

CITATION: *Beau Court Pty Ltd v Berno Bros Pty Ltd* [2005] NTMC 082

PARTIES: BEAU COURT PTY LTD
(TRUSTEE FOR WD & PM WALKER
FAMILY TRUST) TRADING AS LIDECHEM

v

BERNO BROS PTY LTD

TITLE OF COURT: LOCAL COURT

JURISDICTION: LOCAL COURT

FILE NO(s): 20100750

DELIVERED ON: 20 December 2005

DELIVERED AT: Darwin

HEARING DATE(s): 29, 30 November 2005

JUDGMENT OF: Jenny Blokland S.M.

CATCHWORDS:

Claim and Counterclaim – Supply of Goods - Whether inference open that goods not fit for purpose – Whether inference open that goods damaged defendant’s property

REPRESENTATION:

Counsel:

Plaintiff: Mr Young
Defendant: Mr McQueen

Solicitors:

Plaintiff: Ward Keller
Defendant: McQueens

Judgment category classification: C
Judgment ID number: [2005] NTMC 082
Number of paragraphs: 35

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20100750

BETWEEN:

BEAU COURT PTY LTD
(TRUSTEE FOR WD & PM WALKER
FAMILY TRUST) TRADING AS
LIDECHEM
Plaintiff

AND:

BERNO BOS PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 20 December 2005)

Jenny Blokland SM:

Introduction and Background

1. This matter commenced as a small claim filed by the Plaintiff on 10 January 2001 for the sum of \$934.98 (plus certain associated fees) alleged to be the amount owed by the Defendant to the Plaintiff as a result of oil supplied to the Defendant on 16 May 2000. At that stage the matter was clearly within the *Small Claims* jurisdiction.
2. On 12 February 2001 the Defendant filed a counter-claim essentially alleging he did not owe money to the Plaintiff for the two drums of oil because there was an agreement that the Defendant company would receive two drums of oil free of charge from the Plaintiff for certain alleged problems with the oil supplied by the Plaintiff. The Defendant also originally counter-claimed the sum of \$16,823.50 being the costs for

allegedly needing to change oil and associated service of his vehicles and machinery. The Defendant alleges it needed to take this action as a result of the unsuitability of the oil supplied by the Plaintiff and the consequent alleged problems or damage to his vehicles and machinery.

3. According to the Court file, an amended defence and counterclaim was filed on 11 May 2001 that denies owing the alleged sum of \$934.95. The counterclaim is stated to be for \$15,931.85.
4. In its defence to the counterclaim filed on 10 July 2001, the Plaintiff, while admitting the supply of certain types of oil to the Defendant at various times, denies that its oil caused any damage to the Defendant's vehicles or machinery. The Plaintiff asserts that any damage to the Defendant's vehicles and machinery was due to overuse by the Defendant or on account of the Defendant not changing the oil.
5. On 15 October 2001 the proceedings were transferred to the Local Court. Clearly the sum alleged in the counterclaim exceeded the jurisdiction for matters that may be dealt with as Small Claims. Various pre-hearing conferences appear to have been adjourned for different reasons. An amended Notice of Defence and Counterclaim was filed on 9 August 2002 alleging damages in the sum of \$76,499.85. In June 2003 the matter was adjourned *sine die* and not relisted for hearing until this year. A further amended Notice of Defence and Counterclaim dealing with some minor amendments was filed on the first day of hearing before me (29 November 2005).

Evidence Called on Behalf of the Plaintiff

Mr Doug Walker

6. Mr Doug Walker gave evidence on behalf of the Plaintiff company that it previously traded under the name "Lubchem" and was now know as "Boss Fuel". At the material times Mr Walker operated and continues to operate

the business and is a Director of the Plaintiff company. He told the Court the business opened in 1976. He told the court the business essentially sold oils and its principal area since about 1990 was selling lubricants. Mr Walker gave evidence of his professional and trade qualifications including a four year traineeship for BHP in Newcastle; a Certificate in Mechanical Engineering; a qualified Fitter and Turner. Some of his time working at BHP involved working in the lubrication department for (12 months) and further time in the maintenance department; his employment involved extensive time working as a fitter and in allied areas; in 1976 he came to Darwin and soon after purchased what was then the Wynne's business. Known as "Boss Oils" the business commenced selling its own brand in around 1993; In 1998 the business expanded into its own full range of lubricants; principally, he told the Court it was Boss products and 2 per cent of other products; eventually he stopped supply of a previous brand (AGIP) as continuity of supply could not be guaranteed and he established the "House Brand" that was manufactured in Sydney; he explained to the Court that his primary motivation was to stock good quality greases. He was asked to comment on the quality of Boss products compared to those supplied by AGIP; he explained that the production of oils and associated products are governed by international standards set by the American Petroleum Institute and are produced according to those specifications and the specifications of particular manufacturers. Mr Walker gave the example of the manufacturer *Caterpillar*. He said *Caterpillar* had its own specifications for oils and that when an oil or other lubricant is produced, the particular company's advice on any additives is sought.

7. Tendered in the Plaintiff's case are *Table of Invoices* (Exhibit P1) compiling the relevant invoices between the Parties. Mr Walker explained a number of those items that point to the specifications used in each product. For example in relation to item 1 for the invoice dated 10/5/96 he said AS 40 CD11/SF SAE 40 meant that the product specifications were determined by

the Society of Automotive Engineers; he said “D” indicated that it was for diesel, although it may be used in a petrol mechanism, it was not recommended; he said the “SAE 40” represented the viscosity; he explained that the viscosity was measured at temperatures at both the operating end and at minus 20 degrees centigrade; he said that the abbreviation “SAE” referred to the Society of Automotive Engineers; he said that “AS 40” is the name of the particular product. Turning for example to item 13 and referring to an invoice to the Defendant on the 24 August 1998 he said this referred to the Boss Excel Super Turbo; he said “DD” referred to “Detroit Diesel”; he said this referred to the same specification as in item 1. Referring to item 11 that indicates an invoice of the 11 June 1998 “Boss Excel Super Turbo”; he said the 40 referred to the viscosity and the M referred to medium ash content of the oil; he said the names of the products reveal all that is necessary to know about the specifications.

8. Mr Walker was asked whether “Boss oil” was a discount brand or a lower quality brand. Mr Walker replied that Boss oil is manufactured to the same specifications as other brands of oils and that his whole business relied on production to those specifications. He said it was his belief that his products were headed to the *top end* of the market and he relied on selling a quality product. He was asked about the characteristics of the AGIP Diesel SA40; he told the court this was a mono-grade oil and was a common oil in use until the late 1980’s; he said this type of oil could be compared with a multigrade oil; he said the multigrade oils have the advantage that the viscosity varies less over the range of temperatures than is the case with a mono-grade oil. He said the Boss Excel super turbo diesel formula 40MX had the same characteristics as the AGIP; he said it performed all the same functions and was not significantly different; he said when his company went to the Boss range there was an upgrade of specifications and the Boss products had to meet the latest quality levels; he said its characteristics were that it was multigrade with a viscosity of 40; it was made in accordance with

the American Petroleum Institute's specifications. He told the court that the product in item 20, being the Boss Extra Turbo Diesel CF4/SG 15W/40 was a suitable oil for this climate because the viscosity drops as the temperature becomes hotter; he said it is a similar viscosity than the mono 40 but its advantage is that at start up the oil gets pumping a lot quicker into the moving parts of the motor; he said 80 per cent of the wear on most machinery takes place in the first few minutes of start up and that is the critical time to lubricate; he thought this product to have significant advantages over previous products.

9. Of the Delvac 1330, Mr Walker said it was of a lighter viscosity than the SAE 40; he said the difference was that it was a lighter oil than any of the forty grade. He said of the Boss Classic 50SG that it was a mono-grade oil with a viscosity of 50. It was therefore a much thicker oil and it had the same viscosity characteristics as a 25W50; he said it was a mono-grade oil used for old model petrol engine passenger vehicles and was not suitable for the Defendant's vehicles.
10. Mr Walker said that Mr Berno of Berno Bros told him that he would like an equivalent oil to the Delvac 13/30; Mr Walker said that he spoke to Mr Berno and said that given the climatic conditions in the Northern Territory it would be better to move to a mono-grade of 40 rather than the previous mono-grade of 30. The first oil supplied by Mr Walker was the AGIP Diesel Sigma which Mr Walker said was every bit equal to the Delvac, the only difference was the viscosity but otherwise the quality was identical and this had been supplied to Mr Berno. He said the next type of item supplied was that which is listed as item 11 being the Boss Excel Super Turbo Diesel; he said that compared to Delvac 1330 it was a more viscous product, stating that in lay terms this meant a more sticky product. He said of item 20 supplied on 11 February 2000 that this was a higher quality product with an additive to give it special characteristics. He was asked whether he ever supplied the Boss Classic 50 as alleged by the Defendant and he said he had

never supplied it to Mr Berno and there was no reason that he would recommend or supply that product given the type of machinery Mr Berno possessed; he was asked if he knew how Mr Berno would have obtained a drum or drums of that particular type of oil and Mr Walker said that Mr Berno was always asking for empty drums from the Plaintiff company which he used for pontoons and he would sometimes collect extra drums.

11. Mr Walker was asked when he first heard of any complaint concerning use of his products on Berno Bros vehicles; he said that around November 1999 his salesperson at that time said that he had a concern communicated from Berno Bros because a Toyota owned and operated by Berno Bros had a collapsed engine; Mr Walker said he understood that Mr Berno supplied his salesperson Shane Winter with a sample of the oil. Mr Walker said it was black like grease; he said it looked tarish and greasy and not how oil in a Toyota should look. Mr Walker said that he instructed Mr Winter to check with Mr Berno on how often Mr Berno changes his oil; he said on past experiences when Toyotas have an excessive amount of soot, it doesn't take much more than 5000 kilometres of driving to turn the oil into the poor state that Mr Walker thought the oil was in. Mr Walker said he sent the sample to a lab for testing but it was sent back as being "untestable"; he said it had no flowing characteristics and could not run. Mr Walker said that after directing Mr Winter to ask Mr Berno how often he changed the oil, Mr Winter reported back to him saying it was changed every 30,000 to 40,000 kilometres; Mr Walker said he told Mr Winter to go and see Jack Berno and to tell him he needed to service the Toyotas every 5000 kilometres. (I am not taking account of the hearsay elements of this part of the evidence, in other words I am not using this report from Mr Winter as proof of the statement at this stage concerning the 30,000 to 40,000 kilometre oil changes although I think it does have separate evidential value in terms of the timing of complaints by the Defendant company to the Plaintiff and why the Plaintiff took certain steps).

12. Mr Walker said he did not hear anything back until early the following year being January or February of 2000; Mr Walker said he received a message indicating “Jack wants to talk to you” and he went to the Berno Bros property at 22 Mile. He told the court he had a lengthy conversation with Mr Jack Berno. Present also was Mr Shane Winter. He told the court it was just the three of them but it was possible that some of Mr Berno’s sons may have been there also. During the conversation he said that Mr Berno pointed out the land cruiser sitting on blocks and told Mr Walker that the engine had failed; Mr Walker said he told Mr Berno to look at the service regime and explained to him that service every 30,000-40,000 kilometres was not good enough; Mr Walker told the court that Mr Berno said that when he had used Delvac he changed oil every 30,000-40,000 kilometres and it was not a problem but now (using the Plaintiff’s oil) it was a problem; Mr Walker said that he asked if there were any other problems and he checked another vehicle where he said the oil was black and it definitely needed an oil change. Mr Walker said that not far away was an old front end loader; he pulled the dipstick and he said the oil looked like the colour of condensed milk which he said means it must have emulsified; he said he told Mr Berno that he needed to change oils; he said there was a further discussion at the brick works about the need to change oils and Mr Walker said he agreed to give Mr Berno two drums of oil but that he emphasised to Mr Berno that he (Mr Berno) must make sure that he changed the oil; he said it was the Boss Extra Turbo that he agreed to supply and he was definite that he agreed to supply two drums; he denied that there was any agreement to provide 10 drums saying “no, definitely not”; he said he did in fact supply those two drums which appear at item 20 of the Plaintiff’s invoices and the cost on the invoice does read as zero.
13. In relation to item 21 for the next invoice concerning two drums of oil (Boss Extra Turbo Diesel) of 24 March 2000, Mr Walker said that invoice was paid on delivery and it was paid by cheque. He said about the further oil

supplied and noted on invoice number 22, that that invoice was not paid; he said that every time someone from his company went past Mr Berno's premises at 22 Mile they were always told Mr Jack Berno was away; Mr Walker said it never concerned him because he regarded Mr Jack Berno as a "good payer"; several months later in 2000 he said he heard Jack Berno was in town and he told him he needed to speak to him; he said he thought it was about November 2000 that he spoke to Mr Jack Berno in his office. Mr Walker explained that he told Mr Berno that he needed payment for his invoice; that Mr Berno said he was not paying; that Mr Berno said he wanted 10 drums of oil free and that he had 50 vehicles so he needed 10 drums; Mr Walker said that he told him that he would not be getting 10 drums out of him; he said the discussion went around in circles but basically Mr Berno wanted Mr Walker to replace the engine oil in all of his equipment as a safeguard because he said he did not want what happened to the Toyota to happen to anything else. Mr Walker told the court that he told Mr Berno that he still did owe them for two drums and said he would put two more on the ute free of charge but after that he did not want anything else to do with him; he said that he told Mr Berno if he did not accept that offer he would take him to the Small Claims Court.

14. Mr Walker acknowledged that although Mr Berno wanted initially an oil that had a viscosity of 30, he (Mr Walker) recommended an oil with a viscosity of 40; he said he explained the advantage of change to Mr Berno explaining that working in a tropical environment with higher temperatures, oil tends to thin out and that by a higher viscosity oil he would be getting a better lubricant and Mr Walker said that in his view, (which he advised Mr Berno), it meant getting a better seal around rings on pistons and there was less likelihood on contamination from combustion.
15. In cross examination Mr Walker agreed that he understood Mr Berno had been using Mobil products for a long time; he agreed that he had approached Mr Berno to change brands; Mr Walker agreed that Mr Berno had said he

was happy with the Mobil oil; Mr Walker agreed Mr Berno relented and agreed to try his oils; Mr Walker agreed that Mr Berno said it was Delvac 13/30 that he was using and Mr Walker agreed that he explained he could supply a different but better product.

16. Mr Walker agreed that at Berno Bros 22 Mile property he observed different sorts of equipment such as loaders. Mr Walker was asked how orders were placed and Mr Walker responded that generally “Jack” rang up and then somebody would deliver. Mr Walker agreed the oil in the vehicle on blocks was black. He agreed he checked the oil in the loader; he disagreed that he was shown another older vehicle. In cross examination Mr Walker reiterated his evidence concerning his discussions with Mr Berno at 22 Mile about Mr Berno changing oil at 30,000 to 40,000 kilometres; Mr Walker disagreed that Mr Berno had said that he changed the oil every 3000 to 4000 kilometres. It was suggested to him that he had supplied the Classic Boss 50 25W; Mr Walker denied this saying it was not possible and that the two oils were kept in entirely different places; Mr Walker said he had one driver who would deliver at the most 2 to 3 or 4 drums at a time. In terms of the complaint Mr Berno had made, Mr Walker said that in November 2000 he was aware that Mr Berno was not happy but he said the only problems that were pointed out concerned the Toyota and the forklift and that Mr Berno had told him that he felt the oil was thickening; Mr Walker said there was also a mention by Mr Berno of the forklifts overheating; Mr Walker said in terms of the difference of an engine in a forklift that generally a forklift had a smaller engine; Mr Walker agreed that if all the vehicles were regularly tested by using the dipstick it would be possible to tell if the oil was degrading. Mr Walker disagreed with any suggestion that he told Mr Berno he would have to replace all the oil in all of his machines; he disagreed that Mr Berno asked him for nine small samples rather than two drums.

Shane Winter

17. Mr Shane Winter gave evidence for the Plaintiff that he worked for the Plaintiff at the time known as “Lubchem” for about seven to eight years, for some time in the 1990’s to 2001. He occupied the position of sales representative. He no longer works for Lubchem. He said before he was employed by Lubchem his experience with maintenance and vehicles concerned the organisation and maintenance of 21 vehicles for a safari company; he said that position concerned the servicing and repairing of vehicles; he said he had vigorous training in oil products and knew what was required for certain engines and was aware that certain engines required different oils.
18. In relation to Berno Bros, Mr Winter agreed that he and Mr Walker won the Berno Bros account; he agreed that Lubchem supplied an equivalent oil to the Delvac oil that Berno Bros had previously been using. He said the first oils supplied, the AGIP was of the same technical specifications being SAE40 save that the viscosity was higher; he was asked to comment on the Boss Excel Super Turbo and explained that it too was an equivalent oil, it had a higher viscosity but that in a hotter climate it would operate better than a lower viscosity oil and give better ring coverage on parts of the engine; he said there was a discussion between himself and Mr Berno and Mr Walker explaining the benefits. He disagreed that Boss Classic 50 had been supplied to Berno Bros; he disagreed that he said that was a suitable oil for Berno Bros equipment; he said that that product would only be for petrol run cars and engines such as aspirated Holdens, Fords and pre 1990 engines such as V8’s and V6’s. In relation to why Mr Berno may have had a drum of this product at his premises, Mr Winter said that he would collect used oil drums on behalf of customers and take them or offer them to customers who might like to use them.
19. Mr Winter said it was probably in about December 1999 that Mr Berno first complained about problems with the oil; Mr Winter explained this occurred

as part of his service call to Berno Bros; he was shown exhibit P2 being a photo of a Toyota; he said that this was the type of vehicle he saw when he called in at Berno Bros premises at 22 Mile and the vehicle was being stripped down; he said the oil appeared scorched and gooey. In conversation with Mr Berno, Mr Winter said that Mr Berno was not 100 per cent sure of what the problem was and he suggested to Mr Berno that he take a sample of the oil to help identify the problem and he noted that the oil looked burnt; he said he showed the sample to “Doug”; he said that Doug asked him to ask Mr Berno if there had been any servicing of the vehicle and he said Mr Berno had said they were serviced every 30,000-40,000 kilometres or three to four years.

20. Mr Winter said he asked Mr Berno if he had any service books or records and that Mr Berno had said he did not keep anything like that; he confirmed that Mr Walker had asked him to inform Mr Berno to increase the oil changes and he also said that he called Mr Berno to inform him to follow the manufacturer’s service obligations. Mr Winter said it would have been a few days later and he is not sure if he contacted Mr Berno or vice versa but he went down to see him and he Mr Berno said he was still having problems and that he thought the engine oil was getting thick. Mr Winter said he asked Mr Berno if it was happening across all of the engines and that Mr Berno had said that everything else was fine; Mr Winter said he thought that Mr Berno was talking about the oil in the Toyota and the forklift; during the discussion about the engine types in the different machinery, Mr Winter said Doug asked him how often he changed the oil and Mr Berno said every 30-000-40,000 kilometres or every three to four years; he said Mr Walker informed Mr Berno that there were strict service conditions and that Mr Berno had said he had not had to do it in the past and did not do it now. Mr Winter said he looked at some other machines including the front end loader which showed emulsification of the oil; he said the oil in one of the trucks was black and had soot; he said he could feel from oil on the dipstick that

the oil was due for changing; he said that Doug had made a comment to Jack Berno about what to do when the oil looks milky and Jack had said he does it when he gets around to it. He agreed that Doug had suggested a change of oil on the small diesel motors and made that recommendation and that as a show of good faith Mr Walker offered some oil, (one drum at first and then Mr Berno asked for two, two were delivered), and that was to help Mr Berno make the changes. He said those two drums were delivered to Jack Berno. Mr Winter told the court he left Lubchem in about February 2001.

21. In cross examination Mr Winter agreed he was not a qualified mechanic himself; he agreed that diesels are dirty engines and soot builds up as the oil gets thicker. He agreed that in his first conversation about the problems with Mr Berno that he saw the oil looked burnt, scorched and gooey; he agreed that he had assumed that the engine had overheated and he agreed that Jack Berno acknowledged this although he said that Jack did not know what was causing the overheating; he agreed that he knew the oil was being used in all of the machinery; he disagreed with assertions put to him concerning the state of the other equipment at Berno Bros.

Evidence Called on Behalf of the Defendant

Mr Jack Berno

22. Mr Berno gave evidence that he was a Director of Berno Bros. He told the court that he was born in Italy and had been in Australia for sixteen years; that he worked in Adelaide first in the cement and brick industry and was employed in a similar capacity for a time in Alice Springs; he commenced a brick making operation at Winnellie and subsequently moved to the company's premises at 22 Mile and had a brick plant; he operated his own brick making machine and eventually moved into dredges and maintaining trucks, bulldozers, a loader and other machinery; he also maintained a Landcruiser; he opened another property close to Kakadu. He said he had three forklifts and two Toyota's; one forklift was a single wheel Toyota

forklift; another was used in the brick factory; he had two caterpillars and six loaders; he said he had four tractors and seven trucks as well as pumps and generators. Of the bulldozers he said he had two *caterpillars* and also had a *harvester*; he said there were two Landcruisers, one a 1975 model and one a 1991 model; he said his machinery was acquired over a long period of time and he used it at the sandpit or at the other site; he acknowledged that his machinery was important. He said in terms of maintenance that he did the servicing work all the time and he either did it himself or his nephew participated in it and that he also had some people employed to service the machinery.

23. He said that previously Mobil supplied his oil and he purchased it in either a container or a drum and his detergent was provided by Lubchem. He said he checked his vehicles every time he used them and he would always check the oil and water before he started his engines; he said he did this every time and he had done it all his life. He said that when Mobil were supplying his oil he would change the oil every three to four thousand kilometres; he said he did not know where Mr Winter got the figure 30,000-40,000 from; he said it was too long; he said there would be no more oil left if he left changing the oil that long; he said everything would get seized up inside; he said he did not keep service books, he said he kept it “up here” (indicating his head). He said he followed the same practice when he started with Lubchem.
24. He said he started with the Plaintiff’s company in 1996 and first noticed troubles in 1998; he said the first problem was with the twin forklift; he said it was hot and boiling and it would mean that he could not use it for three to four hours; he said that that occurred in about 1998. He said when the problems started he checked all the components including the engine and there was nothing wrong; he reiterated that he repaired everything himself; he said he had similar problems with the other forklift. He said in relation to the 1975 Toyota, when it developed problems he started working on the

vehicle and had to pull the engine off and that the oil was thick like bitumen and that he did not use the 1975 Toyota, much after that. He said that in relation to changing from Mobil to the Plaintiff's oil, he said that he told the Plaintiff's representative that he wanted the same oil and that the Plaintiff said that it might be the same or better. He said that the oil supplied by the Plaintiff got thicker and that by comparison the Mobil oil was thinner; he said he continued doing oil changes and there was no difference between the new oil and the old oil in relation to when he was changing the oil. He said he built his dredge at the Mary River and he did use oil drums and similar empty drums on the pontoon; he had receipts for labour for the forklifts (see invoices in Exhibit D1).

25. He said that he worked on the 1975 Toyota and the problem continued so he stopped using the '75 Toyota. He said the other one broke down with similar problems; he said the bulldozer 988 was repaired by him building tanks to address the overheating problem; he said in about the year 2000 he performed work on the '91 Toyota; he said he changed the oil and replaced it with 15W40 that had been supplied by Mr Walker in place of the previous oil; he said he used the 1991 Landcruiser to go to Kakadu but it became too hot and he tried the Mobil oil again and there was no further trouble; he said he went to Adelaide in the vehicle and came back and there was no further trouble; he said that he had already taken some of his machinery to Adelaide on or about April or May of the same year; he said he took the Chamberlain tractor and the Volvo trucks to Adelaide on the back of trucks; that they had been getting hot and that he also had difficulties with the harvester as the temperatures were coming up. He said with the 1991 Landcruiser he changed the oil back to Mobil oil and there were now no more problems; he said he went through the same process with his loaders and there were no more problems when he changed back to Mobil oil. He said it was Mr Walker who he spoke to in relation to the Boss Classic 50 oil and the supply of that oil. In terms of repairing the vehicles he said he calculated the cost

for the price of 10 drums of diesel fuel plus his labour at an hourly rate; he said Mr Walker saw his forklift in about February and could see that the oil was too thick. He reiterated that he changed all of the oils; he said he had no more problems since he changed back to Mobil oil.

26. In cross examination Mr Berno was asked about his evidence where he said he tried everything on trying to find out what was wrong with his machinery; he was asked whether he called in a mechanic; he said he did call one who charged \$450.00; he agreed that no one looked at the Bulldozer; no mechanic looked at either of the Toyota's or the two wheel forklift; he said a mechanic looked at the single wheel forklift. He said a mechanic looked at vehicles 9008, 966 and 9097. He said nobody suggested that he could bring a mechanic to court to give evidence; he said he fixed it himself; he said the quote from Hastings Steering was a quote only and the work had not been done; he agreed that no mechanic had looked at his trucks; in relation to some oil samples which had been sent by him to be tested and analysed, he said he had never refused to give them to the Plaintiff.
27. He agreed he first obtained oils from the Plaintiff in 1996; he said he was never told what it was or he did not take any notice of it being AGIP oil; he said he did not take notice of the brand; he said with the problem of his machines heating up this would have been in about 1997 but he did not know if it was from the oil or from some other cause; he said that before 1997 there was no problem with overheating and it began with his forklift in 1997; following that, there were problems with the other machinery. He said he received the Boss brand oil from June 1998 and continued to receive it through to October 1999; he said the overheating problems were from 1997 through to 1999; he said he thought it was the oil causing the problem when Mr Walker came to visit in about February 2000 at the 22 Mile and he said that was when he said there was a problem with the oil. He said he had no service documents or records for his 30 to 40 machines; he said he had 43 machines; he said sometimes his nephews and some other people employed

would work on the machinery; he said he had no calendar concerning service of the machinery stating "I decide when it needs service". He said there was no way to check the mileage on the Toyota which he thinks had about 52,000 kilometres on it when he bought it and he had driven it about 7,000 kilometres; he said he did not know if it had been properly serviced prior to him buying it; he was asked whether he thought use of the Toyota on the mine site meant that it was in harsh conditions and he said "no not really". He said to service the vehicles he would check the oil and filter and change them if it was needed and he would grease them up if needed. He said he did not know what the manufacturer required in terms of service and he had never looked for the manufacturer to see what is recommended; he said if a vehicle was not in use then it did not need service; in relation to leaving vehicles outside he was not aware of the manufacturer's recommendations concerning the bulldozer.

28. He said in relation to the two free drums of oil that Mr Walker had said he would replace all of the oil; he said in relation to the two free drums that his nephew ordered the drums and was not there for the discussion with Mr Walker and the nephew was unaware that the drums would be free; he said that he claimed for 10 drums because that was what would be required to replace all of the oil, not the two drums in the order; he was asked that if Mr Walker had said to replace all of the oil, why didn't he do that?; he said he could not do it all at once and he was concerned the oil was damaging his machinery; he disagreed that he was being inconsistent in asking for 10 drums of oil if he thought the oil was the problem; he said he wanted the replacement to be Mobil oil.
29. It was suggested to him that he had brought the counterclaim because the Plaintiff had brought a small claims matter against him; it was suggested to him that his first defence and counterclaim related to only one vehicle and the claim was for \$16,000; it was suggested to him that if he was aware he was having problems in 2000, he ought to have included the bulldozer aspect

of the claim back then; he said he had to put everything together and it took time; it was suggested to him he was making his claim bigger and bigger to frighten Mr Walker away; he agreed that he had not actually done any repair work as yet on the bulldozer.

30. The Defendant reopened its case briefly to tender documents from Caltex concerning the analysis of some oil over which privilege had previously been claimed but was now waived. He also clarified that he had done work by way of repair on the 1975 Landcruiser, the 1991 Landcruiser and the twin wheeled forklift. He said in relation to the Hastings Steering quote concerning the loader, the work was carried out by him. He said for the 10 drums of oil the cost was calculated at \$559.69 per drum which was the price he had been paying for Delvac oil.

Consideration of the Evidence and Conclusions

31. In my view the Plaintiff's original claim brought in the Small Claims jurisdiction has not been credibly denied. The Plaintiff company has kept very professional records of everything that has been supplied to the Defendant and it is clear that the Plaintiff wanted the Defendant's custom and wanted the Defendant to change his practises in relation to servicing and oil change and was prepared to not charge for two drums of oil in order to facilitate that. Clearly, the Defendant was supplied with oil after that time which he failed to pay for. In its defence, the Defendant company claims effectively that the oil was not supplied pursuant to an agreement for an oil of specific characteristics or that the oil was not fit for purpose and that it damaged the Defendant's machinery. The Defendant bears the onus of establishing its counterclaim.
32. I was impressed with the care and professionalism that Mr Walker applied to his business and to his dealings with the Defendant. He has produced full records and his evidence was clear. His evidence is supported by Mr Winter who has not worked for the Plaintiff company for a number of years and in

my view Mr Walker does not have any reason to shape his evidence to suit the Plaintiff's case. The reasons given for moving to oil of 40 grade viscosity rather than 30 grade viscosity was clear and concerned the heat and other factors relevant in the Northern Territory. The evidence concerning the acceptance of that advice and the supply of the AGIP40 grade oil was not seriously challenged. I do not see any reason to reject the evidence of Mr Walker and Mr Winter.

33. The Defendant Company urges the court to draw an inference against the Plaintiff concerning the cause of problems with the Defendant's extensive array of machinery.
34. The only difference between the oils supplied by the Plaintiff from 1998 through to September 2000 was that they were 40 grade viscosity as opposed to the 30 grade viscosity that the Defendant company had previously used. The reason why 40 grade viscosity might be beneficial was raised clearly in the evidence in the Plaintiff's case and has not been seriously challenged. There is no evidence before the court to indicate that the 40 grade viscosity specification is unsuitable for any or all of the machinery or vehicles in question. For a claim alleging damages in the realm of \$76,000 it is not unreasonable to expect a mechanic or other specialist to give some evidence about this matter. The Defendant engaged Hastings Steering at one point but no one has been called.
35. The Defendant asks the Court to infer the source of the problems to be Plaintiff's oil, and suggests that this inference can be drawn because when the Defendant began to use Mobil oil again in August or September of 2000, the problems ceased. I note it was suggested to Mr Berno that it was inconsistent for him to ask for 10 drums of oil from the Plaintiff in November 2000. Mr Berno said that he had asked for Mobil oil. I do not find this convincing, in my view it is equally consistent with Mr Berno realising that his claim for the 10 drums of oil could not be sustained. The

evidence in relation to the overheating of the 1975 Toyota is vague and there are a number of inferences favourable to the Plaintiff which are just as likely or more likely to explain the “bituminous” oil that was observed. There are no records of that vehicle’s servicing prior to Mr Berno buying it when it had done 52,000 kilometres; there was no evidence concerning its condition at the time of purchase. I cannot help but be suspicious of Mr Berno’s evidence concerning the maintenance of his machinery. Although I have great respect for self taught mechanical skills, Mr Berno has absolutely no service records and no knowledge of the manufacturer’s recommendations on service to very valuable machinery. I appreciate that Mr Berno speaks English as a second language and that care must be taken with his evidence, however I found him unconvincing in suggesting that he would service vehicles every 3,000 to 4000 kilometres and I believe Mr Walker and Mr Winter in that regard. In my view the potential inference that can be drawn against the Plaintiff is so slight that it is simply not enough to persuade me on the balance of probabilities that the Plaintiff’s oil was the cause of the problems for the vehicle or that it was unfit for purpose. In my view it is equally if not more likely that the vehicles and machinery suffered due to poor maintenance including not servicing and not changing oil. I note the document initially withheld under privilege (exhibit D3) from Castrol notes “poor combustion of fuel – extended oil drain period – inability of the oil to handle high soot levels”. Given the conditions that the vehicles were kept in; given the casual attention on the part of the Defendant to service and maintenance; given the professionalism of the Plaintiff; given Mr Walker’s detailed knowledge of his products and the care he obviously takes with his products I cannot be satisfied of the matters raised in the Defendant’s counterclaim; the defence and count claim are dismissed. I reject also the Defendant’s case that it was supplied with the Classic Boss 50 25W; the Plaintiff’s evidence was compelling that this was unsuitable oil and that Mr Berno collected drums for his own reasons.

Orders

1. Judgment for the Plaintiff in the sum of \$1,124.28.
2. Dismiss the counterclaim and enter judgment for the Plaintiff on the counterclaim.
3. The Defendant is to pay the Plaintiff's costs on the counterclaim at 90 per cent of the Supreme Court scale.
4. I certify the matter fit for counsel.

Dated this 20 day of December 2005.

STIPENDIARY MAGISTRATE