MCRAE V COMMONWEALTH DISPOSALS COMMISSION, (1951) 84 CLR 377 AUS

MCRAE **PLAINTIFF**

AND

COMMONWEALTH DISPOSALS COMMISSION **DEFENDANT**

DIXON AND FULLAGAR JJ.

This is an appeal from a judgment of Webb J. in an action in which the plaintiffs claimed damages on three causes of action alleged alternatively — breach of contract, deceit and negligence. The judgment, as passed and entered, was in favour of the plaintiffs against the Commonwealth Disposals Commission for 756 pounds 10s. 0d. as damages for deceit, and his Honour awarded the plaintiffs one-half of the costs of the action. The plaintiffs appeal, asserting that they are entitled to damages far in excess of 756 pounds 10s. 0d. The defendants cross-appeal, asserting that the maximum amount recoverable by the plaintiffs on any view of the case was 285 pounds. The amounts actually claimed by the statement of claim were, on the basis of one set of allegations, some 250,000 pounds, and, on the basis of another set of allegations, some 10,000 pounds.

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[396] The case presents serious difficulties, the facts being in some respects of an extraordinary character. Some aspects of them are probably not fully explained by anything that appears in the evidence. They are summarized chronologically in the judgment of Webb J., and that summary need not be repeated here. Though it may be necessary for some purposes to go back in point of time, we think that, for the purposes of this appeal, the proper starting-point is the acceptance by the Commission of a tender by the plaintiffs for the purchase from the Commission of a wrecked or stranded oil tanker. It would be premature to speak of that acceptance as creating a contract, because the defendants have contended

throughout that the “contract” was “void”, or, in other words, that no contract was ever made. Only one thing need be said before proceeding to the starting point. In the assumed background of the case lay the facts that during the war a considerable number of ships, including “oil tankers”, became wrecked or stranded in the waters adjacent to New Guinea, that after the war the Commission had the function of disposing of these as it thought fit, and that a purchaser from the Commission of any of these wrecked or stranded vessels might, but not necessarily would, make a very large profit by salving and selling the vessel, or the materials of her hull and equipment, or her cargo. The realization of a profit in this way (and the evidence suggests that a purchaser would not contemplate a realization of profit by an immediate resale of what he had bought as such) could, of course, only be achieved after the expenditure of large sums of money. Such a purchaser would naturally regard himself as acquiring, at best, a chance of making a profit. But he would not regard himself as acquiring a certainty of making a loss.

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[397] In the Melbourne newspapers, Age and Argus, of 29th March 1947, appeared an advertisement inserted by the Commission. The advertisement read:— “Tenders are invited for the purchase of an OIL TANKER lying on JOURMAUND REEF, which is approximately 100 miles NORTH OF SAMARAI. THE VESSEL IS SAID TO CONTAIN OIL. OFFERS TO PURCHASE THE VESSEL AND ITS CONTENTS should be submitted to the COMMONWEALTH DISPOSALS COMMISSION, Nicholas Building, 37 Swanston Street, Melbourne, indorsed ‘OFFER FOR VESSEL ON JOURMAUND REEF’, and should be lodged not later than 2 p.m., March 31, 1947.” In response to this advertisement, the plaintiffs, who are brothers trading in partnership, submitted a tender dated 31st March 1947. The tender was on a printed form. It was headed “Offer for vessel on Jourmaund Reef”. The form was divided into columns. In a column headed “Description of Goods” the words “1 oil tanker lying on Jourmaund Reef as advertised Age, Argus, 29/3/47” were inserted. In the next column, which was headed “Location of Goods” the words “On Jourmaund Reef, off Samarai” were inserted. The price quoted was 285 pounds, and a cheque for 28 pounds 10s. 0d. being the required deposit of ten per cent, was forwarded with the tender. Indorsed on the printed form of tender were a number of conditions. On 11th April 1947 the Commission wrote to the plaintiffs a letter saying:— “With reference to your tender of 31st March 1947, I desire to advise that your offer of 285 pounds net has been accepted. A sales advice note to cover this transaction will be forwarded in the course of the next few days.” This letter was followed by another letter of 15th April 1947, which says:— “I wish to inform you that your offer to purchase dated 31.3.47 is accepted for the quantities, the items, and at the price set out hereunder and/or in the attachment hereto bearing the same sales advice number as this acceptance”. Below appear the words “One (1) Oil Tanker including Contents wrecked on Jourmaund Reef approximately 100 miles north of Samarai. Price 285 pounds.” Then come some provisions as to payment and delivery, followed by the signature on behalf of the Commission. After the signature come the words “Your offer to purchase, the general conditions contained in Form O, and this acceptance, shall constitute the contract. Kindly acknowledge receipt of this communication by return post”. Finally, certain further “terms” are set out. The plaintiffs apparently did not, by return post or otherwise, acknowledge in writing the receipt of this remarkable “communication”. Form O is a printed form which contains a number of “conditions of sale”, most of which are entirely inappropriate to the particular case.

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[398] The contention of the Commission that no contract ever came into existence between itself and the plaintiffs was based on extrinsic facts which will have to be considered in a moment. It was not denied that, apart from those facts, a contract would have been made, and, on the assumption that a contract was made, a good deal of argument took place as to what were the terms of that contract. It will be convenient to deal with this matter at this stage. No less than five documents are involved — the advertisement, the tender, the letter of 11th April, the letter of 15th April, and "Form O". Mr. Gillard, for the plaintiffs, contended that the terms of the contract made were to be found in the first three documents only. He said that the letter of 11th April was an unequivocal acceptance of the offer contained in the tender, that the reference to "sales advice note" was not to be understood as contemplating the addition of further terms so as to make the letter in effect a counter-offer, and that the letter of 15th April was merely an ineffective attempt to add further terms to a contract which was concluded on the receipt of the plaintiffs' letter of 11th April. He referred to a well-known line of cases of which Bellamy v. Debenham (1890) 45 Ch D 481 and Lennon v. Scarlett & Co. [1921] HCA 42; (1921) 29 CLR 499 are good examples. Mr. Tait, for the Commission, contended that the plaintiffs must be taken to have accepted the terms set out and referred to in the second letter, and that the terms of the contract were to be found in all five of the documents. He admitted that in the terms so found there was overlapping and inconsistency, and that some of those terms were entirely inappropriate to the subject matter of the contract, but he said that these facts merely meant that difficult problems of construction might arise. We are disposed to accept the view put by Mr. Gillard, but the question does not seem to us to matter, and for this reason. The only condition on which Mr. Tait affirmatively relied was a condition which is contained in clause 8 of the terms indorsed on the tender form. That clause provides that the goods "are sold as and where they lie with all faults" and that no warranty is given as to "condition description quality or otherwise". This clause cannot, in our opinion, help the Commission in this case. What the Commission sold was an "oil tanker". It was, therefore, a condition of the contract that what was supplied should conform to the description of an oil tanker, and it is settled that such a clause as clause 8 has no application to such a condition: see, e.g., Wallis, Son & Wells v. Pratt & Haynes (1911) AC 394 and Robert A. Munro & Co. Ltd. v. Meyer (1930) 2 KB 312; and cf. Shepherd v. Kain (1821) 5 B & Ald 240 (106 ER 1180).

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[399] There was, however, another communication from the Commission to the plaintiffs, which is of considerable importance. The accepted tender described the subject matter as an "oil tanker lying on Jourmaund Reef as advertised Age, Argus, 29/3/47". The advertisement described her as "lying on Jourmaund Reef, which is approximately 100 miles North of Samarai". Now there appears to be no reef anywhere in the locality which is charted or officially known as "Jourmaund Reef". There is a channel between two islands or reefs charted as "Jomard Entrance", and a few miles to the east of that channel is an island or reef charted as "Jomard Island". Jomard Island, however, is not approximately 100 miles from Samarai, but approximately 170 miles from Samarai, and its bearing from Samarai is not North but a little South of East. The plaintiffs, having bought as they thought, their tanker, looked for "Jourmaund Reef" on a map. They, of course, failed to find it, but they found Jomard Island, and thereupon, not unnaturally, asked the Commission to give them the precise latitude and longitude of the tanker. The Commission gave a latitude and longitude by telephone on 18th April, and confirmed this by a letter written on the same day. The letter read:— "Confirming our telephone conversation of this morning, in connection with the location of the Oil Tanker on Jourmond" (sic) "Reef, I wish to advise it is located as

follows:— Latitude 11 degrees 16 1/2 minutes South: Longitude 151 degrees 58 minutes East". The result of this letter was to resolve any ambiguity in the description of the locality of the tanker and to identify with precision, as against the defendant Commission, the place referred to in the relevant documents as the place where the thing which they were purporting to sell was lying.

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Now, the simple fact is that there was not at any material time any oil tanker lying at or anywhere near the location specified in the letter of 18th April. There was, at a point about eleven miles east of the location specified, a wrecked vessel described as an "oil barge". Some years before 1947 strenuous but unavailing efforts to salve this vessel had been made by a fully equipped expedition sent out by the Commonwealth Salvage Board. It was contended before Webb J., and also, though faintly, before us, that this vessel was a tanker and that delivery of her to the plaintiffs would constitute performance of the contract by the Commission. Webb J. rejected this contention, and the evidence clearly establishes that a "tanker", according to common understanding, is a self-propelled, ocean-going vessel, fully equipped both for navigation and for the carriage of oil in bulk. A barge is merely a floating repository for oil, adapted to be towed, but not otherwise capable of movement under control. The existence of the wrecked barge in question here is not, we think, a directly relevant factor in the case, though it may serve to explain to some extent how a rumour that there was a wrecked tanker somewhere began to circulate in the offices of the Commission.

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[400] We say advisedly that such a rumour began to circulate, because there was indeed no better foundation for any supposition on the part of the officers of the Commission that they had a tanker to sell. They had no more definite information than was derived from an offer by a man named Jarrett to buy for 50 pounds the contents of a wrecked vessel, which he said was within a radius of 200 miles from Samarai, and from what can be quite fairly described as mere gossip. The reckless and irresponsible attitude of the Commission's officers is clearly indicated by the description in the advertisement of the locality of the tanker. In an even worse light appears an attempt which was made later, without any foundation whatever, to suggest that at the time of the making of the contract there had been a tanker in the place specified but that she had since been washed off the reef in a storm. Unfortunately the plaintiffs, for their part, took the matter seriously. They believed, and there is evidence that they had some reason for believing, that an oil tanker wrecked at the place indicated was likely to prove a profitable proposition, and accordingly they paid on 23rd April the balance of their purchase money, and then proceeded to fit up a small ship, which they owned, with diving and salvage equipment, and they engaged personnel, and proceeded from Melbourne to New Guinea. It is sufficient at this stage to say that they expended a large sum of money in discovering that they had bought a non-existent tanker.

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The plaintiffs, as has been said, based their claim for damages on three alternative grounds. They claimed, in the first place, for damages for breach of a contract to sell a tanker lying at a particular place. Alternatively they claimed damages for a fraudulent representation that there was a tanker lying at the place specified. In the further alternative, they claimed damages for a negligent failure to disclose that there was no tanker at the place specified after that fact

became known to the Commission. The second and third of these alleged causes of action depend wholly or partly on certain further facts which have not so far been mentioned. On 19th April 1947 a telegram was sent from the District Officer at Misima to the Port Moresby office of the Commission, which read: "Your S4382 stop Large approx. 100 ft. barge type tanker carrying oil machinery etc. apparently drifted on reef, Jomard Entrance high water during 1944 stop When inspected by Lieut. Middleton 1945 large hole stern admitted sea Machinery ruined stop Understand oil still in hold but quantity unknown Vessel exposed low tide only partly submerged high tide Can inspect when district vessel available". This unquestionably refers to the wrecked barge. How and why this telegram came to be sent is one of the minor mysteries of this case: no Port Moresby message numbered S4382 was produced. It seems reasonable to infer that the plaintiffs' request for a precise "fix" for their tanker prompted the making of inquiries which ought to have been made much earlier, and that the missing "S4382" was a belated attempt to find out whether the Commission had really had anything to sell to the plaintiffs. On 14th April the Port Moresby office of the Commission had telegraphed the District Officer at Samarai, saying:— "S4392 Would appreciate urgent reply details oil tanker Jourmaund Reef stop Understand vessel now moved under water and contents nil stop Can this be confirmed?" It seems quite possible that one of the quoted numbers is a mistake for the other, and that the telegram of 17th April is really in response to that of 14th April, which had been passed on from Samarai to Misima. Anyhow, the telegram of 17th April was set out in a letter of 19th April from the Port Moresby office to the Melbourne office of the Commission. The letter was minuted by Bowser, one of the officers of the Commission who were mainly responsible for the "selling" of the "tanker", as follows:—

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"Received 21/4/47. McRae (successful tenderer) already advised and confirmed by letter location of vessel". In the meantime Port Moresby had replied to Misima, saying:— "Appreciate report stop Vessel sold Melbourne syndicate Inspection not required".

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[401] The plaintiffs put their claim in deceit in this way. They said, first, that there was a false and fraudulent representation in the original advertisement. They said, secondly, that, even if the original representation as to the existence of a tanker was innocent, the representation was a continuing representation and the Commission knew, on 21st April at the latest, that it was false. By thereafter allowing the plaintiffs, on the faith of the truth of the representation, to pay the balance of purchase money and incur expenditure, they rendered themselves liable in deceit. The plaintiffs put their final alternative claim in this way. They said that, when the Commission was asked for the precise location of the vessel, they owed to the plaintiffs a duty to exercise reasonable care in obtaining the information required. The duty arose from the position of the parties. They at least believed that they were contractually bound. It must have been obvious to the Commission that the plaintiffs were likely to spend real money in reliance on the information supplied. So far from exercising any sort of care in the matter, they merely obtained a rough estimate of the latitude and longitude of Jomard Entrance and gave the result to the plaintiffs. The grossness of the negligence is emphasised by the fact that, on the very day (17th April) on which the latitude and longitude were telegraphed from Port Moresby to Melbourne, the Port Moresby office of the Commission received the telegram from Misima which should, the plaintiffs say, have made it plain to them that there was no tanker at Jomard Entrance.

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[402] Webb J. held that the contract for the sale of a tanker was void — in other words, that no contract for the sale of a tanker was ever made. He considered that the well-known case of Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); [1853] EngR 764; (1853) 9 Ex 102 (156 ER 43); [1856] EngR 713; (1856) 5 HLC 673 (10 ER 1065) compelled him to this conclusion. His Honour held, however, as we read his judgment, that the plaintiffs had made out their case on the second aspect of their claim in deceit. He assessed damages on the basis that the plaintiffs were entitled to the return of the price paid plus an amount (necessarily, of course, approximate only) representing what it would have cost (without any preparations for salvage operations) to inspect the locality and ascertain that there was no tanker there. His Honour has not expressly stated the basis of his assessment, but it was common ground before us that this was the basis on which he proceeded.

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The first question to be determined is whether a contract was made between the plaintiffs and the Commission. The argument that the contract was void, or, in other words, that there was no contract, was based, as has been observed, on Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 ER 1065). It is true that Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 ER 1065) has been commonly treated in the text-books as a case of a contract avoided by mutual mistake, and it is found cited in the company of such cases as Gompertz v. Bartlett [1853] EngR 970; (1953) 2 El & Bl 849 (118 ER 985) and Strickland v. Turner [1852] EngR 199; (1852) 7 Ex 208 (155 ER 919). Section 7 of the English Sale of Goods Act 1893 is generally regarded as expressing the effect of the case. The case has not, however, been universally regarded as resting on mistake, and Sir Frederick Pollock, in his preface to vol. 101 of the Revised Reports, at p. vi, says:— "Couturier v. Hastie shows how a large proportion of the cases which swell the rubric of relief against mistake in the textbooks (with or without protest from the text-writer) are really cases of construction". And in Solle v. Butcher (1950) 1 KB, at p 691 Denning L.J. observed that the cases which it had been usual to classify under the head of "mistake" needed reconsideration since the decision of the House of Lords in Bell v. Lever Bros. Ltd. [1931] UKHL 2; (1932) AC 161. No occasion seems to have arisen for a close examination of Couturier v. Hastie [1852] EngR 774; [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); [1853] EngR 764; (1853) 9 Ex 120 (156 ER 43); (1856) 5 HLC 673(10 ER 1065), but such an occasion does now arise.

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[403] The facts of the case were simple enough. A question of del credere agency was involved, which has no relevance to the present case, and the facts may be stated without reference to that question. A sold to B "1,180 quarters of Salonica Indian corn of fair average quality when shipped, at 27/- per quarter f.o.b., and including freight and insurance, to a safe port in the United Kingdom, payment at two months from date upon handing over shipping documents." At the date of the contract the vessel containing the corn had sailed from Salonica, but, having encountered very heavy weather, had put in at Tunis. Here the cargo had been found to have become so heated and fermented that it could not be safely carried further. It had accordingly been landed at Tunis and sold there. These facts were unknown to either party at the date of the contract. On discovering them, B repudiated the contract. After

the expiration of the two months mentioned in the contract, A, being able and willing to hand over the shipping documents, sued B for the price. The case came on for trial before Martin B. and a jury. Martin B. directed the jury that "the contract imported that, at the time of the sale, the corn was in existence as such, and capable of delivery" (1852) 8 Ex, at p 47 (155 ER, at pp 1253, 1254). The jury found a verdict for the defendant, and the plaintiff had leave to move. The Court of Exchequer (Parke B. and Alderson B., Pollock C.B. dissenting) made absolute a rule to enter a verdict for the plaintiff. This decision was reversed in the Court of Exchequer Chamber, and the House of Lords, after consulting the Judges, affirmed the decision of the Exchequer Chamber, so that the defendant ultimately had judgment.

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[404] In considering Couturier v. Hastie [1852] EngR 774; (1952) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 ER 1065) it is necessary to remember that it was, in substance, a case in which a vendor was suing for the price of goods which he was unable to deliver. If there had been nothing more in the case, it would probably never have been reported: indeed the action would probably never have been brought. But the vendor founded his claim on the provision for "payment upon handing over shipping documents". He was not called upon to prove a tender of the documents, because the defendant had "repudiated" the contract, but he was able and willing to hand them over, and his argument was, in effect, that by handing them over he would be doing all that the contract required of him. The question thus raised would seem to depend entirely on the construction of the contract, and it appears really to have been so treated throughout. In the Court of Exchequer, Pollock C.B., in the course of argument, said (1852) 8 Ex, at p 49 (155 ER, at p 1254):— "The question is purely one of construction. I certainly think that the plain and literal meaning of the language here used imports that the thing sold, namely the cargo, was in existence and capable of being transferred." This was, in effect, what Martin B. had told the jury, and what it means is that the plaintiff had contracted that there was a cargo in existence and capable of delivery. Parke B., in giving the judgment of the majority of the Court (1852) 8 Ex, at p 54 (155 ER, at p 1256), said:—

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"It is very true that, when there is a sale of a specific chattel, there is an implied undertaking that it exists; and, if there were nothing in this case but a bargain and sale of a certain cargo on the 15th May, there would be an engagement by the vendor, or a condition, that the cargo was in existence at that time." He went on to say, however, that there was very much more in the contract, and that there was enough to make it plain "that the true meaning of the contract was that the purchaser bought the cargo if it existed at the date of the contract, but that, if it had been damaged or lost, he bought the benefit of insurance but no more" (1852) 8 Ex, at p 55 (155 ER, at p 1257).

[405] The judgment of the Exchequer Chamber was delivered by Coleridge J. The view that the contract was void is probably derived from certain expressions which were used in the course of this judgment. But it does seem clear that again the question of construction was regarded as the fundamental question in the case. In stating the question for decision Coleridge J. (1853) 9 Ex, at p 106 (156 ER, at p 45) refers first to the direction of Martin B. to the jury, and says that the Lord Chief Baron had agreed with the opinion of Martin B. whereas the other learned Barons had differed from him. The judgment below, he says (1853) 9 Ex, at p 107 (156 ER, at pp 45, 46), "turned entirely on the meaning of the contract", and he

proceeds to set out its terms in full. “The question”, he says, “turns entirely upon the terms of the contract”. The argument for the defendant is then put as including the proposition “that a vendor of goods undertakes that they exist”, and (1853) 9 Ex, at p 108 (156 ER, at p 46) the argument for the plaintiff as being “that this was not a mere contract for the sale of an ascertained cargo, but that the purchaser bought the adventure, and took upon himself all risks from the shipment of the cargo”. The final conclusion reached is expressed at the end of the judgment (1853) 9 Ex, at p 110 (156 ER, at pp 46, 47) by saying that “the basis of the contract in this case was the sale and purchase of goods, and all the other terms in the bought note were dependent upon that, and we cannot give to it the effect of a contract for goods lost or not lost”. In the light of these passages it seems impossible to regard the expressions (1853) 9 Ex, at p 109 (156 ER, at p 46) “If the contract for the sale of the cargo was valid” and “the contract failed as to the principal subject-matter of it” as meaning that the contract was treated as being void. All that the passages in which those expressions occur seem in their context to mean is that the principal subject matter of the contract was a cargo of goods, that the purchaser did not buy shipping documents representing non-existent goods, that the consideration to the purchaser had failed, and that he could not therefore be liable to pay the contract price.

In the House of Lords again the Lord Chancellor, in giving judgment (1856) 5 HLC, at p 681 (10 ER, at pp 1068, 1069), said:— “The whole question turns upon the meaning and construction of the contract”. A little later he said:— “What the parties contemplated . . . was that there was an existing something to be sold and bought, and, if sold and bought, then the benefit of insurance should go with it.” In other words, there was not an absolute obligation to pay the price on delivery of the shipping documents (as the plaintiff contended), but an obligation to pay on delivery of those documents only if they represented at the time of the making of the contract goods in existence and capable of delivery. And this is all that the Lord Chancellor really had in mind, we think, when later he says:—

“If the contract of the 15th May had been an operating contract, and there had been a valid contract at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously existing.”

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[406] In Bell v. Lever Bros. Ltd. [1931] UKHL 2; (1932) AC 161, at pp 218-222 Lord Atkin, though he does not mention Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 E.R., 1065). itself, discusses Gompertz v. Bartlett [1853] EngR 970; (1853) 2 El & Bl 849 (118 ER 985) and Gurney v. Womersley [1854] EngR 845;[1854] EngR 845; (1854) 4 El & Bl 133 (119 ER 51) and other cases which have sometimes been regarded as turning on mistake avoiding a contract ab initio, and His Lordship concludes the discussion with a very important observation. He says (1932) AC, at p 222:— “In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing, whether goods or services, that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while, if executed, the other can recover back money paid on the ground of failure of the consideration”. This observation accords with the reasons actually given for the decisions in Gompertz v. Bartlett [1853] EngR 970; [1853] EngR 970; (1853) 2 El & Bl 849(118 ER 985) and Gurney v. Womersley (1854) 4 El & Bl 133 (119 ER 51) . In the former case, in which the action was for money had and received, Lord Campbell C.J. (1853) 2 El & Bl, at p 853 (118 ER, at p 987) said:— “The action is maintainable on the

ground that the article does not answer the description of that which was sold." And Coleridge J. (1853) 2 El & Bl, at pp 854, 855 (118 ER, at pp 987, 988) said:— "The vendee is entitled to have an article answering the description of that which he bought". So in Gurney v. Womersley [1854] EngR 845; (1854) 4 El & Bl 133 (119 ER 51), where also the action was for money had and received, Wightman J. (1854) 4 El & Bl, at p 142 (119 ER, at p 55) said that the defendants had "professed to sell a genuine bill" and that the bill given "failed in what was the substance of the description". So again in Strickland v. Turner [1852] EngR 199; (1852) 7 Ex 208 (155 ER 919) the case is put by Pollock C.B., who delivered the judgment of the Court, entirely on the ground of failure of consideration. "The money which was paid", he said, "was paid wholly without consideration, and may be recovered back" (1852) 7 Ex, at p 219 (155 ER, at p 924). This language clearly imports the existence of a contract. If there were no contract, there could be no failure of consideration. The case of Scott v. Coulson (1903) 1 Ch 453; (1903) 2 Ch 249 stands on a different footing and belongs to a class of case in which relief is given on equitable grounds.

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[408] The observation of Lord Atkin in Bell v. Lever Bros. Ltd. (1932) AC, at p 222 seems entirely appropriate to Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); [1853] EngR 764; (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 E.R. 1065). In that case there was a failure of consideration, and the purchaser was not bound to pay the price: if he had paid it before the truth was discovered, he could have recovered it back as money had and received. The construction of the contract was the vital thing in the case because, and only because, on the construction of the contract depended the question whether the consideration had really failed, the vendor maintaining that, since he was able to hand over the shipping documents, it had not failed. The truth is that the question whether the contract was void, or the vendor excused from performance by reason of the non-existence of the supposed subject matter, did not arise in Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 E.R. 1065). It would have arisen if the purchaser had suffered loss through non-delivery of the corn and had sued the vendor for damages. If it had so arisen, we think that the real question would have been whether the contract was subject to an implied condition precedent that the goods were in existence. Prima facie, one would think, there would be no such implied condition precedent, the position being simply that the vendor promised that the goods were in existence. That is the real meaning of the direction of Martin B. to the jury, and so the argument for the defendant, as has already been pointed out, included the proposition that "a vendor of goods undertakes that they exist and that they are capable of being tranferred, although he may not stipulate for their condition" (1853) 9 Ex, at p 107 (156 ER, at p 46). So in Barr v. Gibson [1836] EngR 984; (1838) 3 M & W 390 (150 ER 1196) , where the contract was for the sale of a ship, Parke B. (1838) 3 M & W, at pp 399, 400 (150 ER, at pp 1200, 1201) said:— "And therefore the sale in this case of a ship implies a contract that the subject of transfer did exist in the character of a ship". It should be noted in this connection that in Solle v. Butcher (1950) 1 KB 671, at pp 691, 692 Denning L.J. said that the doctrine of French law, as enunciated by Pothier, is no part of English law. His Lordship was without doubt thinking of the passage quoted from Pothier in a note to the report of the argument in the House of Lords in Couturier v. Hastie (1856) 5 HLC, at p 678 (10 ER, at pp 1067, 1068). Although we would not be prepared to assent to everything that is said by Denning L.J. in the course of this judgment, we respectfully agree with this observation. When once the common law had made up its mind that a promise supported by consideration ought to be performed, it was inevitable that the theorisings of the civilians about "mistake" should mean little or nothing to

it. On the other hand, the question whether a promisor was excused from performance by existing or supervening impossibility without fault on his part was a practical every-day question of which the common law has been vividly conscious, as witness Taylor v. Caldwell (1863) 3 B & S 826 (122 ER 309), with its innumerable (if sometimes dubious) successors. But here too the common law has generally been true to its theory of simple contract, and it has always regarded the fundamental question as being: "What did the promisor really promise?" Did he promise to perform his part at all events, or only subject to the mutually contemplated original or continued existence of a particular subject-matter? So questions of intention or "presumed intention" arise, and these must be determined in the light of the words used by the parties and reasonable inferences from all the surrounding circumstances. That the problem is fundamentally one of construction is shown clearly by Clifford v. Watts (1870) LR 5 CP 577.

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[409] If the view so far indicated be correct, as we believe it to be, it seems clear that the case of Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43);(1856) 5 HLC 673 (10 E.R. 1065). does not compel one to say that the contract in the present case was void. But, even if the view that Couturier v. Hastie [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); [1856] EngR 713; (1856) 5 HLC 673 (10 E.R. 1065). was a case of a void contract be correct, we would still think that it could not govern the present case. Denning L.J. indeed says in Solle v. Butcher (1950) 1 KB, at p 692:— "Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other party did not know of the mistake, but shared it". But, even if this be not wholly and strictly correct, yet at least it must be true to say that a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party. It does not seem possible on the evidence to say that Bowser or Sheehan was guilty of fraud in the sense that either knew at the date of the contract that the Commission had no tanker to sell. And even at the later stage, after the receipt of the message from Misima, it is difficult to impute to them actual knowledge that there was no tanker at Jomard Entrance. The message should have conveyed to them the fact that the only vessel lying in the vicinity was almost certainly worthless, and ordinary commonsense and decency would have suggested that the contents of the message ought to be communicated to the plaintiffs. But the message referred to a "barge type tanker", and it is quite possible that this description would fail to bring home to their minds that there was no tanker. A finding of actual knowledge that they had nothing to sell does not seem justified by the evidence, though it is difficult to credit them at the time of the publication of the advertisements with any honest affirmative belief that a tanker existed. The confusion as to locality in the description advertised is almost enough to exclude the inference of any such affirmative belief. But, even if they be credited with a real belief in the existence of a tanker, they were guilty of the grossest negligence. It is impossible to say that they had any reasonable ground for such a belief. Having no reasonable grounds for such a belief, they asserted by their advertisement to the world at large, and by their later specification of locality to the plaintiffs, that they had a tanker to sell. They must have known that any tenderer would rely implicitly on their assertion of the existence of a tanker, and they must have known that the plaintiffs would rely implicitly on their later assertion of the existence of a tanker in the latitude and longitude given. They took no steps to verify what they were asserting, and any "mistake" that existed was induced by their own culpable

conduct. In these circumstances it seems out of the question that they should be able to assert that no contract was concluded. It is not unfair or inaccurate to say that the only "mistake" the plaintiffs made was that they believed what the Commission told them.

69

[410] The position so far, then, may be summed up as follows. It was not decided in Couturier v. Hastie […]that the contract in that case was void. The question whether it was void or not did not arise. If it had arisen, as in an action by the purchaser for damages, it would have turned on the ulterior question whether the contract was subject to an implied condition precedent. Whatever might then have been held on the facts of Couturier v. Hastie [1852] EngR 774; (1852) […]it is impossible in this case to imply any such term. The terms of the contract and the surrounding circumstances clearly exclude any such implication. The buyers relied upon, and acted upon, the assertion of the seller that there was a tanker in existence. It is not a case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations. The officers of the Commission made an assumption, but the plaintiffs did not make an assumption in the same sense. They knew nothing except what the Commission had told them. If they had been asked, they would certainly not have said: "Of course, if there is no tanker, there is no contract". They would have said: "We shall have to go and take possession of the tanker. We simply accept the Commission's assurance that there is a tanker and the Commission's promise to give us that tanker." The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified. The Commission contracted that there was a tanker there. "The sale in this case of a ship implies a contract that the subject of the transfer did exist in the character of a ship" (Barr v. Gibson (1838) 3 M& W, at pp 399, 400 (150 ER, at pp 1200, 1201)). If, on the other hand, the case of Couturier v. Hastie [1852] EngR 774; [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); [1853] EngR 764; (1853) 9 Ex 102 (156 ER 43); (1856) 5 HLC 673 (10 ER 1065) and this case ought to be treated as cases raising a question of "mistake", then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground. There was a contract, and the Commission contracted that a tanker existed in the position specified. Since there was no such tanker, there has been a breach of contract, and the plaintiffs are entitled to damages for that breach.

70

Before proceeding to consider the measure of damages, one other matter should be briefly mentioned. The contract was made in Melbourne, and it would seem that its proper law is Victorian law. Section 11 of the Victorian Goods Act 1928 corresponds to s. 6 of the English Sale of Goods Act 1893, and provides that "where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made the contract is void". This has been generally supposed to represent the legislature's view of the effect of Couturier v. Hastie [1852] EngR 774; [1852] EngR 774; (1852) 8 Ex 40 (155 ER 1250); (1853) 9 Ex 102 (156 ER 43); [1856] EngR 713; (1856) 5 HLC 673 (10 ER 1065). Whether it correctly represents the effect of the decision in that case or not, it seems clear that the section has no application to the facts of the present case. Here the goods never existed, and the seller ought to have known that they did not exist.

71

The conclusion that there was an enforceable contract makes it unnecessary to consider the other two causes of action raised by the plaintiffs. As to each of these, the plaintiffs would have been, to say the least, faced with serious obstacles. We have already referred to the evidence bearing on the issue of fraud. And the claim based on negligence would have encountered the difficulties which were held by a majority of the Court of Appeal to be fatal to the plaintiff in Candler v. Crane Christmas & Co. (1951) 1 All ER 426.

72

[411] The question of damages, which is the remaining question, again presents serious difficulties. It is necessary first to arrive at the appropriate measure of damages. The contract was a contract for the sale of goods, and the measure of damages for non-delivery of goods by a seller is defined in very general terms by s. 55(2) of the Goods Act 1928 as being "the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract". This states, in substance, the general prima-facie rule of the common law as to the measure of damages for breach of contract. But, if we approach this case as an ordinary case of wrongful non-delivery of goods sold, and attempt to apply the ordinary rules for arriving at the sum to be awarded as damages, we seem to find ourselves at once in insuperable difficulties. There was obviously no market into which the buyers could go to mitigate their loss, and the rule normally applied would require us to arrive at the value of the goods to the buyer at the place where they ought to have been delivered and at the time when they ought to have been delivered. But it is quite impossible to place any value on what the Commission purported to sell. The plaintiffs indeed, on one basis of claim which is asserted in their statement of claim, assessed their damages on the basis of an "average-sized tanker, 8,000-10,000 ton oil tanker, valued at 1,000,000 pounds, allowing for the said tanker lying on Jourmaund Reef, valued at 250,000 pounds", and, for good measure, they added their "estimated value of cargo of oil" at the figure of 50,000 pounds. But this, as a basis of damages, seems manifestly absurd. The Commission simply did not contract to deliver a tanker of any particular size or of any particular value or in any particular condition, nor did it contract to deliver any oil.

73

[412] It was strongly argued for the plaintiffs that mere difficulty in estimating damages did not relieve a tribunal from the responsibility of assessing them as best it could. This is undoubtedly true. In the well-known case of Chaplin v. Hicks (1911) 2 KB 786, at p 792 Vaughan Williams L.J. said:— "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract". That passage, and others from the same case, are quoted by Street C.J. in Howe v. Teefy (1927) 27 SR (NSW) 301, at pp 305-306; 44 WN 102, at pp 103, 104, but the learned Chief Justice (1927) 27 SR (NSW), at p 306; 44 WN, at p 104 himself states the position more fully. He says:— "The question in every case is: has there been any assessable loss resulting from the breach of contract complained of? There may be cases where it would be impossible to say that any assessable loss had resulted from a breach of contract, but, short of that, if a plaintiff has been deprived of something which has a monetary value, a jury is not relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances do not admit of the damages being assessed with certainty". The present case seems to be more like Sapwell v. Bass (1910) 2 KB 486 than Chaplin v. Hicks (1911) 2

KB 786. And see Fink v. Fink [1946] HCA 54; (1946) 74 CLR 127, at p 143, per Dixon and McTiernan JJ. It does not seem possible to say that "any assessable loss has resulted from" non-delivery as such. In Chaplin v. Hicks (1911) 2 KB 786, if the contract had been performed, the plaintiff would have had a real chance of winning the prize, and it seems proper enough to say that that chance was worth something. It is only in another and quite different sense that it could be said here that, if the contract had been performed, the plaintiffs would have had a chance of making a profit. The broken promise itself in Chaplin v. Hicks (1911) 2 KB 786 was, in effect, "to give the plaintiff a chance": here the element of chance lay in the nature of the thing contracted for itself. Here we seem to have something which cannot be assessed. If there were nothing more in this case than a promise to deliver a stranded tanker and a failure to deliver a stranded tanker, the plaintiffs would, of course, be entitled to recover the price paid by them, but beyond that, in our opinion, only nominal damages.

74

[413] There is, however, more in this case than that, and the truth is that to regard this case as a simple case of breach of contract by non-delivery of goods would be to take an unreal and misleading view of it. The practical substance of the case lies in these three factors— (1) the Commission promised that there was a tanker at or near to the specified place; (2) in reliance on that promise the plaintiffs expended considerable sums of money; (3) there was in fact no tanker at or anywhere near to the specified place. In the waste of their considerable expenditure seems to lie the real and understandable grievance of the plaintiffs, and the ultimate question in the case (apart from any question of quantum) is whether the plaintiffs can recover the amount of this wasted expenditure or any part of it as damages for breach of the Commission's contract that there was a tanker in existence. In the opinion of Webb J. it would have been reasonable, and within the proper contemplation of the Commission, that the plaintiffs should take steps, but should do no more than take steps, to see whether there was a tanker in the locality given, and, if so, whether any and what things should be done to turn her to account. And his Honour estimated the reasonable cost of taking such steps at the sum of 500 pounds. This view, however, seems to assume that the plaintiffs would be, or ought to be, in doubt as to whether they really had succeeded in buying a tanker. But they were clearly entitled to assume that there was a tanker in the locality given. The Commission had not, of course, contracted that she or her cargo was capable of being salved, but it does not follow that the plaintiffs' conduct in making preparations for salvage operations was unreasonable, or that the Commission ought not to have contemplated that the course in fact adopted would be adopted in reliance on their promise. It would be wrong, we think, to say that the course which the plaintiffs took was unreasonable, and it seems to us to be the very course which the Commission would naturally expect them to take. There was evidence that salvage operations at the locality given would not have presented formidable difficulties in fair weather. The plaintiffs were, of course, taking a risk, but it might very naturally seem to them, as business men, that the probability of successful salvage was such as to make the substantial expense of a preliminary inspection unwarranted. It was a matter of business, of weighing one consideration with another, a matter of which business men are likely to be the best judges. So far as the purpose of the expenditure is concerned, the case seems to fall within what is known as the second rule in Hadley v. Baxendale [1854] EngR 296; (1854) 9 Ex 341 (156 ER 145). A fairly close analogy may be found in a case in which there is a contract for the sale of sheep, and the buyer sends a drover to take delivery. There are no sheep at the point of delivery. Sheep have not risen in price, and the buyer has suffered no loss through non-delivery as such. But he will be entitled to recover the expense which he has

incurred in sending the drover to take delivery: cf. Pollock v. Mackenzie (1866) 1 QSCR 156 , and see also Foaminol Laboratories Ltd. v. British Ortid Plastics Ltd. (1941) 2 All ER 393, esp at p 397.

75

[414] There is, however, still another question. Mr. Tait not only strongly opposed the view so far expressed, but he also contended that, even if that view were accepted, it still could not be held that the alleged damage flowed from the alleged breach. Let it be supposed, he said in effect, that the plaintiffs acted reasonably in what they did, and let it be supposed that the Commission ought reasonably to have contemplated that they would so act. Still, he said, the plaintiffs are faced with precisely the same difficulty with which they are faced if the case is regarded as a simple and normal case of breach by non-delivery. Suppose there had been a tanker at the place indicated. Non constat that the expenditure incurred by the plaintiffs would not have been equally wasted. If the promise that there was a tanker in situ had been performed, she might still have been found worthless or not susceptible of profitable salvage operations or of any salvage operations at all. How, then, he asked, can the plaintiffs say that their expenditure was wasted because there was no tanker in existence?

76

The argument is far from being negligible. But it is really, we think, fallacious. If we regard the case as a simple and normal case of breach by non-delivery, the plaintiffs have no starting-point. The burden of proof is on them, and they cannot establish that they have suffered any damage unless they can show that a tanker delivered in performance of the contract would have had some value, and this they cannot show. But when the contract alleged is a contract that there was a tanker in a particular place, and the breach assigned is that there was no tanker there, and the damages claimed are measured by expenditure incurred on the faith of the promise that there was a tanker in that place, the plaintiffs are in a very different position. They have now a starting-point. They can say: (1) this expense was incurred; (2) it was incurred because you promised us that there was a tanker; (3) the fact that there was no tanker made it certain that this expense would be wasted. The plaintiffs have in this way a starting-point. They make a prima-facie case. The fact that the expense was wasted flowed prima facie from the fact that there was no tanker; and the first fact is damage, and the second fact is breach of contract. The burden is now thrown on the Commission of establishing that, if there had been a tanker, the expense incurred would equally have been wasted. This, of course, the Commission cannot establish. The fact is that the impossibility of assessing damages on the basis of a comparison between what was promised and what was delivered arises not because what was promised was valueless but because it is impossible to value a non-existent thing. It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain.

77

[415] For these reasons we are of opinion that the plaintiffs were entitled to recover damages in this case for breach of contract, and that their damages are to be measured by reference to expenditure incurred and wasted in reliance on the Commission's promise that a tanker existed at the place specified. The only problem now remaining is to quantify those damages,

but this is itself a most serious problem, because the evidence is left by the plaintiffs in a highly unsatisfactory state. Whether the evidence has been so left because of the loss of records or because of misplaced confidence in the view that any wrecked or stranded tanker must be worth something like a quarter of a million pounds need not be considered. Two things seem clear, for what they are worth. The first is that the plaintiffs did expend and waste a sum of money very considerably in excess of 500 pounds. The second is that the plaintiffs have, in their statement of claim, and also in their evidence, sought to exaggerate grossly the amount of their claim.

78

What actually happened may be summarized as follows. The plaintiffs owned a small steam vessel named the Gippsland. This vessel was, at the date of the making of the contract, being refitted in Sydney for trading between Melbourne and King Island. After the making of the contract the plan of refitting seems to have been modified in some respects with a view to making her suitable for salvage work. Certain salvage equipment was purchased and placed on board. A crew was engaged, and Mr. J.E. Johnstone, a shipwright and diver, and an acknowledged expert in salvage work, was also engaged. The ship sailed from Sydney for the supposed locality of the tanker on 28th June 1947. While she was on the voyage north, Mr. Johnstone and a brother of the plaintiffs proceeded together by air to Port Moresby. The ship foundered in the vicinity of Port Moresby on 24th July 1947. Why she took so long to reach this locality from Sydney is not explained, but she appears to have called at Brisbane and other northern ports. No lives were lost when she sank, and the ship's company landed at Port Moresby. Mr. F.E. McRae, one of the plaintiffs, entered into negotiations for the charter of a vessel named the Betty Joan, but in the meantime his brother and Mr. Johnstone went to Samarai and there chartered a boat named the Jessie for the purpose of looking for the tanker. They found, of course, no tanker, and returned to Port Moresby, where they informed Mr. McRae of the position.

79

[416] The plaintiffs make their claim on the basis of wasted expenditure under ten heads, several of which it is plainly impossible to support at all. The first claim is under the head of "equipment", and relates to certain equipment purchased for the Gippsland. This claim is wholly untenable. Some of the items in it, such as navigating lights and signalling lamps, are ordinary necessities of a ship's equipment, and some were purchased months before the date of the contract. But in any case this was all capital expenditure represented by acquired assets, and it is out of the question to claim it as damages. One would assume, though there is no clear evidence on the matter, that it was covered by insurance.

80

The second claim is under the head of "reconditioning", and refers to work done on the Gippsland herself. Again it is plain that this claim must be wholly disallowed. About one-third of the amount claimed proves to relate to work done long before the date of the contract, but again the whole of it is capital expenditure.

81

[417] The third claim is of a different character and does not relate to actual expenditure at all. It is made under the head of "loss of revenue", and represents the profit which the Gippsland might have been expected to make if she had not been devoted to the futile tanker enterprise. As framed, this claim was based on the profit anticipated as likely to accrue from the use of the vessel under a contract with a company called King Island Scheelite No Liability. In April 1947 no contract with that company had been concluded, but negotiations were proceeding for the use of the vessel in trading between King Island and Melbourne. Mr. Laird, the witness who gave evidence for the plaintiffs on these matters, said that in consultation with Captain Guthrie he had estimated that, if the last offer of the King Island company had been accepted, a profit of 75 pounds per week would have been realized, and he said or implied that that offer would have been accepted if better terms could not have been obtained. On this basis the claim ultimately put forward under this head was for 1,050 pounds, a sum which represents 75 pounds per week for fourteen weeks. Put baldly as a claim for this estimated loss of profit as such, the claim might be thought to be in its nature too remote, and in its amount conjectural to a degree. But the plaintiffs would be entitled to include in their damages the daily value of their vessel for a period which would not be excessively estimated as ten weeks, and the estimate based on Mr. Laird's calculations may be used as a basis — though it can only provide a rough and approximate basis — for arriving at this daily value. It would appear from cross-examination that the estimate was made after taking into account the obvious physical contingencies, but it has, we think, to be substantially discounted for the contingency of the ship being idle for part of the period. There is no evidence as to her earnings in the past. To allow 50 pounds per week does not seem unreasonable, and at that rate the plaintiffs should be allowed 500 pounds under this head.

82

The next four heads of claim are heads under which we think that the plaintiffs are entitled to recover damages. But, whereas one would have expected that the claim in each of these four cases would be capable, if not of precise computation, at least of a close approximation, we find that the evidence is for the most part of the vaguest kind. In most cases it is not possible to do more than make an estimate as best one can.

83

The fourth claim is made under the head of travelling expenses. It is difficult to avoid the conclusion that better evidence could have been given about this. It is said by Mr. Laird to include 200 pounds for the cost of searching for the wreck, and, as such, may be taken to include the cost incurred by McRae and Johnstone in going from Port Moresby to Samarai and the hire of the Jessie. We know also that McRae and Johnstone travelled by air from Melbourne to Port Moresby, and it seems proper to allow a further sum of 200 pounds in respect of this expense. Beyond this, either the evidence is too vague to justify any claim or it shows that the claim is unjustified or made under another head. The plaintiffs should recover 400 pounds under this head.

84

The fifth claim is made under the head of "Ship's Stores, etc." The plaintiffs would, we should think, be entitled to the value of coal and other stores consumed before the Gippsland foundered but not for what went down with the ship. So far as coal is concerned, an invoice

in Exhibit NN shows that about sixty tons was loaded at Bowen at a cost of about 100 pounds, and a note on the invoice states that the balance on board when the ship went down was twenty-five tons. Since Bowen is about half-way between Sydney and Port Moresby, this probably justifies an estimate that the ship had used about seventy tons between leaving Sydney and foundering and an allowance of 120 pounds for coal consumed may be made. Beyond this, there is no real material on which to found any estimate. Exhibit NN consists simply of a mass of invoices, which include a host of articles which are not ship's stores in any relevant sense, and for which no claim could be made. The best that can be done seems to be to make a rough man-day estimate for two months, and allow (say) 720 pounds. We would allow 840 pounds under the fifth head of claim.

85

[418] The sixth head of claim relates to special expenses of Mr. Johnstone, which are itemised in Exhibit PP. The account has only been paid in part by the plaintiffs. Mr. Johnstone's travelling expenses have already been allowed at 100 pounds under the fourth head of claim. It is not clear why he spent eight weeks in Port Moresby, though the amount claimed in respect of these eight weeks seems moderate enough. He had some undefined financial interest in the venture, and no clear evidence was given as to his contract or arrangement with the plaintiffs. Mr. Johnstone, however, had very special qualifications and experience in matters of salvage. It was certainly reasonable to engage his services, and his claim cannot be narrowly scanned. The sum of 400 pounds should be allowed under this head of claim.

86

The seventh head of claim relates to "crew's wages". Here at last we get something like definite evidence, though it reveals that the amount of the claim is again exaggerated, and the evidence is still defective. However, it finally appeared from evidence given by Captain Guthrie that a total sum of 1,400 pounds was paid in wages. This sum apparently includes Captain Guthrie's own salary, and it covers a period commencing on 13th November 1946 and ending on the dates on which the members of the crew arrived back at their home ports. But, while this figure may be taken to represent the whole wages bill of the Gippsland for the period mentioned, it cannot be taken to mean that all the members of the crew who sailed from Sydney were paid from 13th November 1946, because Captain Guthrie gave the monthly rate of pay of each man, and, if every man were paid at the rate stated for the whole period mentioned, the total sum paid would be very much larger than 1,400 pounds. The monthly rates of pay given by Captain Guthrie seem reasonable and it seems proper to allow a wages bill at those rates for two months. On this basis we arrive at a figure of 768 pounds.

Nothing can be claimed under either of the next two heads of claim. The eighth is "Claims by Crew" and represents amounts claimed by the crew in respect of clothing and other property lost when the ship foundered. These claims appear to have been, in part at least, covered by insurance and met by the insurers, but the Commission cannot in any case be responsible for consequences of the sinking of the ship. The ninth claim is for insurance premiums. The carrying of insurance is an ordinary incident of the ownership and operation of a ship, whatever she is doing. The tenth and last claim is for 150 pounds for office expenses. It seems reasonable to suppose that some office expenses were incurred and wasted, and,

though nothing much better than a guess is possible, it is probably fair enough to add 100 pounds for these.

[419] The total amount now arrived at is 3,008 pounds, and we may fairly take the figure of 3,000 pounds as representing, as nearly as can be estimated on the very defective evidence, the loss suffered by the plaintiffs for which damages are recoverable. To this must be added the sum of 285 pounds paid by the plaintiffs.

For convenience we have throughout treated the Commission as the party responsible to the plaintiffs. But, in our view, the cause of action lies in contract, and reg. 7 of the National Security (Disposal of Commonwealth Property) Regulations provides that the Commission may make contracts on behalf of the Commonwealth. Accordingly we think that the judgment should be against the Commonwealth.

The appeal should be allowed and the judgment of Webb J. set aside. In lieu thereof there should be judgment for the plaintiffs against the Commonwealth for the sum of 3,285 pounds as damages for breach of contract. There is no reason why the plaintiffs should not have the full costs of the appeal. With regard to the costs of the action, Webb J. gave no reasons for allowing the plaintiffs only one-half of their costs, but it was doubtless because he considered that the costs had been increased by the raising of matters (whether technically "issues" or not) on which the plaintiffs had failed and by the generally extravagant nature of their claim. We think that the costs may have been to some extent increased by the raising of unjustifiable claims. On the other hand, the whole case was one of very exceptional difficulty, the plaintiffs were fully justified in raising alternative bases of claim, and the extent to which costs were necessarily increased by the claim based on the supposed value of a tanker and by the unwarranted claims in respect of expenditure would be proportionately very small and hardly such as, in our opinion, to justify any attempt to apportion costs either by direct order or on taxation. It may be added that the conduct of the Commission's officers throughout, including their attitude when a claim was first made, is not such as would incline any court readily to exercise any discretion in favour of the defendants. We think that the plaintiffs should have their costs of the action. The cross-appeal should be dismissed with costs.