a matter of fact, if the tank were completely filled before the engine is started there would be the danger of over-filling the tank.

30

This is due to the fact that during idle periods of the tractor part of the oil contained in the tank passes into the engine sump, past the pump gearing and through the inevitable interstices of the bearings. But as soon as the engine begins to turn over, the extraction pump inducts all the oil accumulated in the sump during the stationary period and returns it to the tank which fills up partly. Thus, in case the refilling were carried out before starting the engine, there would be a danger of setting up harmful pressures in the lubrication circuit or creating an overflow and scattering of the oil.

40

The oil content of the tank must thus be checked, and if necessary topped-up, only while

Plaintiff's
Exhibits

J

Reports with
written
Precis.

- continued

the engine is turning over and has been running for about ten minutes. Under these conditions the oil level must not be below that corresponding to a tank 2/ full.

T R A N S M I S S I O N

CENTRAL CLUTCH (Table 17)

The engine clutch has been described on page 51. If the clutch slips, first check the play between the fork lever 1571 and the needle bearing 1541 (see Table 17); the play must be between $7/32$ " and at least $\frac{1}{2}$ ". When the wear of the clutch facings has reduced this play to below $\frac{1}{2}$ ", they must be replaced. 10

For this purpose eight distance pieces 1549 are provided under each of the three supports 1548 for the control levers 1544; remove equal numbers one or several, of these spacers from each support until the play obtained is within the limits indicated above. To these limits must correspond a lost motion of from $5/8$ " to $13/4$ " of the clutch pedal in the slot in the floor. It may, therefore, be necessary to adjust the stroke of the pedal by suitably altering the length of the actuating rod 1579. When all the distance pieces have been taken out, the clutch disc facings must be renewed. For this purpose the clutch can be dismantled, without removing the motor, in the following manner:- 20

1. Dismantle the whole universal joint assembly by undoing the screws which fix the two cross-heads to the respective coupling flange. To facilitate the turning of these screws with the 14-mm spanner the crankshaft must be suitable turned over by hand. 30

2. Release the return lever 1572 by removing the fixing screws and take it off the shaft 1575 by removing the fixing screws and allowing it to slide along the shaft until it can be disengaged from the splines of the latter. Release the fork lever 1571 from the flexible arm 1592 by unscrewing the two fixing screws (see Table 17). These operations are necessary to make it possible to swivel the fork lever freely, as otherwise this would constitute an unsurmountable obstacle to the removal of the clutch from the flywheel. In order not to lose or damage any parts, the flexible arm 1592 can be swivelled through 90° instead of being removed altogether; to do so it suffices to remove only one of the fixing screws and merely to slacken the second. 40

Plaintiff's
Exhibits

J

Reports with
written
Precis.

- continued

10

3. Remove the screws 12 which fix the cover 1502 to the flywheel, and keep the clutch assembly raised externally to prevent the dropping or distortion of the parts. For this purpose it will be necessary to use appropriate lifting tackle or the help of another man. While the screws are being removed it is better to leave to last those four located at diagonally opposed corners. When the cover is off, the whole clutch - with the exception of the fixed ring 1508 - can be removed from the flywheel.

It is now possible to replace the clutch facings or, in order to save time, the complete discs 1515 and 1516 with facings ready mounted, leaving the replacement of the worn facings on the old discs for some other time.

Before mounting the clutch once more it is better to dismantle, clean and inspect the remaining components of the clutch assembly as well.

20

30

ROAD	TRACTOR HOURS	Breda Tractor with Cable Dozer	REMARKS
MON. 25th June 1951	x	Wet day	
TUES. 26th June Coolatai Wall.Road.	8	Dozing fillings to formations.	
WED. 27th June	8	Formations.	
THURS. 28th June	8	Formations.	
FRI. 29th June	8	"	
Summary Coolatai 4 days	£20	G. Kramer, operator.	
MON. 2nd July Coolatai Wall.Rd.	8	Formations	
TUES. 3rd July	8	"	
WED. 4th July	8	"	
THURS. 5th July	x	Radiator mishap	
FRI. 6th July Coolatai 3 days	£15.	G. Kramer.	

Plaintiff's
Exhibits

J
Reports with
written
Precis.
- continued

ROAD	TRACTOR HOURS	Breda Tractor with Cable Dozer	REMARKS
MON. 9th July	x	Idle - radiator trouble.	
TUES. 10th "	x	"	
WED. 11th "	x	"	
THURS. 12th " M.R. 187 Item 24	8	Scooping fillings to pipe culverts.	
FRI. 13th " M.R. 187 Item 24	8	Pipe culverts.	10
M.R. 187 Item 24		G. Kramer operator.	
Breda 2 days	£3.15.-	£7.10.-.	
Dozer 2 "	10.-	1. -.-.	
P.C.U. 2 "	15.-	1.10.-.	
		£	
MON. 16th July M.R. 187 Item 23	8	Scooping fillings to formation.	
TUES. 17th " M.R. 187	8	Placing concrete pipes.	
WED. 18th " "	8	" " "	20
THURS. 19th "	x		
FRI. 20th "	x		
M.R. 187 Item 23		G. Kramer	
Breda 2 days	£7.10.-.		
Dozer 2 "	1. -.-.		
P.C.U. 2 "	1.10.-.		
MON. 30th July M.R. 187 Item 21	8	Scooping gravel.	
TUES. 31st July Camp Creek Keetah Develop- mental Road 1193	8	Being removed by lorry.	30
WED. 1st Aug. Yetman North Star	8	Filling to formation.	
THURS. 2nd " " "	8	Formations.	
FRI. 3rd " " "	8	Formations.	
M.R. 187 Item 21	Breda 1 day	£7.7.6	G. Kramer.
	P.C.U.	16.9	
	Dozer	19.6	40
Camp Creek	as above		
Yetman N. Star.	Breda 3 days	£22.2.6	
	P.C.U. 3 "	2.10.3	
	Dozer 3 "	2.8.6	

					Plaintiff's Exhibits	
		ROAD	TRACTOR HOURS	Breda Tractor with Cable Dozer	REMARKS	J
	MON. 6th Aug.	Yctman North Star Road	8	Dozing fillings to pipe culverts		Reports with written Precis.
	TUES. 7th "	"	8	" "	"	- continued
	WED. 8th "	"	8	" "	"	
	THURS. 9th "	"	8	Clearing.		
10	FRI. 10th "	"	8	"		
					G. Kramer.	
	North Star	Breda 5 days	Dozer 5 "	P.C.U. 5 "	£36.17.6 4. 3.9 4.17.6	
	MON. 13th Aug. to FRI. 17th Aug.	No work stood down - clutch trouble (Sgnd by initials)			N.D.T.	

EXHIBIT M

LIST OF FIGURES SHEWING COST OF
REPAIRS AND LOSS OF TIME

20

REPAIRS (not including P.C.U. or bearing failure)

E.W. Ackhurst 56 hours at 10/6 per hour
4 hours at time and half. £32.11. 0

OIL

$\frac{3}{4}$ gal. per day, 10/- per gal.
200 hours work. 9. 8. 0

DRIVER Non productive hours.

2 hours per day - 30 working days
wage £32.2.0 per fortnight. £24.15. 0

30

£66.14. 0

M

List of
Figures showing
Cost of Repairs
and Loss of
Time.

Defendant's
Exhibits

DEFENDANT'S EXHIBITS

1

EXHIBIT 1

Letter -
Plaintiff's
Shire Clerk
to Defendant.

LETTER - PLAINTIFF'S SHIRE CLERK TO DEFENDANT

12.11.1951

All communications to be
addressed to THE SHIRE
CLERK, ASHFORD.

TELEPHONE 15
ASHFORD EXCHANGE

ASHFORD SHIRE COUNCIL

ASHFORD

12th November 1951

The Manager,
Dependable Motors Pty. Ltd.,
Parramatta Road.,
CAMPERDOWNE.

10

Dear Sir,

Re: BREDA TRACTOR

My council is in receipt of a letter dated 18th
October from Hedesan & Co., Ltd. enclosing a trans-
lated copy of a letter from the Breda Tractor Coy.
with reference to the overhaul and replacement
of parts necessary to put this machine in working
order.

20

I have been directed to ask for a quote for
carrying out the necessary repairs and replacement
of parts provided the Council delivered this
machine to your workshop and also if you carried
out this work at Councils workshop.

Yours faithfully,

A.N. Heywood.

SHIRE CLERK.



EXHIBIT 1

Defendant's
Exhibits

1

LETTER - DEFENDANT TO PLAINTIFF'S SHIRE CLERK

Letter -
Defendant to
Plaintiff's
Shire Clerk.

DEPENDABLE

Branch Church Street
Parramatta. UW 9966-7

3.12.1951

DEPENDABLE MOTORS PTY. LTD.

GENERAL MOTOR MERCHANTS

First and Last - EFFICIENCY

Distributors: Phones LA 5134 (3 lines)
G.M.C.6x6 PARTS. 82a-90 PARRAMATTA ROAD
10 Nasco Parts CAMPERDOWN

3rd December, 1951.

The Shire Clerk,
Ashford Shire Council,
ASHFORD.

Dear Sir,

We are in receipt of your letter of the 12th
ult., re the overhaul of your Breda Tractor.

20 It would be necessary to advise us what repairs
you require to be carried out also what replacement
parts are to be fitted before a quotation could be
submitted.

We would suggest you submit an itemised list
of repairs to be carried out. It would also be
necessary to advise us who would be responsible for
the payment as we note Hedesan & Co's name is men-
tioned in your letter, also Breda Tractor Co. It
would not be possible for us to carry out these
repairs in your Council's Workshop.

30 Awaiting your further advice as to the nature
of repairs required.

We are,
Yours faithfully,
DEPENDABLE MOTORS PTY. LTD.

A. CORNEY
DIRECTOR.

Defendant's
Exhibits

EXHIBIT 2

2

LETTER - PLAINTIFF'S SHIRE CLERK TO DEFENDANT

Letter -
Plaintiff's
Shire Clerk
to Defendant.
11.3.1952

All communications to be
addressed to THE SHIRE
CLERK, ASHFORD

TELEPHONE 15
ASHFORD EXCHANGE

ASHFORD SHIRE COUNCIL

ASHFORD

11th March 1952.

The Manager,
Dependable Motors.,
Parramatta Road,
CAMPERDOWN.

10

Dear Sir,

With reference to your account for £9.13.11
for part supplies to the Breda tractor as you are
aware this tractor is at present under discussion
with the makers and the account will be adjusted
when finality with the makers has been achieved.

Yours faithfully,

A.N. HEYWOOD

SHIRE CLERK.

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EXHIBIT 3

LETTER HEDESAN & CO. PTY. LTD. TO
 DEFENDANT FORWARDING TRANSLATED
 COPY LETTER FROM BREDA COMPANY TO
PLAINTIFF

Defendant's
Exhibits

3

Letter -
 Hedesan & Co.
 Pty.Ltd. to
 Defendant
 forwarding
 translated
 copy letter
 from Breda
 Company to
 Plaintiff.

HEDESAN & CO. PTY. LTD.

EXPORTERS
 MANUFACTURERS'

IMPORTERS
 REPRESENTATIVES:

336 KENT STREET, SYDNEY, N.S.W. - PHONE BX 4118.

10 Your ref. All correspondence to
 Our Ref. VH.CAF Box 5069 G.P.O. SYDNEY.
 Date 18th Oct: 1951. Cables & Telegrams:
 "HEDESAN" SYDNEY
 Codes used: Bentley's 2nd
 Edition.

18.10.1951

AUSTRALIAN AGENT FOR:
 "Breda" CRAWLER TRACTORS
 "Olympia" TYPEWRITERS.

IMPORTERS OF:
 MACHINERY - STEEL
 20 BUILDING MATERIALS
 HARDWARE
 MOTORS CARS.

EXPORTERS OF:
 PRIMARY PRODUCTS
 WHEAT - FLOUR
 GENERAL MERCHANDISE
 INDUSTRIAL MACHINERY
 ELECTRICAL EQUIPMENT & GOODS

30 AGENTS IN ALL STATES
 Connections throughout the world.

Mr. Corney,
 Dependable Motors Pty. Ltd.
 82a-90 Parramatta Road,
CAMPERDOWN.

Dear Sir,

We enclose with this letter a copy of a letter
 just received from Breda Italy in answer to a letter
 dated Sept: 4th 1951 submitted to them on the matter
 of Ashford Shire Council.

40 A similar copy has been posted to Ashford Shire
 Council and we request that you contact them for
 further action.

Yours faithfully,
HEDESAN & CO.PTY.LTD.

V.L. HEGER
GOVERNING DIRECTOR.

Encl:

Defendant's
Exhibits

EXHIBIT 3

3

TRANSLATED COPY LETTER FROM
BREDA COMPANY TO PLAINTIFF

Translated
copy letter
from Breda
Company to
Plaintiff.

27.9.1951

TRANSLATION OF LETTER FROM SOCIETA ITALIANO ERNESTO
GG/33320 DATED 27 Sept. 1951. BREDA

THIS TRANSLATION INTO ENGLISH IS ATTACHED FOR YOUR
CONVENIENCE

THE ITALIAN TEXT HOWEVER IS THE ONLY VALID AND
AUTHENTIC

10

re AUSTRALIA - Farm tractors.

Messrs.
ASHFORD SHIRE COUNCIL.
ASHFORD.
(Australia)

Dear Sirs,

The Italian Legation in Sydney and our Agents, Messrs. Hedesan, have handed us your letter of Sept.4th 1951. In this letter which is based on your attached report showing some trouble experienced in using our 70-D Tractor purchased from Dependable Motors, you suggest we should take back this tractor and refund the purchase expenses.

20

In this connection we would like to point out in the very first place that the tractor you have, we supplied for agriculture operating and not for industrial use, whilst it appears from your report that the machine has been called for mainly operating on road work.

Moreover the fitting of the bulldozer may not be very convenient in conjunction with our tractor, may have contributed to have some machine pieces undergo a particular strain turning out the consequences you complain of.

30

At any rate both for the nature of defects appeared on tractor working, as for business habits applying everywhere, we feel your asking for having the machine taken back as certainly not being justified and we consider acceptable only a replacement free of charge of faulty parts. In our case we would therefore have to arrange for changement of clutch elements, furthermore replacing of tracks fitted at present with more sturdy

40

ones and the overhauling of pistons and cylinder liners, in order to utterly relieve you on freeing of deficiency for excessive oil consumption.

As to ratio between weight and output, this is a question liable of being twisted, as shown on report of our Technical Offices answering your comments contained in your report; we are attaching these notes of ours for the sake of our Company's good name.

10 With this in mind we are anxious to give you a new proof of our business fairness and the seriousness we use entering into engagements with our Customers and we would advise you that in the event of your not wanting to keep the tractor after we have replaced such parts worn out by use and have put the tractor in perfect working order, we are prepared for a very exceptional policy to take same back and refund the purchase expense; this of course with the understanding of considering the operating period undergone and the consequently wear out of use, adapting appropriate equity, viz. after estimating the market value of tractor conditions as given back to us.

20

We have charged our Agents in your Country, Messrs. Hedesan in Sydney to handle this questions given them full authority for clearing the matter. We would like to again point out that our proceeding in your favour is absolutely exceptional and has never been confronted either in any business policy, nor with supplies of ours even for Government Offices and we therefore trust you will duly appreciate our ethical business standing we are always living up to in our relations to Customers.

30

We feel we met with your requirement to our utmost endeavours and looking forward to hear from you on your deliberations, we remain, dear Sirs,

Yours faithfully,

Defendant's
Exhibits

3

Translated
copy letter
from Breda
Company to
Plaintiff.

27.9.1951

- continued

Defendant's
Exhibits

7

Letter -
Defendant to
Hedesan &
Co.Pty.Ltd.

8. 2. 1950

EXHIBIT 7

LETTER - DEFENDANT TO HEDESAN & CO.PTY.LTD.

DEPENDABLE MOTORS PTY. LTD.
DISTRIBUTORS FOR AUSTRALIA AND
NEW GUINEA

BREDA CRAWLER TRACTORS

82a-90 Parramatta Road,
Camperdown, Sydney.

TELEGRAMS
"DEPENDMOTOR" SYDNEY 10
Telephones
LA 5134 - 3 lines.

Messrs.
Hedesan & Co.,
Kent Street,
S Y D N E Y.

8. 2. 50

Attention Dr. Hegar."BREDA" MODEL "50D".

Engine No. 4757.
Delivery Date .. 12.12.50.

20

OWNER - E.W. Mackay, Earls Court Estate, Dry Plains
Via Cooma.

DATE OF SERVICES.

January 11th to 14th. Jan 26th to 29th.
January 31st to February 3rd.
Each of the above dates are inclusive and
include travelling time to and from Dry
Plains. Mileage from Sydney 300.

FIRST SERVICE CALL.

The first service visit was for the purpose
of rectifying the following troubles:-
1. Oil leak in air cooled oil radiator.
2. Rectify steering clutch adjustments.
3. Check electric starter.
4. Check master clutch adjustment.

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On arrival at Dry Plains the oil radiator was re-
moved, cleaned down and repaired, it was then tes-
ted for leaks and replaced.

The steering clutches were adjusted and the adjust-
ment rectified the trouble.

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The electric starter was checked and it was found to be in need of adjustment at the solenoid contacts.

The master clutch was inclined to slip and after adjustment shims were removed, the operation of the clutch was still unsatisfactory and it was arranged with the owner to have the field service man return with a new clutch and fit same if necessary.

Time spent on Tractor 16 Hours.
 Time Travelling 2 days.

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Defendant's
Exhibits

7

Letter -
 Defendant to
 Hedesan &
 Co.Pty.Ltd.

8. 2.1950

- continued

Second and Third Service Calls.

The Second service call was made for the purpose of removing the master clutch assembly. On dismantling the clutch it was found to be in poor condition generally and the clutch plate facings were very badly worn and scored (Part No.6) had three bad heat cracks in the surface of the plate. The clutch fingers part No.36 were very stiff two were only operating and one was inoperative. The clutch finger anchoring blocks and adjusting plates were found to be too tightly fitted to the outside plate assembly, Part No. 1. The clutch shaft Part No.19 was found to be too full on the spigot end and it would not enter the flywheel spigot race, Part No. 20 and the outside plate assembly would not face up to or enter the flywheel recess without the use of considerable force. Part No.31 the release housing assembly had a small section broken from the collar that accommodates the clutch fingers the general condition of the clutch made a return to Sydney necessary so that release housing assembly could be welded and machined and the outside clutch assembly plate could also be machined.

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After the necessary work was carried out and all of the component parts were refitted and the complete assembly replaced the clutch operated very satisfactorily.

A new starter motor was fitted to the Tractor as the original electric starter was continuing to give trouble.

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Time spent on Tractor 20 hours.
 Time spent working tractor after repairs had been effected 18 hours.
 Time Travelling 4 days.

Defendant's
Exhibits

7
Letter -
Defendant to
Hedesan &
Co.Pty.Ltd.
8. 2. 1950
- continued

Parts required to be replaced under claims.

1 only Part No. 31.)
2 " " 13) TAV. XVI.
1 " " 6)

A report and claim on the electric starter will be forwarded as soon as the necessary repairs are effected.

7

Letter -
Defendant to
Hedesan &
Co.Pty.Ltd.
28.2.1951

EXHIBIT 7

LETTER - DEFENDANT TO HEDESAN & CO.PTY.LTD.

DEPENDABLE MOTORS PTY. LTD.

AUSTRALIAN AND NEW GUINEA
DISTRIBUTORS FOR

BREDA CRAWLER TRACTORS

82a-90 Parramatta Road,
Camperdown, Sydney.

TELEGRAMS
"DEPENDMOTOR" SYDNEY
Telephones
LA 5134 - 3 lines.

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28th February, 1951. 20

Messrs. Hedesan & Co.Pty.Ltd.,
336 Kent Street,
S Y D N E Y.

REPORT ON "BREDA" 70D MODEL THAT HAS NOT BEEN USED.

Dear Sirs,

We wish to advise for your information and would like you to forward this complaint to the factory so as to avoid future recurrence.

The petrol starter motor would not turn the main engine through the slipping of the clutch. On dismantling we found that the clutch had been installed incorrectly, resulting in bent plates and would not allow the pressure to come on the clutch.

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The assembly was removed, the plates trued up, cleaned and reassembled correctly, on starting the auxiliary motor the gear engaged and turned the main engine immediately.

This operation took our mechanic eight hours to complete the work.

A closer supervision at the factory would obviate this complaint.

Yours faithfully,
DEPENDABLE MOTORS PTY. LTD.

A. CORNEY

Director.

EXHIBIT 7

LETTER - DEFENDANT TO HEDESAN & CO.PTY.LTD.

DEPENDABLE MOTORS PTY. LTD.

AUSTRALIAN AND NEW GUINEA
DISTRIBUTORS FOR

BREDA CRAWLER TRACTORS

82a-90 Parramatta Road,
Camperdown, Sydney.

TELEGRAMS
"DEPENDMOTOR" SYDNEY
Telephones
LA 5134 - 3 lines.

24th July, 1951.

Messrs. Hedesan & Co.Pty.Ltd.,
336 Kent Street,
S Y D N E Y.

Dear Sirs,

We have received a further report on the tracks of the "7C" Model No. 4942. Odd links appear to be soft and very noticeable wear has shown where the rollers have worn deep into the chain. This makes a gap between the pads at the top of about $\frac{1}{2}$ ".

Defendant's
Exhibits

7

Letter -
Defendant to
Hedesan &
Co.Pty.Ltd.

28.2.1951

- continued

7

Letter -
Defendant to
Hedesan &
Co.Pty.Ltd.

24.7.1951

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Defendant's
Exhibits

7

Letter -
Defendant to
Hedesan &
Co.Pty.Ltd.

24.7.1951

- continued

Normally they overlap in this section by about $\frac{1}{2}$ ".
A number of pads are bent through this wear, one
pad gets jammed under the following pad and breaks
same. We would be glad to have the Factory's
remarks on this matter.

We will have a full report on this machine
when our man returns. This machine is the one
that is causing a lot of trouble, and they want to
return same.

Yours faithfully,
DEPENDABLE MOTORS PTY. LTD.

A. CORNEY

DIRECTOR.

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