CITATION: *D & L Diesels Pty Ltd v Bob Kerr Transport Pty Ltd* [2009] NTMC 012

PARTIES:	D & L DIESELS PTY LTD
	v
	BOB KERR TRANSPORT PTY LTD
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20733752
DELIVERED ON:	24 April 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	1 - 3 December 2008 & 18 and 19 March 2009
JUDGMENT OF:	Ms Fong Lim RSM

CATCHWORDS:

Contract – Oral Contract – Breach of Contract – workmanship – delay – damages – restitution for benefit gained- frustration of contract- loss of profits

Pavey & Mathews Pty Ltd v Paul [1987] 162 CLR 221
Wigan v Edwards (1973) 47 ALJR 586 at 589
Laurinda Pty Ltd v Capalaba Shopping Centre Pty Ltd (1989) 166 CLR 623
Hadley v Baxendale [1854] 156 ER 145
BP Refinery (Westernport) Pty Ltd v Comco Constructions Pty Ltd v Shire of Hastings [1977] 16 ALR 363
Hawkins v Clayton [1988] 164 CLR 539
Burns v M.A.N. Automotive (Aust) Pty Ltd [1986] HCA 81
Waratah Quest Pty Ltd v Scania Australia Pty Ltd [1995] FCA 1352

REPRESENTATION:

Counsel:

Plaintiff:	Ms Porter
Defendant:	Mr O'Loughlin

Solicitors:

Plaintiff:	Tony Crane
Defendant:	Maley & Co

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 012
Number of paragraphs:	229

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

No. 20733752

[2009] NTMC 012

BETWEEN:

D & L DIESEL PTY LTD
Plaintiff

AND:

BOB KERR TRANSPORT PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 24 April 2009)

Ms FONG LIM RSM:

1. The Plaintiff has sued for the recovery of a debt for mechanical work completed by it for the Defendant. The work was the rebuild of an engine, removal of old engine and refit of rebuilt engine into a vehicle owned by the Defendant and was completed over a period of time in 2005. The Plaintiff has received part payment for that work. The Plaintiff has pleaded that the Defendant has breached its contract with the Plaintiff whereby the Plaintiff has provided the requested services and the Defendant has failed to pay for those services. The Plaintiff further pleads in the alternative a claim in "quantum meruit" for reasonable payment for benefit received by the Defendant.

2. The contract was an oral contract between Mr Brown, director of the Plaintiff and Mr Kerr, director of the Defendant.

3. The Defendant has paid $29,124.00 to the Plaintiff for the job, $16,340.45 in March of 2005 and a further $12,783.55 by two cheques in 2007. The Plaintiff's claim is for $47,400.23 plus interest and costs.

4. The Defendant has pleaded breach of contract by the Plaintiff claiming the work performed was defective, constituted total failure of consideration by the Plaintiff and took so long that they suffered loss of business arising out of the truck being off the road for so long.

5. The Defendant counter-claims the cost of rectification of the defective work, $9,748.39, damages for loss of business of $111,140.00 and reimbursement of the monies already paid on the basis that there was total lack of consideration from the Plaintiff because the work done was not done in a workmanlike manner.

6. The Defendant forgoes that part of his counter-claim over the jurisdictional limit of this court of $100,000.00.

7. The issues to be decided are as follows:

   (a) The terms of the oral contract. Was there a quote as to price and was a timeframe set in which the work was to be done? What was the scope of works?

   (b) If the terms of the contract were uncertain does the Plaintiff have a claim for restitution for unjust enrichment (quantum meruit)?

   (c) Was the work completed by the Plaintiff done in a workmanlike manner?

   If not was the alleged defective work of the Plaintiff the cause of the need for further work to be completed on the engine in question?

   (d) Was the delay in completing the work reasonable in all of the circumstances and if not did it cause the Defendant loss of business?

(e) If the Defendant suffered loss of business what is the value of that loss.

(f) Was there an acknowledgement of debt and agreement to pay?

8. For the Plaintiff the court heard evidence from Mr Brown (principal of the Plaintiff), Mr Nitschke the mechanic who did most of the work, Mr Capponi the Plaintiff's office manager, Mr Green a mechanic who did some warranty work on the vehicle and Mr Smith, an expert witness. For the Defendant the court heard evidence from Mr Kerr (principal of the Defendant) and Mr Lock an expert witness. The hearing took five days, three of which were taken up by the Plaintiff's case.

9. **Agreed facts:** It is agreed between the parties that there was an oral agreement that the Plaintiff was to replace the Detroit engine ("the old engine") in the Defendant's Kenworth W series prime mover ("the truck") with a Cummins engine ("the new engine"). The replacement engine was purchased from a third party who was paid directly by the Defendant. It is also agreed that the work was done on the vehicle and that work took approximately 10 months to complete and that prior to the work, the truck was worth approximately $15,000.00. Further the parties agreed there was an additional component added to the scope of works after the work began and that was the reracing of the gearbox of the truck for a quoted price of approximately $3,000.00.

10. Prior to this dispute the Plaintiff and the Defendant had a good working relationship and the Plaintiff had previously done work on the Defendant's vehicles. Mr Brown is an experienced diesel mechanic and Mr Kerr a long time operator of prime mover vehicles. Both Mr Brown and Mr Kerr have a lot of experience with these vehicles and their engines and both have been involved in their respective industries for a long time.

11. **Terms of Contract:** Mr Brown's evidence is that in early 2005 Mr Kerr approached him at his workshop regarding replacing the engine in his Kenworth truck with a Cummins engine and there was some discussion of where such an engine could be sourced. Mr Brown was adamant that during that conversation, he did not quote Mr Kerr a price for the job, it was not his usual practice to give quotes on large jobs because he knew that anything could develop. Mr Brown's usual practice was only to give a quote when the customer requested it and even then he always reduced it to writing and placed a rider clause on the quote warning that the price was only an estimate and the owner would be contacted should the job require more work than anticipated. Mr Brown says Mr Kerr did not request a quote.

12. In relation to timeframe Mr Brown says he advised Mr Kerr that his workshop was very busy and the job would be done when they could get to it. There was no urgency or set time for the job to be completed.

13. Mr Brown had doubts as to the economics of such a major job on such an old truck but claims did not discuss this with Mr Kerr because he seemed to be sentimentally attached to the truck referring to if as a "good old girl". Present at that conversation was Mr Brown and Mr Kerr.

14. It is clear from his evidence that Mr Brown is of the view the terms of the contract were for his business to rebuild the new engine, remove the old engine, undertake any modifications necessary for the new engine to be fitted to the truck and then fit the rebuilt engine to the truck. The work was to be completed within whatever time his business could fit it in with no obligation to report to the Defendant about the progress of the cost of the job.

15. Mr Kerr has a different story. He says it was Mr Brown's idea to repower the truck and initially he was quoted "$20,000 -$25,000 tops" with the work to be completed by the end of April 2005. He says he was mindful of the economics of the situation and he agreed to the have the work done because

the truck was a good truck and the quoted price was reasonable. He knew his truck was only worth about $15,000.00 and he didn't want to spend too much on fixing it up. He says that he was advised by the Plaintiff of the availability of an engine from a third party and after the Plaintiff advised him that the engine was "a goer", he paid the third party. It was Mr Kerr's recollection that the engine had been in the Plaintiff's workshop for some time before he was given the go ahead to pay for it. Mr Kerr was adamant that he had been given a quote and the promised timeline however was not so certain exactly what the job required.

16. Mr Kerr was clear in his evidence that Mr Brown's advice that the engine was "a goer" induced him into purchasing it for $9,500.00. He expected the engine to be a working engine at that price and relied on Mr Brown's advice that it was "a goer" before he paid for the engine.

17. Both Mr Brown and Mr Kerr accepted in their evidence that prior to this job they had a good working relationship and trusted each other. There had been no previous difficulties regarding standard of work or payment of invoices. It is against this background that I should assess the evidence of both Mr Brown and Mr Kerr.

18. To accept either the Plaintiff's or the Defendant's version of the conversation between Mr Brown and Mr Kerr, I have to be satisfied on the balance of probabilities that one version is more likely than the other. In these circumstances where the terms of the agreement are oral terms, the credibility of the witnesses becomes an issue as well as any objective evidence supporting those witnesses.

19. Both Mr Brown's and Mr Kerr's evidence on the terms of the contract can be found to be unreliable in some way. There are elements of both their evidence that casts doubt on the voracity of that evidence some of which are discussed immediately below and some later in the judgement.

20. Mr Brown accepts Mr Kerr to be a prudent businessman, yet claims that he gave Mr Brown the go ahead to repower the truck without any discussion of the cost or the time to be taken to complete the job. His evidence that he does not give oral quotes is contradicted by his evidence of his oral quote to Mr Kerr of approximately $3,000 to fix the gearbox which quote was not reduced to writing. He also gave evidence that the new engine was not in his workshop at the time he gave Mr Kerr the go ahead to pay for the engine, yet the evidence does not support this claim. Mr Nitchske remembers the truck and engine arriving at about the same time. Mr Capponi remembers the workshop having commenced work on the engine by 24 March 2005 when the invoice 4376 was produced. Mr Kerr had paid for the engine on 19 March 2005. The job cards show work commenced on the engine on 18 February 2005. Mr Brown was clearly mistaken about when the engine came to his workshop.

21. Given that Mr Brown viewed Mr Kerr as a good customer, his contention that economics of such a large job was not discussed with Mr Kerr is also difficult to believe. While it is understandable it would be difficult to quote for these types of jobs, Mr Brown also stated it was his usual course of business to advise a customer when large amounts of money would be spent and if inordinate delays would be necessary. On all of the evidence before the court, no such advice was given by the Plaintiff to the Defendant except in relation to the gearbox. Mr Brown would have the court believe that he discussed the radiator, broken camshaft, and modifications required of the drivelines with Mr Kerr without any discussion of how much more it would cost. His evidence in relation to this issue cannot be believed.

22. The objective evidence of invoice 4376 dated 23 March 2005 indicates that at that stage the Plaintiff thought that the rebuild of the Cummins engine including the replacement camshaft would be approximately $16,340.45. At that stage the engine was already in the Defendant's workshop. Mr Brown and Mr Nitchske's recollection of the date of the arrival of the engine is

clearly wrong. From 18 February 2005 to 23 March 2005 the job cards show 30 hours work had been done, therefore it is more likely that the Plaintiff had the engine in the workshop at the time Mr Brown advised Mr Kerr to pay for the engine.

23. The issue of invoice 4376 on 24 March 2005 (P6) for a sum of $16,340.45 was a curious development in the dealings between the parties. It is alleged by Mr Brown and Mr Capponi that the invoice was produced at the Defendant's request and was made up to help Mr Kerr "get rid of $16,000.00" and it is clear from the evidence, the job sheets and evidence of Mr Brown, Mr Kerr and Mr Capponi, that the invoice was produced and paid before the work was completed. Mr Kerr agreed with Mr Brown and Mr Capponi that he requested the invoice because of tax reasons, "I wanted to get it off my BAS statement". He didn't agree that is was as Mr Brown and Mr Capponi say because "he wanted to get rid of $16,000" his claim is that he wanted to pay for the bulk of the work prior to the end of the next BAS period.

24. The inconsistency between the $16,000 and the actual price on the invoice does bring into question the reliability of Mr Brown and Mr Capponi's evidence about how that invoice came about. The wording of the invoice would suggest that the invoice was in fact a calculated estimate of the cost of the job given the description of the labour component, not just something cobbled together to come up to $16,000.00. It is entirely believable that the invoice was produced by the Plaintiff to help a good customer with his BAS issues, however that does not mean that it wasn't also an educated estimate of the cost of the out of chassis rebuild undertaken on the Cummins engine.

25. At the time of the production of the invoice, Mr Capponi says that the mechanic had just started stripping down the engine and they had already started to order parts, therefore they had a good idea of what was involved on the engine. He produced his handwritten notes (P7) of the prices of parts

he obtained from the supplier as advised by Mr Nitchke as required in the rebuild.

26. Mr Kerr gave evidence that when he received invoice 4367 on 23 March 2005 he expected that would be payment for the bulk of the work, given he had already purchased the motor for $9,500.00 and the quote was for "$25,000.00 tops". It is Mr Kerr's evidence that he always believed that the "$25,000.00 tops" included the cost of the engine and therefore when he received an invoice for approximately $16,000.00, his understanding was that there would not be much more payable on the job, given that he had already paid $9,500.00 for the Cummins engine. He accepted in his evidence that he had agreed to the extra charge of around $3,000.00 for the gearbox later on in the piece, as advised by Mr Brown, but did not expect to pay much more.

27. Mr Kerr did not give any evidence whether he read and checked the invoice on 23 March 2005 just that it was produced by Mr Capponi in the office while he waited and was paid by him on that day. It is conceivable that Mr Kerr received and paid invoice 4367 without considering the content of the invoice itself, however if it is accepted that he is a prudent businessman, paying an invoice without considering what it was for would indicate to the contrary.

28. If Mr Kerr had read the invoice, he should have realised that it was only for the rebuild of the Cummins engine and did not include any work on the removing the old engine, necessary modifications and refitting the Cummins engine to the truck.

29. The production of invoice 4367 supports both cases. It supports the Plaintiff's case that there was more to charge on the job, in particular the modifications to the truck for the refit, the removal of the old engine and the reracing of the gearbox. It also supports the Defendant's case that if it was not an invoice for the bulk of the work, it was at least the Plaintiff's best

estimate of the cost of the rebuild of the engine at the time of production of that invoice, not just a document produced so that the Defendant could "get rid of $16,000.00" and therefore supports his denial that he ever said those words and casts doubt on Mr Brown and Mr Capponi's evidence about that conversation.

30. In relation to the timeframes, Mr Kerr states there was a discussion between him and Mr Brown how long the job would take. Mr Brown told him they would "shit it in" in two weeks, however Mr Kerr thought that was being optimistic and gave Mr Brown until the end of the month to complete the work. Mr Brown denies any such conversation and is adamant that the job was always going to be a fill in job and they would do the work when they had time.

31. Mr Brown was not shaken in cross-examination about this issue, however he was evasive and inconsistent when asked questions about prioritising other jobs over Mr Kerr's. In his evidence in chief, Mr Brown originally attempted to convince the court that Mr Kerr's job was only set aside for work that was already booked in. The Defendant produced no evidence that they had prior work booked in for most of 2005 which, on Mr Brown's evidence, had to take priority. Later in his evidence, Mr Brown then stated he did give priority to other jobs to keep the cash flow going and became more fixed in his assertion that in any event, it had been agreed that Mr Kerr's job would be done whenever they could reach it.

32. It is clear from Mr Nitchske's evidence that he had been told by Mr Brown that Mr Kerr's job was a fill in job and he was to get to it whenever he could. His evidence supports Mr Brown's contention that he believed that he had been given that leeway by Mr Kerr. It is conceivable however that <u>at the time of entering the contract</u> that Mr Brown believed even fitting the job around others, it could be completed by the end of April as Mr Kerr says he

promised, therefore Mr Nitchske's evidence on this issue offers little assistance.

33. Mr Brown stated that he told Mr Kerr that they were busy and they would "get to it when we could". Mr Brown's view is that Mr Kerr should have understood that to mean they would do his job as a fill in job. Defence submission is that the words, if said, could have also meant that the job would not be started straightaway not necessarily that once the job was started it would only be worked on when other work was not available. Mr Kerr denies those words were ever uttered to him.

34. Mr Kerr was also inconsistent in his evidence about the issue of timelines. He stated in evidence in chief that he told Mr Brown he would give them until the end of April to finish the job. He also said that by the end of May he had become annoyed because they were missing out on work and he told Mr Brown if there were further delays "I will bill you $1,000 per day" to which Mr Brown replied "I will double your bill", Mr Brown of course denies this conversation. There was no mention in evidence in chief about any urgency for the truck to be back on the road at the time of entering the contract. It was only in cross-examination that Mr Kerr gives evidence that he told Mr Brown about the Wolpers and Grahl job in March 2005 and that he needed the truck for that work. This is inconsistent with his earlier evidence in chief where he said that he couldn't recall whether he told Mr Brown what sort of work he was intending to use the truck for after it was repowered. Mr Kerr's evidence is that he only became anxious about the delay when he realised that he had a major job lined up in April and would be without the use of the truck. It is Mr Kerr's evidence that before he entered this agreement with Mr Brown the truck was not being used and it can be inferred from that it would not have been used in the Wolpers and Grahl job if not repowered. There is no evidence that the Wolpers and Grahl job was in Mr Kerr's mind at the time he came to the agreement with Mr Brown, yet he puts forward that contract as the basis for the alleged

timelines he says were agreed. The inconsistency places some doubt on the reliability of Mr Kerr's memory of this issue.

35. Given the above, I cannot be satisfied on the balance of probabilities with any certainty of the terms of the oral contract between Mr Brown and Mr Kerr. Doubt has to be held as to the total reliability of Mr Brown and Mr Kerr in their memory of their conversations. The objective evidence such as Invoice 4376 (P6) and the job cards (D1 and D2) do not assist in establishing what the oral agreement was and while I view both Mr Brown's and Mr Kerr's evidence unreliable for the reasons I have set out above, I cannot totally discount either person's evidence.

36. Without any certainty in contractual terms the task is then to assess the work done by the Plaintiff, the reasonableness of that work, the reasonableness of the charges for that work and if the Defendant benefited from that work.

37. It is trite law that if it is found that the Defendant has benefited from that work done by the Plaintiff, then the Defendant should pay a reasonable amount for that benefit (see *Pavey & Mathews Pty Ltd v Paul* [1987] 162 CLR 221).

38. **Reasonableness of charges claimed:** The reasonableness of the work done, the charge for that work and any assessment of benefit can be done by breaking down the issues between the parties as follows:

- Delay to complete the work
- Hours claimed and rate claimed
- Parts used

39. **Delay:** Evidence from Mr Brown and Mr Capponi did confirm that Mr Kerr was concerned about the delay in the job as it is clear that he had several conversations with both of them about his concern. There were apparently no conversations with Mr Nitchske about the delay. Mr Kerr also alleges

that Mr Capponi had agreed with him, when he saw him at Coles on a couple of occasions, that the delay was unacceptable and that he should not be charged any more for the job. Mr Capponi denies that he ever made such a comment.

40. Interestingly when asked about the delay in the job, Mr Brown gives evidence that "It was a long job, I knew there were going to be problems" when he came to that view is not clear and there is no evidence that he conveyed that concern to Mr Kerr. Mr Brown also conceded the job could have been done in 10 – 12 weeks if someone was dedicated to it full time.

41. Mr Brown described enquiries by Mr Kerr as "hassling him" when he had already been told that the work would be done when they got to it. He suggested that the business had to prioritise "booked in work" however he did not produce any objective or evidence of that "booked in work" at the time the job was accepted. Mr Brown also emphasised that the need for cash flow over a period of time influenced his decision on what work was prioritised. Mr Brown claims that he told Mr Kerr, in initial discussions, that they would do the job fitting it around their other work as they were very busy, however he refused to concede in cross-examination that he had prioritised other work over Mr Kerr's job. The refusal to concede on this issue was clearly inconsistent with his earlier evidence and indicates Mr Brown attempting to put himself and his actions in a better light.

42. Mr Brown also suggested that some of the delay was caused by sourcing parts and that was confirmed by Mr Nitchske to some extent. Mr Nitchske stated that there were times when they were waiting for parts or he was working on other jobs and that can be confirmed by the breaks in time shown on the job cards. Mr Nitchske always categorised the job as a "fill in" job.

43. The job cards (D1 and D2) show that there were several periods of time of five days or more, in the ten months when there were no hours worked on

Mr Kerr's job. Those periods of time cannot all be explained by sourcing parts nor can they be explained by waiting for 3rd parties to complete their work. There is only a vague assertion by Mr Brown that there were some delays in getting parts however, he could not say which parts were delayed or support his claim by documentation. He produced purchase order forms for parts in the later part of the year, October, November and December, however did not produce the corresponding supply invoices which would confirm the delivery of those parts and any delay in their supply. The documents produced did not assist in explaining any delay.

44. Mr Brown also claimed Mr Kerr "did not help out" regarding the sourcing of parts and therefore contributed to the delay. I find it to be an unusual and unreasonable expectation of a tradesman to require a customer to source parts to make a job quicker. In putting this forward, Mr Brown appeared defensive and trying to justify the delay. It was conceded by Mr Kerr in cross-examination that he had in the past provided some parts to Mr Brown for work to be done, however there is no evidence in relation to this job that Mr Brown had advised Mr Kerr of delay in delivery or sourcing of parts or any evidence that he was even asked to "help out". Mr Brown's reliance on Mr Kerr's "failure" to help out is clearly an attempt to deflect criticism from himself for what is an unreasonable delay.

45. Mr Smith, who I found to be a credible well qualified expert witness, also expressed a concern that the job had taken the time that it did, he thought the "overall length of time was excessive". He suggested that "I would have expected the turn around to be much less even given the difficulties of the job."

46. Mr Kerr complained that he lost work because of the unavailability of the truck and while Mr Brown does not accept that he had an obligation to complete the job as soon as possible, he did acknowledge that Mr Brown had voiced concerns about the time it was taking. Significantly Mr Brown did

not give evidence that when Mr Kerr complained he confirmed with Mr Kerr that the agreement was they would get to it when they could nor did he say that he gave any explanation for the delay, eg the delay in parts.

47. Mr Brown's evidence is that Mr Kerr was making a nuisance of himself regarding the completion of the job almost from the beginning and because of that he, Mr Brown, was "getting cranky". Mr Brown stated that he just ignored Mr Kerr's enquires and continued doing the job as a "fill in" job. Given the situation it is unlikely that Mr Brown did not convey his "crankiness" to Mr Kerr. It is quite possible that after both Mr Brown and Mr Kerr both became frustrated with the situation, a conversation about losses and doubling of charges did take place and that places some doubt on the voracity of Mr Brown's claims.

48. It is also clear from the evidence that Mr Kerr made it clear to Mr Capponi and Mr Brown that he was not happy with the delay and they were aware that delay was an issue for Mr Kerr. The evidence also shows that there was a clear lack of communication between the parties to negotiate a better outcome. On Mr Brown's evidence he ignored the issue on Mr Kerr's evidence, they both became angry and made threats regarding losses and charges.

49. Given the difficulties the Plaintiff had with the job, the pressure the Plaintiff was under to complete work for other regular customers and Mr Brown's evidence that he told Mr Kerr that they would "get to the job when they could", it is most likely that the Plaintiff did prioritise other jobs over Mr Kerr's causing some of the delay.

50. All of this evidence put together satisfies me on the balance of probabilities that the time it took to complete the job, approximately 10 months, was unreasonable in all of the circumstances. It is trite law that it was the Plaintiff's obligation to perform the work within a reasonable time given there was no term of the contract specifying the time for performance.

(*Wigan v Edwards* (1973) 47 ALJR 586 at 589, *Laurinda Pty Ltd v Capalaba Shopping Centre Pty Ltd* (1989) 166 CLR 623).

51. The delay however does not necessarily mean that the Plaintiff is not entitled to be paid for the work that he has done. Failure to perform the work within a reasonable time may have given the Defendant the right to terminate the contract, however this clearly was not an option taken by the Defendant in this case. The work was completed and the Defendant took delivery of the truck. That does not preclude the Defendant basing part of its counter-claim on that delay and that will be discussed later in this judgement.

52. **Hours claimed:** In relation to the hours actually spent on the job, Mr Smith provided an analysis in his report on the reasonableness of those hours. His report justifies the hours spent on the job, however he accepts that the time spent on the job seemed to be a lot and he was of the view that something must have gone wrong for that many hours to be required. In cross-examination, Mr Smith conceded that he was given the number of hours that had been billed by the Plaintiff and asked to advise if those hours were reasonable, he says he looked at the work done and the parts used and came to the conclusion that the job had not been straightforward and that is why he allocated the time he did to certain tasks.

53. It is clear from Mr Smith's diary notes and his evidence that in relation to a straightforward remove and refit of the same type of engine, along with a refit of the gearbox and driveline, plus an allowance for some contingencies, his first thought was that a reasonable labour time would have been closer to 100 hours (see D7).

54. Mr Smith was cross-examined at length in relation to the times he placed on the work done and he did not concede that the figures he produced were merely a justification for the hours claimed by the Plaintiff. I accept that he

did not set out to only "justify" the hours claimed, however his reasoning in respect to this aspect of his report is flawed.

55. Mr Smith did give the opinion that "I have reviewed the extensive parts list of this job. My opinion is that these parts are reasonably required to carry out such a major modification." Mr Smith has assessed the parts list accepting that there was a major modification involved in this job. He did not have the opportunity to look at the engine or truck chassis in question, so he had to rely on the invoice of parts used and the job cards to assess what was necessary for the job to be completed. He assumed that the work done was necessary and assumed that the time spent was justified in part because of the need to stop work several times. He added some hours to tasks on the assumption that there was a lot of time spent chasing parts and ensuring that the engine etc were packed up properly to avoid it getting dirty in between the times it was actually being worked on.

56. There is no evidence before the court that a lot of time was spent sourcing parts, except Mr Brown's estimate that delays in sourcing parts may have amounted to about one month, nor is there evidence that time was spent "wrapping the engine in plastic" to avoid contamination. There is no evidence from Mr Brown that some of the hours claimed on the job cards were for running around chasing parts. There is some evidence that the truck had to be pushed out of the shed at least once to allow room for other work to be done, however no figures were placed on the time it took to undertake that task.

57. The Plaintiff in fact did not claim hours for administration or sourcing parts, they only claimed for the hours evidenced on the job cards, apparently entered by the mechanics not people in the office.

58. It would be expected that if it was particularly difficult to source parts for this job in particular, given the nature of this dispute, Mr Brown would have specified that fact in his evidence, he did not, he only made vague assertions

about the difficulty in general a mechanic may have in sourcing parts in Darwin. Mr Smith has clearly made assumptions which are not supported by the evidence.

59. Mr Lock gave evidence as an expert diesel mechanic having worked in the industry for many years and for most of his working life having worked on Cummins engines. Mr Lock has the further qualification as an expert because he has in fact personally been involved in at least twenty jobs where a Detroit engine in Kenworth W series primer mover was replaced with a Cummins engine. He had, in the past, undertaken the same task, (in relation to other vehicles), that Mr Brown was contracted to do by Mr Kerr.

60. Mr Lock gave his assessment of the reasonable time to complete the job based on his experience in undertaking the same task, his assessment is contained in "LL2" of his report (exhibit D 11).

61. Mr Lock's view is that if a fully reconditioned engine was available to substitute for the old Detroit engine, then the removal of the Detroit engine and the refit of the reconditioned engine should only have taken 25 hours. Not the 470 hours as claimed by the Plaintiff.

62. In relation to undertaking the rebuilding, Mr Lock originally allowed 40 hours, however in cross-examination he qualified his comments about that time. While he says that it took more time than he would have expected (96 hours instead of 40 hours) he accepted Mr Brown as a good mechanic and because of that conceded the work done was necessary. Even with the need for extra work spent to rebuild the engine, Mr Lock could only justify up to 60 hours at the most not the 96 hours claimed.

63. In relation to the removal of the old engine, modifications to the driveline etc and refit of the new engine, Mr Lock could not accept that 470 hours was reasonable for that work.

64. There was also some evidence that it would have been more efficient and less costly if a fully reconditioned engine had been used instead of rebuilding the engine purchased.

65. The suggestion made by the Defendant's counsel is that the work on the engine as evidenced by invoice number 4376 was an expensive way of going about things. Mr Lock recently had the opportunity to cost a fully reconditioned engine and advised the cost was $26,000.00 plus GST on today's prices, he was not asked to advise the cost of a reconditioned engine in 2005. Mr Brown gave evidence that when he found out that the camshaft on the engine purchased by Mr Kerr was unrepairable, he rang around and priced a fully reconditioned engine. He says he rang Cummins and they advised they had an engine available for $10,000 plus GST. It was his opinion that as the engine Cummins had was older, it was not worthwhile considering as an option.

66. Mr Brown's evidence suggests that age of engine does affect the value of the engine, however there is no evidence how much older the engine was and why it was not a worthwhile proposition. Again Mr Brown's evidence was vague and full of generalisations. The evidence produced on this issue was unhelpful and therefore, it is not possible for this court to assess whether buying a fully reconditioned engine was a reasonable alternative to rebuilding the Cummins engine subject of this claim. Although it is accepted that the Defendant paid $9,500.00 for the new engine and then spent another $16,340.45 for the Plaintiff to rebuild it, there is not enough cogent evidence as to the availability of the supply of an alternative.

67. It was suggested by Mr Brown if Mr Kerr was not happy with the cost of fixing the engine he could have taken it back to the previous owner and asked for a refund, however that was clearly speculation on Mr Brown's behalf and there was no evidence that was a viable option available to Mr Kerr. In any event, Mr Kerr had paid for the rebuild of the engine on the

production of invoice 4376 and therefore would have also had to retrieve that payment from Mr Brown.

68. Further, no claim was made in the pleadings for damages arising out of any misrepresentation regarding the state of the new engine, therefore evidence of a cheaper alternative to rebuilding it is only of minimal use to the court in the assessment of what benefit has been received by the Defendant.

69. While Mr Lock conceded that there may have been some difficulties in the job he could not concede, given his experience, there was a need for modifications to cross members, supporting the engine, and drivelines or if those modifications were necessary, why so many hours were spent on those modifications.

70. Specifically Mr Lock gave evidence that the difference in the length of the Detroit and Cummins engines could simply be accommodated by the mechanic unbolting the cross member and turning it around. Mr Lock was adamant if the cross member had been turned around then there would have been no need to shorten the driveline as the Plaintiff apparently did. Mr Lock was cross–examined at length on the size of the cross member and the difference in length of the engines and while he accepted some suggestions by the Plaintiff's counsel about measurements, he continued to insist there was no need to shorten the driveline. He accepted that there may have been a need to purchase a new cross member (as shown in the Dieseltech quote D12) if the old one was rusty, however the new cross member would not have to be altered to accommodate the difference in length, it would simply be bolted on the correct way around.

71. While some of the concessions made by Mr Lock in cross-examination may seem to cast doubt on his evidence about the fit of the engine, those concessions are of little weight. Mathematically, without exact measurements of both the engines (the only measurements taken are those produced by the Plaintiff), the particular cross members and whereabouts on

the cross member the engine would sit, it is not safe to reject Mr Lock's evidence on the basis of those concessions. Considering Mr Lock's experience in this area, it is more likely that the estimates of the width of cross members given to Mr Lock in cross-examination were inaccurate and Mr Lock's evidence on this issue should be accepted.

72. Both Mr Smith and Mr Lock were well qualified to give evidence as experts. Mr Smith, an experienced diesel mechanic who is a lecturer at the Charles Darwin University in diesel mechanics and who has used the particular model of Cummins engine for a working example for the apprentices he trains. Mr Lock is also a diesel mechanic of some years who has undertaken at least 20 replacements of Detroit engines with Cummins engines into Kenworth W series trucks. Mr Lock also had the advantage of having the opportunity to inspect the vehicle and work on the engine to undertake some repairs whereas Mr Smith did not.

73. Both Mr Smith and Mr Lock gave their evidence in an honest and straightforward manner trying to give as much assistance to the court as they could and they should both be commended for their patience.

74. However the obvious limitation on Mr Smith's evidence in relation to the refitting of the engine is that he has never undertaken the task in issue, ie replace a Detroit engine with a Cummins into a Kenworth W series. He assumed the modifications to the truck and the driveline etc were necessary. Mr Lock's practical experience in this area is clearly superior and in relation to the actual mechanics of the job, I place more weight on his evidence.

75. Evidence from both Mr Lock and Mr Smith supports the view that had the job run smoothly, and then it would be reasonable to expect that the job would be completed in about 100 hours, even taking into account some delays regarding parts and third party contractors.

76. While maintaining the view that the hours spent on the job and the time to complete the job were reasonable, Mr Brown curiously decided, in his first full invoice to Mr Kerr, to not charge him for any labour at all. It was suggested to Mr Brown that he did this because he acknowledged that the job had taken too long and while he denies this suggestion, the evidence supports the proposition.

77. I find Mr Brown's denial to be unbelievable it is not likely that a prudent businessman, as Mr Brown would have the court believe he is, would forgo approximately $30,000.00 worth of labour "to get it out of my hair". It is also not likely that a prudent businessman would have allowed an account worth $60,183.96 to remain outstanding for 12 months before making concerted efforts to pursue the customer. All the way through his evidence, Mr Brown was adamant one of the reasons for Mr Kerr's job not being completed in good time was that as a small business, cash flow and maintaining customer base was important to him. If cash flow was such an issue, then it is inconceivable that he allow such a large debt to remain outstanding unless there was some other reason to allow this delay in payment. No reason was given by Mr Brown.

78. In light of the evidence of the attempts by Mr Capponi to adjust job sheets and create unusual invoices for the job and Mr Brown's preparedness to write off $30,000.00 labour, and the acknowledgement by both Mr Capponi and Mr Brown that the delay had become an issue for Mr Kerr, it is more likely than not that the Plaintiff, by originally discarding the labour charges, was acknowledging an unacceptable delay and excessive hours used in completing the work.

79. Given the experts' evidence and the attempts by Mr Brown to minimise the reasons for the delay, I find on the balance of probabilities that the hours spent to do the job were unreasonable. A large part of the hours claimed were caused by the inexperience of the Plaintiff in undertaking this work

(unnecessary modifications of cross members and driveline) and the Plaintiff's decision to undertake the work in an ad hoc manner, fitting it in whenever they could. The need to move the truck in and out of the workshop, and the obvious inefficiencies of not completing the job in one or two blocks of time also added to the unreasonableness of the hours claimed.

80. It seems that Mr Brown, in claiming the number of hours he has claimed, has attempted to make good his threat to "double the charges".

81. The next question must be if the hours claimed are unreasonable, then what is reasonable. Both Mr Smith and Mr Lock, while surprised the rebuild of the engine took 96 hours, accepted that given the parts that went into the job, there must have been some difficulties. Mr Smith accepted the 96 hours as claimed and Mr Lock conceded up to 60 hours as reasonable.

82. The further 470 hours claimed to complete the job is difficult for the Plaintiff to justify. For reasons I have set out before, I rely on Mr Lock's evidence in relation to this and find that a further 45 hours for a mechanic of Mr Lock's experience, was reasonable to remove the old engine and refit the new, given that I have ruled that the modifications to the driveline and cross members were not necessary.

83. Other evidence produced of how long a removal and refit of engine would take (without the need for modifications to accommodate a different sized engine) is two invoices of D& L Diesel, no 432 of the 26.8.2002 and invoice no 3037 of the 28.9.2001 (part of exhibit P1). Mr Lock was referred to those invoice and confirmed he thought the hours spent on those jobs were reasonable. In relation to invoice 432, that job was identified as a straightforward out of chassis rebuild, where the engine was removed from the vehicle, rebuilt and then replaced, the hours spent on that task was 47.5 hours. In relation to invoice no 3037 that too was an out of chassis rebuild which had the added complication of the crankshaft being broken the hours on that invoice were not specified however assuming a charge rate of $60

per hour the hours would be approximately 108 hours. The charge rate on 2002 invoices was shown as $60 per hour and that accords with Mr Brown's evidence. These invoices related to work done by the Plaintiff for the Defendant.

84. The court was also provided with a quote from Dieseltech on 27.3.08 (D 12) produced to L & K Tyre and Truck services, Mr Lock's business, for an in chassis rebuild of engine and a remove and refit of that engine. The labour charge for that particular job was 64 hours.

85. It is clear from the evidence available that it is difficult to compare like jobs as there may always be some differences, however even the larger of the previous rebuilds by D & L Diesel took 108 hours including removing, rebuilding and replacing the engine nowhere near the 470 hours claimed for the work subject of these proceedings.

86. Based on the evidence before me, I am prepared to add in some allowance for the fact that Mr Lock's experience in this area would make him more efficient in this task and for the fact that no job is the same and there were some complications in this job. I find that a reasonable time to complete the job subject of these proceedings is 60 hours for the rebuild of the engine and a further 100 hours to remove and refit the engine to the truck. A total of 160 hours.

87. **Rates charged for the reasonable hours:** In examination in chief, Mr Brown was not sure what his hourly rate was at the end of 2004. He originally stated that he thought the rate was $70.00 per hour and then $85.00 in 2005, but when he was referred to invoices from his business from late 2004 and early 2005, he accepted that in 2004 the rate was more likely $60.00 per hour and in 2005 $65.00 per hour.

88. In my view Mr Brown was being disingenuous in his original evidence of his rates and this is another example of his attempt to "double" his charges.

89. Mr Lock's evidence is that in 2005 his hourly rates were $50.00 per hour. Mr Smith's notes (D7) show him applying an hourly rate of $65.00 per hour.

90. There is no further evidence of the market prices at the time and given that there are several invoices from D & L Diesel to Bob Kerr in evidence for work done between 2002 and 2005 showing varying rates between $60.00 per hour to $70.00 per hour, none of which were challenged by Mr Kerr, it is likely that the rate of $65.00 per hour is an acceptable rate for work done in 2005.

91. Accordingly, in relation to the labour charges for the job in dispute, a reasonable claim for the rebuild of the engine is 60 hours at $65.00 per hour, 100 hours for removal of old engine and refit of new at $65.00 per hour. The total reasonable labour charge including the work on the gearbox being $10,400.00

92. **Parts:** Each of the experts agreed that they could not comment on the parts claimed on the invoice, except to say that it is conceivable that those parts were used in the job. There was some suggestion by Defence counsel that the claim for $2,889.89 for miscellaneous nuts, bolts and washers etc seemed excessive. Mr Nitchke gave evidence that a lot of those sorts of parts were used on the job. There are also some purchase orders in evidence for those sorts of miscellaneous parts attributable to the job in question, however the quantities are not set out on those invoices, neither are the delivery dockets supplied.

93. There was evidence from Mr Kerr that during some discussions he had with Mr Capponi regarding the account when he challenged the amount claimed for those miscellaneous parts, Mr Capponi drew a line through them indicating his preparedness to forgo that amount. It could be inferred from this action of Mr Capponi's that the claim for those parts was not legitimate, however it could be equally inferred that the Plaintiff was willing to forgo the amount to settle the dispute.

94. Mr Capponi's evidence in relation to the ordering of parts and attributing them to the Defendant's job was problematic. He was challenged on why the job number had not been entered on the purchase orders until after the docket was returned to their office and his explanation was plainly contrived. Mr Capponi stated that the job number was not included on the purchase order because they didn't want their competitors knowing who their customers were. He then had to concede in cross-examination that unless the competitors also had access to the job cards, there was no way they could know from a job number who was the relevant customer. Mr Capponi was clearly attempting to justify sloppy business practice with the knowledge that the purchase orders were the only way the Plaintiff could prove absolutely that the parts claimed were actually used.

95. Given the above, particularly the evidence of Mr Lock and Mr Smith, I am satisfied that the claim for most of the parts by the Plaintiff has been established on the balance of probabilities, however a deduction must be made for the time spent to shorten the driveline and a further reduction from the miscellaneous parts, given some of those must have been used though it has not been proved on the balance of probabilities that all of those miscellaneous parts were used.

96. The Plaintiff's claim for parts on invoice 4561 for work on the driveline is $1,400.30. It is not totally clear whether some of those parts would have been required, even if the driveline was not shortened, however Mr Luck's evidence it that there is no need to do any work on the driveline and based on that evidence, that amount will be deducted from the total. In relation to the miscellaneous parts, I am prepared to allow half of that amount, $1,444.95.

97. It is important to note that Mr Luck's estimate of parts necessary (see D11 attachment LL2) for refit of the Cummins engine and gearbox work is $9,528.00 being the figures he adopted from the Plaintiff's invoices.

98. Accepting parts of $8,550.38 for the rebuild of the Cummins engine (see P3) and $20,999.72 for the balance of the work (see P4) the total parts the Plaintiff can claim is $29,550.10.

99. Taking into account the evidence before the court, I find that reasonable restitution to the Plaintiff for the work done, without any consideration of the Defendant's counterclaim, is $39,950.10 ($29,550.10 for parts and $10,400.00 for labour). The Defendant has already paid the Plaintiff the sum of $29,124.00 and therefore the balance owing to the Plaintiff is $10,826.10.

100. Mention must be made of the Defendant's having pleaded payments of $38,624.18 which included the $9,500.00 paid for the engine, clearly that pleading was made on the basis that the cost of the engine was to be included in the $25,000.00 "quote". That pleading is clearly erroneous based on the evidence available. That amount was never paid to the Plaintiff and never included in the original invoice 4367.

101. **Counterclaim:** The Defendant submits that even if there are outstanding monies owing to the Plaintiff, they are not liable to pay those monies because the workmanship was such that there was a total lack of consideration by the Plaintiff, the lack of proper workmanship required the Defendant to have the engine repaired by Mr Lock at a cost of $9,748.00 and because of the delay in completing the work the Defendant lost the opportunity to use the truck in earning $1,000.00 per day. The Defendant did not plead a duty of care or a claim in negligence in relation to workmanship, the Defendant only pleaded its counter-claim in contract.

102. **Workmanship:** In considering the evidence of Mr Smith and Mr Lock, it is important to point out at the outset that both Mr Smith and Mr Lock as experienced mechanics are equally well qualified to comment on the operations of a diesel engine. Mr Smith and Mr Lock were asked to give comment on the causal connection between the work completed by the

Plaintiff and the defects Mr Lock found in the engine. They were also asked to comment on the effect of those defects on the operation of the truck.

103. The Defendant complains that the rebuild of the Cummins engine and the refit of that engine to the truck were not done in a workmanlike manner, causing the engine not to operate at optimum level and requiring the engine to be eventually repaired by Mr Lock in 2008.

104. The Defendant claims in the pleadings that from the time that he picked up the truck from the Plaintiff he had trouble with the lack of power of the engine, excessive vibration and a knocking noise in the engine. He further claims that he has refused to pay the Plaintiff any more money because he was dissatisfied with the quality of the work.

105. The evidence of Mr Green confirmed that in 2006 he had been called out to attend Bob Kerr's yard and assess an issue they had with the truck. Mr Green found that there was a vibration which was caused by the rusting out of a pulley. The pulley was replaced under warranty and there were no other issues with the engine at that time. Particularly there were no complaints made to Mr Green about the lack of power or a noise in the engine.

106. Mr Brown's evidence is he test drove the vehicle before it was returned to Mr Kerr and apart from a little bit of bouncing around because of the lack of load on the trailer it ran just fine. Mr Nitchke also gave evidence that he took the truck for a test drive once the work was completed and he had no concerns with the performance of the truck. Mr Nitchke was specifically asked about vibration and knocking noises and his recollection was that there was none.

107. Mr Kerr's evidence is that when he drove the truck from Mr Brown's workshop he immediately had concerns about the accelerator sticking and deliberately drove the truck the back way to avoid having an accident. Mr Kerr says that he fixed that issue with the accelerator by adjusting it in his

yard. His memory of the drive "down the back road" to avoid having an accident was vividly described and as such, seemed to be an honest recollection. When giving that evidence Mr Kerr did not mention any issue regarding a knocking noise or lack of power.

108. It was only after further probing by his solicitor that he gave evidence in relation to the knocking noise, Mr Kerr's evidence is that it was present from the moment when the truck first started up and got worse over time. Mr Kerr also gave evidence that the lack of power was an issue with the vehicle from the beginning and when he complained to Mr Brown about it, he was advised that it would improve once the engine was run in. While Mr Brown agrees that this conversation took place and he says that he advised Mr Kerr to bring the truck back in if the problem did not improve, but he heard no further from Mr Kerr.

109. Mr Kerr says that he also complained to Mr Brown about the vibration problem but was very vague about when and where he made that complaint to Mr Brown. Mr Brown says there was never any complaint made to him about vibration or knocking noise until he commenced proceedings against Mr Kerr for payment.

110. The truck was taken to Mr Lock to look at and to repair in early 2008. It is important to note at this stage that the truck was taken to Mr Lock after the commencement of the proceedings and after Mr Kerr was advised to get an expert opinion on what was wrong with the vehicle.

111. While Mr Kerr confirmed that he did not pursue the Plaintiff for rectification of the problems he was having, he says he did refuse to pay any more money after his cheque of 27 October 2007, "until the truck was working properly". Mr Kerr did not return the truck to the Plaintiff for rectification nor had he seen any other mechanic about the difficulties he was allegedly having with the truck.

112. When Mr Lock inspected the engine he discovered several problems:

(a) Broken piston injector tube in the sump pan

(b) Corrosion in piston number 5 (where the broken injector tube came from)

(c) Damage inside piston head for piston 1 & 2 caused by a foreign object

(d) Cylinder bores were glazed up

(e) Accessory drive unit was leaking

(f) Static timing valve (STC) was not properly connected and the Jacobs brake system was not connected at all

(g) AFC workings was compromised because the inlet manifold had been squashed

(h) Engine was mounted too far forward not allowing for a backward slope of the engine. (see D11 Mr Lock's report)

113. The Defendant claims that all of these faults as identified by Mr Lock all contributed to the lack of power and excessive vibration experienced by the Defendant with the truck since return from the Plaintiff, thereby causing the Defendant to have to incur the costs of rectification by Mr Lock and the basis for the claim of total failure of consideration.

114. It is Mr Locks' opinion that the damage to the engine as discovered by him is attributable to the engine rebuild done by the Plaintiff.

115. **Broken injector tube, corrosion in piston 5 and worn bearings:** The fact that there was a broken piston cooler tube found in the sump was accepted by Mr Smith. It is agreed the broken injector tube was the probable cause of the corrosion in piston number 5.

116. It is contended by the Defendant, through the evidence of Mr Kerr and Mr Lock that, in a rebuild of an engine these tubes are a disposable item and a prudent mechanic would have replaced them. It is accepted by the Plaintiff that these tubes were not replaced in this job, however Mr Nitchske gave evidence that he had looked at the tubes and they were still a light colour, therefore did not need replacing. All of the mechanics accept that the tubes are light in colour when new and become darker and more brittle as they age.

117. It is conceded by all of the witnesses, who were experienced diesel mechanics that the coolant injector tubes are an item in the engine you would expect to fail over time.

118. It is agreed between Mr Lock and Mr Smith that the failure of the one injector tube for piston 5 would have caused a drop in oil pressure, what is not agreed between them is the level of the drop and its affect on the performance of the engine.

119. On the second page of his letter of 1 May 2008 attached to his report, Mr Lock advises the drop in oil pressure would have been so severe that it caused accelerated bearing wear which was evident in the excessive wear of the bearings he inspected.

120. Mr Smith is of the opinion that if the injector tube was fractured during reassembly and then later failed, one of the indicators of this may have happened may be a minor decrease in the oil pressure, however it is more likely to be evidenced by an overheating of the piston affected and that failure was likely to have shown up in a short space of time after the breaking of the injector tube.

121. Mr Smith accepted that there was excessive wear shown in the photos produced of the bearings (exhibit D20) however in his report (exhibit P11) disagrees with Mr Lock that the wear was caused by a decrease in oil

pressure. Mr Smith's opinion is that the wear as shown on the bearings is more likely as a result of a contaminant in the oil rather than a drop in oil pressure. Mr Lock conceded in cross-examination that the damage to the bearings could have been caused by a contaminant in the oil, however he could not say how the contaminant got into the oil. Mr Smith's view is that the contamination could have been caused by poor maintenance on the vehicle, particularly extended intervals between oil changes. In addition to the poor maintenance, it could be that the contamination may have been in the engine and bearings before the work was done, as the engine was not completely stripped down. Mr Smith suggested a further cause of contamination was coolant leaking into the oil from the broken piston cooler in piston 5.

122. Mr Nitchke's evidence is that the main bearings were replaced as part of the work on the gearbox. His evidence is that "you remove all of the bearings, they get replaced" and that is supported by the parts included in the invoice 4561 "BRG Kit RT/RT012515".

123. Both Mr Smith and Mr Lock accepted that for a drop in oil pressure to be the cause of the wear on the bearings as shown, there would have to be a noticeable drop which should have been noticed by the drivers of that vehicle. Mr Kerr did not give any evidence of drivers reporting loss of oil pressure.

124. Mr Kerr did not give evidence of any difficulties with oil pressure, over consumption of oil or overheating of the engine. He was given the opportunity in cross-examination to clarify what problems he was having and at that stage confirm that he did not remember any reports of those problems with the vehicle from the drivers of that vehicle.

125. When questioned about his maintenance regime, Mr Kerr stated that his trucks were given an oil change every 5 – 6 weeks or every 250 hours, it was the responsibility of the drivers to ensure oil changes were undertaken and

there was no formal system in place to record or ensure those services took place. Mr Kerr could not be sure that those services took place.

126. Mr Lock's report states "In my opinion the damage I found in March 2008 and contained in the above report, suggested either the engine had done about a million kilometres since its last rebuild, or the rebuild was poor. I was told that the rebuild had only been done two years prior so that is why I believe the faults I found were caused by poor workmanship during that rebuild. Even if that had been poor maintenance during that 2 years, it would not have produced what is shown in the photographs."

127. There is further evidence from Mr Kerr that the vehicle in question had done 1539 hours from 2005 - 2008 but there is no evidence of the kilometres it had travelled during that time. There is not even any estimate of the kilometres the truck had travelled. That evidence was not particularly helpful on this issue, except to show that the Defendant did not record the truck as being charged out to customers regularly during that period.

128. Mr Lock's concession that the wear on the bearings could have been caused by contaminated oil cast doubt on his conclusion in his report in relation to the bearings at least.

129. Due to the fact that there was no complaint of a drop in oil pressure, Mr Smith's explanation of the damage to the bearings that is a contaminant in the oil is more likely. I find that the damage to the bearings was from a contaminant in the oil, however the evidence does not make the one of the two mooted causes of that contaminant more likely. Whether or not the contaminant was introduced because of the Plaintiff's poor workmanship (in particular the failure to change the injector tubes or fracture of the tube during the refit) or because of the Defendant's poor maintenance.

130. The colour of the broken injector tube (black) is an indication that it was at the end of its life when it broke and it is agreed by all mechanics who gave

evidence that these parts were expected to fail over time. There is no evidence of how long an injector tube would be expected to last.

131. It is clear from the evidence that had the tube broken at the time of the refit, the broken tube would have fallen out before the sump was replaced, it would not have been found in the sump. Mr Nitchske gave evidence that he checked the injector tubes before refitting the engine and chose not to replace them as they were of good colour and didn't need replacing, there is no reason to doubt his evidence. Although Mr Lock gave evidence that he would have replaced the piston cooler tubes as a matter of course, Mr Smith stated that he couldn't see any reason why a mechanic would not replace them, however says it is up to the mechanic on the day. Given the above, it cannot be held that a prudent mechanic would necessarily replace that part if it had been checked and found to be in good order.

132. Mr Lock conceded in cross-examination that the broken injector tube could have occurred for a number of reasons and could not be sure that it was because it was fractured while refit occurring. The only thing he was sure of was that he would have replaced all injector tubes as a matter of course, however conceded that was just the way he did things.

133. With the evidence as it stands before the court it has not been proven on the balance of probabilities that the broken injector tube can be attributed to poor workmanship of the Defendant, it could have failed due to ordinary wear & tear. Any claim for damages arising out of the corrosion of piston 5 or worn bearings has not been proved by the Defendant.

134. **Foreign object:** It is agreed that there was a foreign object imbedded in one of piston 1 or 2 and that foreign object had caused damage to the piston head over those two pistons. The object could not be identified except that it was ferrous and had obviously bounced around the piston head before becoming imbedded.

135. All of the mechanics who gave evidence agreed that once the head had been fixed back onto the engine it is a closed system and there are only limited ways in which a foreign object that size can be introduced into the piston area.

136. The mechanics are also in agreement that if the foreign object was in the engine, there would have been a severe knock in the engine immediately upon start up which would have alerted any prudent mechanic to a problem.

137. What is not agreed is how the object came to be in the engine and if and when there were any indicators to those who drove the truck that the object was in the engine immediately after the completion of the job by the Plaintiff. Mr Lock is of the opinion that given the evidence of Mr Kerr regarding the "knock" in the engine, the foreign object must have been introduced at the time of rebuilding of the engine by the Plaintiff.

138. Mr Kerr claims in his first drive of the truck he noticed it was a bit sluggish, there was a loud "tic" or "knock" in the engine and some vibration. He conceded that the vibration was probably just because it was an old truck. Mr Kerr says that he did mention "tic" in the engine and the sluggishness to Mr Brown and was advised that it was the hydraulic lifters which would right itself after the engine was run in. Mr Brown accepts there was a conversation about the power issue in which he says he told Mr Kerr to bring the truck back if the problem persisted which he did not.

139. Mr Kerr's further evidence is that the "knock" was constant and became worse over time.

140. Mr Smith's and Mr Nitchske's opinions are that if the foreign object entered the engine at the time of the rebuild, the engine would have failed far earlier than 2008 and the damage to the pistons would have been far greater. They base that opinion on the level of carbon build up seen in the head around the object and the lack of damage to the piston walls. It is their opinion that if

the object had been imbedded for two years, then the piston walls would have cracked and the engine failed completely before 2008.

141. When cross-examined about this point Mr Lock disagreed with Mr Smith and Mr Nitschke, his view is that the object may not have been imbedded for the whole time. When asked if the truck was driven for 1500 hours with foreign body in its engine, would the damage have been more severe, Mr Lock answered "not necessarily". His view is that cracking in a piston is more likely caused by over-fuelling or heat. He did not totally disregard the possibility of cracking because of a foreign object being imbedded in the piston wall. What he did say is that no one could be absolutely sure about how long the object had been in the engine because the damage shown was "both old and new".

142. Mr Lock mooted the scenario that the object may have "flicked" in and out of the piston wall given that aluminium softens when heated. He suggested that this could be an explanation for the noise not being consistent in the engine and the fact that there was no cracking of the piston walls.

143. When Mr Smith was asked if the damage shown on the piston heads could have been "old and new" his opinion was that the regular lack of build up of carbon in the indentations caused by the foreign object indicates only one single event. Mr Smith did not accept that the foreign object had been bouncing around for months because the damage to the piston would have, in his opinion, been more than what was evident in the pistons in question.

144. Mr Smith was cross-examined at length about how the foreign object could have entered into the engine and he suggested once the engine is sealed it could have come in through the inlet manifold or contaminated oil. Mr Smith also conceded that the foreign object could have been left in the engine at the time of the rebuild, however given the engine had not failed before 2008 was not convinced that was how it did get in there.

145. Mr Smith also noted that there was evidence that the fuel injector failed in cylinder 1 or 2, the evidence being an irregular spray pattern. It is through that failure Mr Smith suggests the piston may have failed because of overheating. Mr Smith wasn't sure whether the failure of the injector in this piston was the cause of the foreign object in that cylinder or whether the foreign object had bounced around and caused the injector to fail.

146. Mr Smith agreed that a failure of a fuel injector could end up with "fuel dilution of the engine oil" and consequently poor lubrication, loss of power, and a lot of exhaust emission. He was not convinced however that the foreign object or failure of the fuel injector were introduced or caused during the engine rebuild undertaken by the Plaintiff because if it had there would have been a "pretty ugly rattly noise" at start up and that would have alerted a mechanic to investigate immediately. The evidence of Mr Brown is that when he drove the truck on a test run there was no such noise. Mr Nitchke, the mechanic who did most of the work on the truck stated that he took the truck for a test run upon the completion of the work and "was quite happy with the job … couldn't fault anything while driving the truck". Mr Nitchke also confirms if there had been a contaminant in the engine when he stated it up there would have been a bang and a rattle which would have made him stop and investigate.

147. Both Mr Smith and Mr Nitchke are of the opinion that the foreign object found in the piston must have been introduced a lot later than the original rebuild by the Plaintiff because the carbon build up and the actual damage of the piston wall would have been far more extensive than is presently shown if the truck had been working over the two years between the rebuild and the repair by Mr Lock. Mr Smith pointed out in his report and evidence in chief that the indentations made by the object had sharp edges and given that the aluminium heated up during operation if the damage was there for some time he would expect those sharp edges to be melted away.

148. Mr Lock's speculation about the object "flicking" in and out of the piston wall as an explanation for the lack of damage to the walls is just that, speculation, he did not point to any evidence to support that proposition except by implication. The implication being that as there was no further damage to the piston walls, the object could not have been imbedded for two years.

149. There is no evidence that there was a loud noise or rattle at the initial start up of the engine and the only noise Mr Kerr reported was a "slight knock" which got worse. Mr Smith and Mr Lock agreed that once the object was imbedded the noise caused by that object would cease, Mr Smith says cease completely and Mr Lock says would be intermittent if the object was "flicked" in and out. The evidence of Mr Kerr however is that there was a constant knock which got worse as the time went on.

150. Mr Kerr's report of a constant knock is more corroborative with Mr Smith's suggestion that the irregular spray pattern on piston one is an indicator that the fuel injector into that piston was broken and would have resulted in poor combustion in that piston leading to "diesel knock". This is something separate and apart from the problem of the foreign object.

151. In cross-examination Mr Smith conceded that a "knock" from the moment of start up would "tend to indicate" a foreign body inside the engine but held firm in his opinion that if it were the cause a prudent truck owner/driver would not have driven the truck for 2 years without referring to a mechanic and he still would have expected the damage to the pistons to be more extensive.

152. While Mr Smith conceded that the foreign object could have been left in the engine at the time of rebuild he opined it was more likely a more recent introduction. The alternative possible causes of the foreign object put forward by Mr Smith are:

(a) failure air compressor

(b) failure of fuel injector – fracture of that injector could have been the cause of the contamination

(c) poor oil change techniques – dirty funnel, too long between changes

153. The evidence of Mr Lock is that at the time he undertook repairs of the engine in 2008 there was nothing wrong with the compressor and even though one of the fuel injectors had a crack in it that fracture was on the other end of the injector, nowhere near the cylinder side of the head. There is no reason to doubt Mr Lock's observations of these parts and therefore the court is left with the possibility of the introduction of the object at time of rebuild or the introduction of that object through contaminated oil from a poor maintenance regime.

154. Mr Kerr gave evidence that his trucks were regularly serviced including an oil change every 250 hours or 5 – 6 weeks. The oil change was left up to the drivers of the truck and they were alerted to the need for a change by a sticker on the oil filter. His further evidence in cross-examination is that each truck had a log book, however the particular truck no longer had a log book. He gave no evidence specifically about the truck in question and there was no evidence called from any of the drivers of the truck who may have undertaken that maintenance.

155. While Mr Lock's evidence about the hours required to do the job has been preferred over Mr Smith's, the same cannot be done in relation to Mr Smith's and Mr Lock's evidence regarding the workings of a diesel engine and the possible causes of the failure of that engine. Mr Smith is clearly well qualified to assess possible causes of the foreign object in the engine as is Mr Lock and both of them accept by a process of elimination there are two possible causes of the foreign object, either it was left there in the rebuild or as a result of poor maintenance.

156. The evidence of Mr Kerr about a constant knock in the engine is more corroborative of a "diesel knock" due to a failing fuel injector. Both Mr Smith and Mr Kerr were not of the opinion that there would be a constant noise arising out of the foreign object in the engine. Mr Lock opined, to explain the "old and new" damage to the piston, the item would have flicked in and out of the piston and therefore the "knock" would have been intermittent. Mr Smith opined that if the item had been there from 2005, the noise would have been so severe that any operator of the vehicle would have referred back to the mechanics immediately. Mr Smith did not expect the noise to get steadily worse over time because once the object was imbedded there would be no noise.

157. None of the people who drove the vehicle immediately after its repair, Mr Brown, Mr Nitchske or Mr Kerr gave evidence of the sort of noise which created that immediate alarm. Mr Kerr gave evidence of a "knock" however did not consider it severe enough to take the vehicle to a mechanic.

158. Mr Kerr is an experienced owner/operator of prime movers and his business relies on his vehicles operating at optimum levels. It is therefore unbelievable that he would continue to use a truck for two years with a consistent knocking noise in its engine without taking it to a mechanic to be looked at and repaired. I find Mr Kerr's evidence about the presence of a constant "knock" to be unreliable and even if he can be believed, the nature of that noise is more consistent "diesel knock" not an intermittent noise because the foreign object was flicking in and out. Therefore without reliable evidence of a "ugly rattle or knock" at the time of start up it is more likely that the foreign object was introduced to the engine after the rebuild and most likely due to poor maintenance regime by the Defendant.

159. Accordingly it cannot be accepted that the Plaintiff has proved on the balance of probabilities that the foreign object in the pistons was introduced

at the time of the rebuild. Any claim for the rectification of the damage caused by the foreign object must fail.

160. **Bedding in of Pistons:** Mr Lock also identified a problem with the "bedding in" of the pistons. There was some clear glazing of the cylinder bores in Mr Lock's opinion caused by the fact that the engine was not properly run in after the rebuild. Mr Smith agreed that if the cylinders were not properly run in, then that could cause glazing of the liners and consequently cause increased oil consumption. He also agreed that if the glazing were severe enough the only solution would be to replace those liners. Mr Smith suggested that sometimes that problem can right itself if the glazing is not too bad and was puzzled as to why liners were not in the parts list of the repairs undertaken by Mr Lock.

161. Defence counsel submitted the reason the engine was not run in properly is there were no proper instructions given to Mr Kerr regarding that process. It is accepted by Mr Brown and Mr Nitchske that no instructions regarding running in of the engine were given to Mr Kerr. It was assumed by Mr Brown that Mr Kerr was aware of how to run in an engine as he had done it before. It is also clear from Mr Kerr's evidence in cross-examination that "we ran it in the way we always did" he thought he knew what he was doing even though the glazing on the cylinders showed what he did on this occasion was not correct.

162. The question is whether it is reasonable for a mechanic to assume that a customer is aware of the need to run in a rebuilt engine, given the customer's experience or is there still an obligation to advise the customer of the right way to run in the engine.

163. The Defendant has not pleaded that it was an implied term of the contract that the Plaintiff had a responsibility to ensure the Defendant knew of the proper procedure to properly run in a newly reconditioned engine. Even if it had been pleaded as an implied term it is not a term which the court would

imply pursuant to the principles set out in *BP Refinery (Westernport) Pty Ltd v Comco Constructions Pty Ltd v Shire of Hastings* [1977] 16 ALR 363. There is no formal contract and it is not "necessary for the reasonable and effective operation of the contract of this nature in the circumstances of the case" *Hawkins v Clayton* [1988] 164 CLR 539. The Defendant had the experience and knowledge of the proper way to run in an engine and therefore in those circumstances it cannot be implied into the contract that the Plaintiff should have advised the Defendant of how to properly run in an engine.

164. Further there is no pleading of breach of contractual duty or duty of care of the Plaintiff to offer that advice about running in the engine.

165. Any claim for damages arising out of the glazing of the cylinders must fail.

166. **Slope of engine:** Mr Lock also identified an issue with the lack of backward slope of the engine causing severe driveline vibration in the vehicle. Mr Lock's letter of 1 May 2008 states that the lack of backward slope of the engine did not take into account the angles of the drive shaft and "If this is not right it can cause severe vibration in the vehicle's driveline due to the universals binding up for incorrect angle set up". He goes onto to say that the vibration can be caused by "worn or damaged unis but they were found to be in good condition."

167. Mr Smith was at a disadvantage in relation to commenting on this particular issue. He accepts that as he has not seen the vehicle or the slope of the engine, then all he could say is that driveline vibration called be caused by a number of factors including engine slope. He does not elaborate on what else can cause that vibration and accepts that a truck could be driven with a vibration without the need to refer to a mechanic. If the vibration was not severe it would be open to the driver to put down any vibration to the fact that it was an old truck.

168. Mr Smith states that if the vibration is caused by the angle of the driveline that could be rectified to obtain the correct universal joint cancellation by an engineering process which had not been done on this truck. The solution suggested by Mr Lock is interrelated to the way the engine was mounted into the truck. Mr Lock is of the opinion that if the engine was moved back to where it should have been (if the cross members had been used properly), then the problem would be alleviated if the driveline had not been shortened by the Defendant.

169. Mr Lock confirmed that he had driven the truck and found a severe vibration and it is his opinion that vibration cannot be rectified without major work on realigning the engine and therefore another adjustment to the length of the driveline. No evidence was called to establish the cost of rectification of this fault. It is the Defendant's submission that this fault, along with others already discussed and some yet to be discussed, had caused there to be a total lack of consideration on the behalf of the Plaintiff and therefore the Defendant should be reimbursed monies already paid. This will be discussed later once all of the Defendant's complaints are dealt with.

170. **Accessory drive unit was leaking:** While there may have been a fault in relation to this unit, there is no evidence that it was necessary to do work on this unit as part of the rebuild or refit. Further there is Mr Lock's evidence that this would not have affected the performance of the engine.

171. **Static Timing valve (STC) was not properly connected:** It is accepted by Mr Smith that he has never worked with a STC. He accepts that the STC may have been installed incorrectly, however does not accept that would have affected the performance of the engine. It is agreed between the experts that the STC was a valve introduced into newer engines as part of compulsory emission control in these vehicles.

172. Mr Smith's view is that even if the STC was installed incorrectly, the result would be more white smoke on idle and the engine would perform as an

older engine would without the emission control valve on it. He also totally disagrees with Mr Lock's analysis that if the STC had remained connected as it was and the Jacobs brake system was also connected, that combination could lead to total engine failure. The article attached to Mr Smith's report supports his proposition that the STC operates entirely independently of the Jacobs brake system.

173. Mr Nitchske reconnected the STC in the same manner it was connected to the engine originally. He says he marked each hose or connection with corresponding ties and reconnected the STC with reference to those ties. It is quite possible that that STC was improperly installed on the engine as it came into the workshop and Mr Nitchske, by reinstalling it in the same way, perpetuated the problem. None of the mechanics were asked if the method used by Mr Nitchske was an acceptable method to industry standards and therefore it is not possible to make a finding that his failure to refer to the manual regarding this piece of equipment was bad workmanship.

174. Even if the STC was not properly connected and that wrong connection was because of bad workmanship, given the opposing views of the expert witnesses, neither of which can be preferred, I cannot find on the balance of probabilities that this connection caused any performance issues with the engine in question.

175. **AFC workings was compromised because the inlet manifold had been squashed:** Again Mr Smith was not given the opportunity to view the engine before the repairs undertaken by Mr Lock and has to accept Mr Lock's observation of that pipe. Mr Smith concedes that it is possible that the power of the engine could be affected by a "squashed" manifold inlet pipe, however that really depended on how badly it was damaged.

176. Mr Smith also suggested there were many ways that the part could have been damaged and even Mr Lock conceded in cross-examination that it was not necessarily damaged by the Plaintiff's workmen at the time of the refit.

His words were “it’s hidden enough that you can’t really damage it”. The only explanation Mr Lock provides of how it could have been damaged during the refit is if the “Aftercooler was dropped on it”.

177. There is therefore not enough evidence to support the proposition that it was the responsibility of the Plaintiff to fix the “squashed” manifold inlet pipe, nor that it was the Plaintiff’s mechanics who actually damaged the pipe. Mr Lock’s opinion is that this damaged part would have contributed to the loss of power of the engine, but he stops short at suggesting that it must have been damaged at the time of the work done by the Plaintiff.

178. **Jacobs brake system:** It is agreed that the Jacobs brake system was not reconnected by the Plaintiff and it is unclear whether this was required as part of the contract. The mechanics all agreed the reconnection of this system is a simple task and was an insignificant part of the cost of the work undertaken by Mr Lock. It is also agreed that the Jacobs brake system is desirable for use when more than one trailer is being towed by the truck and that truck is required to travel up and down hills. There was no complaint by Mr Kerr regarding this issue until it was discovered by Mr Lock, clearly the lack of the system was not a matter of concern for the drivers of the truck and did not affect the use of the vehicle, therefore any claim for damages in relation to this aspect is not established.

179. **Total failure of consideration:** The Defendant’s submission is that in total the faults identified by Mr Lock on his repair of the vehicle show that there has been a total lack of consideration given to the Defendant by the Plaintiff. The difficulty with that argument for the Defendant is that they must rely on the terms of the contract to prove lack of consideration. What consideration did the Plaintiff promise to the Defendant? Was it to replace the Detroit engine with a Cummins engine which would give a certain amount of power to the vehicle or was it that the Plaintiff was to refit the Defendant’s truck with a rebuilt working engine? On the pleadings it is

agreed that it was an implied term of the contract that once the work was complete, the Defendant would have a roadworthy engine capable of efficient operation. That being part of the agreed consideration from the Plaintiff then the Defendant must show the Plaintiff totally failed to do provide that consideration.

180. On Mr Brown's evidence he was to repower the vehicle with a rebuilt Cummins engine and the use of the vehicle was that it was to pull a float. Mr Kerr's evidence is that he couldn't remember whether he told Mr Brown what he wanted to use the truck for but he assumed that Mr Brown would know the truck was rated for three trailers and that is what he would be using it for.

181. In any event both Mr Kerr and Mr Brown stated that before any work was done on the truck it was not in service. Mr Kerr gave evidence that he had even been considering putting the truck up on a pole as an advertisement.

182. Even on Mr Brown's evidence the truck was used for at least 1539 hours during the two years from end of 2005 to end of 2007. The Defendant says it was used in a limited way because of the lack of power. Whether the efficient operation of the truck is the efficient operation of the truck as a puller of floats or as a puller of three trailers is a matter which is subject to a finding of what the exact terms of the contract were regarding the use of the vehicle. The evidence is that it is unclear whether the purpose for which the truck was to be used and therefore with that uncertainty it is difficult to find that there has been a total lack of consideration.

183. The Plaintiff did provide some consideration to the Defendant their work resulting in the truck functioning even if it may have been only for pulling floats and not three trailers.

184. In relation to the severe vibration it could be argued that the Plaintiff breached the obligation to provide an efficient running vehicle because the

severity of the vibration made it impossible to use. However while it is clearly not an ideal situation, Mr Kerr continued to use the vehicle for two years and therefore that fault is no basis for the claim that the Defendant is entitled to be repaid any monies he has already paid to the Plaintiff for total lack of consideration.

185. **Costs of repairs:** All of the repairs undertaken by Mr Lock were necessary and if they had been proven to be attributable to the Plaintiff's poor workmanship, the Defendant may have been successful in this part of its counterclaim. The Defendant failed to prove the repairs were made necessary by the Plaintiff's workmanship.

186. In relation to the rectification of the angle of the engine, it is accepted by Mr Smith that if the engine is not rearward sloping (he did not get the opportunity to actually inspect the engine), it would cause problems with vibration unless there is a complicated engineering process undertaken. Mr Lock is clearly of the view that if the engine had been refitted properly (by just swapping the cross member around), there was no need to adjust the driveline and the angle of the engine would be correct. I am satisfied that Mr Lock's view of this issue is correct and the slope of the engine is the most likely cause of the vibration in the truck. I am further satisfied that the vibration in the truck is caused by poor workmanship of the Plaintiff and even though it is not a basis for a claim for total failure of consideration by the Plaintiff, the Defendant is entitled to damages for the cost of the rectification of that work. It should be noted that Mr Lock did not change the universal joints on the truck because although he thought the vibration was bad he did not think universals were so badly affected they needed replacing at that time. The poor workmanship is a breach of the implied condition that the Plaintiff was to provide the Defendant with good workmanship.

187. Both Mr Lock and Mr Smith are of the view whatever solution is employed to rectify this situation there would be difficulties and issues. Mr Smith puts forward the solution of mathematically working out the proper connections to accommodate the slope to ensure no stress on the universal joints (cause of the vibration). Mr Lock suggests the solution to the problem is to lift the engine out of the chassis, readjust the driveline and refit the engine as it should have been in the first place. Neither Mr Smith nor Mr Lock placed a cost on or estimate of hours it would take for their solutions.

188. Without evidence of the cost of rectification or even an estimate of the labour hours to do the work to rectify the problem, it is impossible for the court to assess those damages and therefore no value can be placed on those damages.

189. **Loss of opportunity:** The third arm of the Defendant's counterclaim is the claim for loss of opportunity, particularly the Defendant's claim for $1,000.00 per day for the loss of use of the truck during the unreasonable delay it took to complete the work.

190. The Defendant's claim is that if they had the use of the truck at full capacity between May and December 2005, it would have earnt the Defendant's business $1,000.00 per day less expenses. The Defendant bases these calculations on the claim that it had been agreed that the work would be complete by the end of April 2005 and that the Defendant was contracted on an earthmoving job during that period for which the truck could have been used.

191. While there was not enough reliable evidence to establish an agreement that the work was to be completed by the end of April, it is clear that the work should have been completed in a shorter time than it took. To reiterate, Mr Brown estimated 12 weeks if he had dedicated resources to the job without interruptions for other work, Mr Smith would have expected the turn around

to be much less and Mr Lock was of the opinion that the work could have been completed in eight days at the most.

192. Taking into account the efficiencies that Mr Lock would have because of his experience undertaking this type of job and the difficulties the Plaintiff encountered, a reasonable period of time would be most likely somewhere in between the eight days and 12 weeks.

193. In relation to the claim for $1,000.00 per day, it is for the Defendant to prove on the balance of probabilities that he could have earnt $1,000.00 per day from that truck during the time it was unreasonably kept in the Plaintiff's workshop.

194. The only evidence produced to the court regarding the earning capabilities of the truck was the oral evidence of Mr Kerr and some paperwork showing the use of other trucks during that time on "the Wolpers and Grahl job". In his evidence in chief, Mr Kerr was adamant that had the truck been ready and capable of pulling three trailers, he would have been able to have it fully employed in the Wolpers and Grahl job, that is 170 days at $1,000.00 per day. He produced documents which clearly showed that he had a contract with Wolpers and Grahl for the haulage of fill on a development and that trucks were charged at $100.00 per hour. The documents showed that there were several trucks working the job. Mr Kerr stated that he could "have had as many trucks as he could find" on the job. He also claimed that each truck would work a 10 hour day.

195. In cross-examination Mr Kerr was shown to have exaggerated the use of his vehicles on the Wolpers and Grahl job. The invoices to Wolpers and Grahl indicated that only 115 days were worked on the Wolpers and Grahl job and there were only some days in which the trucks actually worked 10 hours per day. Mr Kerr then claimed that if the trucks were not being used on the Wolpers and Grahl job, they were being used for other work. He did not produce any documentation to support this claim.

196. In re-examination when asked in what capacity were his trucks working in 2005, he stated that 2005 was a “reasonably good year”. The Defendant did not say that all of his trucks were fully employed for the whole of the year or that they were fully employed for the period of time from May 2005 to December 2005. Certainly in reference to the Wolpers and Grahl contract the evidence of the Defendant was that the “job was dropping off as the time went by”.

197. The Defendant attempted to convince the court that there was work available to keep all of his trucks fully employed during the period between May 2005 and December 2005 charging at least $1,000.00 per day. He only supported that claim with vague references to other customers, besides Wolpers and Grahl he had during that time, however could not produce any objective evidence, eg invoices, to support that claim. When asked why he had not produced this evidence he stated he was only asked for Wolpers and Grahl documents, the implication being documents existed but he just didn’t produce them to the court.

198. It is for the Defendant to prove his counterclaim on the balance of probabilities, vague references to other customers and a “reasonably good year” does not sufficiently discharge that burden. The court should be provided with the best evidence available and the Defendant has failed to do that.

199. Even if it was accepted that the truck in question could have been fully employed at $1,000.00 per day for 179 days, the Defendant then could not supply any cogent evidence as to the expenses of running that truck giving only vague estimation of his expenses, again no documentary evidence was produced to support these estimates, which document might reasonably be expected to be kept by the Defendant. Without that evidence it is a very difficult proposition to calculate any damages that might be owed to the Defendant.

200. In addition to the evidential burden regarding the use of the truck the Defendant must also satisfy the court that a reasonable person would have realised the loss was likely to occur and that the Plaintiff should have realised the loss was likely to occur based on the facts and circumstances known to the Plaintiff - *Hadley v Baxendale* [1854]156 ER 145.

201. In relation to the Defendant's claim in contract, unless there was a specific agreement between the parties that the truck would be ready within a certain time and the Plaintiff knew of the intended use of the vehicle it may be found that the damages claimed for loss of profit for that period in 2005 is too remote.

202. The evidence of Mr Kerr is that at the commencement of the contract he did not remember discussing the intended use of the vehicle with Mr Brown. Mr Brown's evidence is that Mr Kerr had told him that he would be using the truck for pulling a float around town. There was no evidence produced to the court as to what, if any, charge would be made for the truck in this activity. Mr Kerr was adamant that by the end of April 2005 however, Mr Brown was aware that he needed the truck for the Wolpers and Grahl job and by June he had advised Mr Brown he was losing $1,000.00 per day.

203. In relation to the principles expounded in *Hadley v Baxendale* (supra) the damages claimed by the Defendant for loss of opportunity may be too remote if they were not within the Plaintiff's contemplation before they entered into the contract to do the work. That is, if the Plaintiff was aware that the Defendant needed the truck for a job which was commencing in May 2005 and therefore the work needed to be done by then, the Plaintiff may not have entered into the contract because they knew they would be unable to complete the work within that time.

204. It is clear from Mr Kerr's evidence that he assumed the Plaintiff knew he was going to be using the truck to pull three trailers. The question then is with that lack of specific information, should the Plaintiff have reasonably

contemplated the loss as claimed by the Defendant. I was referred to the case of *Waratah Quest Pty Ltd v Scania Australia Pty Ltd* [1995] FCA 1352 as authority for the proposition that the Plaintiff isn't required to have specific knowledge of the Defendant's intended use for the vehicle it is enough that the Plaintiff knew what the Defendant's business was and should have reasonably expected the Defendant's loss. Having read that case I do not accept that it stands for that proposition. The court's concern in assessing damages in that matter was whether the damages claimed were too remote because it cannot have been reasonably expected by the defendant in that matter that the plaintiff was in financial situation which did not enable him to replace the vehicle with another. There is no such issue in the present matter.

205. The High Court in *Burns v M.A.N. Automotive (Aust) Pty Ltd* [1986] HCA 81 considered a matter where the Plaintiff was sold a vehicle on the basis that it had a fully reconditioned motor. The Defendant was aware that the vehicle was to be used in interstate haulage. The vehicle did not have a fully reconditioned motor installed and was consequently unfit for interstate haulage. The Plaintiff then used the vehicle for intrastate cartage until it broke down. His Honour Chief Justice Gibbs succinctly analysed the issue as follows:

> "There can be no doubt that it was within the reasonable contemplation of the parties at the time when the contract was made that if the warranty was broken the appellant might lose the profits which he might otherwise have made in the business of an interstate haulier. According to the finding of the learned trial judge, the appellant might have been able, with the use of a prime mover whose engine had been fully reconditioned, to earn such profits for four years. The appellant had made known to representatives of the respondent the purpose for which he intended to use the vehicle, and if the engine was not in a fully reconditioned state a loss of profits was a serious possibility at the time when the contract was made. In accordance with the rule in Hadley v. Baxendale (1854) 9 Ex 341 (156 ER 145), as explained in Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. (1949) 2 KB 528, C. Czarnikow Ltd. v. Koufos [1967] UKHL 4; (1969) 1 AC 350 and Wenham v. Ella

> [1972] HCA 43; (1972) 127 CLR 454, any loss of profits proved to have resulted from the fact that the engine was not fully reconditioned would, subject to the considerations which I am about to mention, be recoverable as damages for breach of warranty.
>
> .....a loss of profits for the four years during which the reconditioned engine could probably have been used was within the reasonable contemplation of the parties as a consequence of a breach of the warranty. Notwithstanding the much criticized decision in Liesbosch, Dredger v. Edison, S.S. (Owners) [1933] UKHL 2; (1933) AC 449, any damage which resulted from a breach of the contract, and was reasonably within the contemplation of the parties when the contract was made, is recoverable even though the appellant's impecuniosity contributed to it: Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriker (A/B) (1949) AC 196, at p 224; Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd. (1952) 2 QB 297, at pp 302, 306, 307. However, the appellant was bound to take all reasonable steps to mitigate the loss, and one course open to him to mitigate the damage, if he could have afforded to take it, was to have the engine reconditioned or to buy another to replace it. However his impecuniosity prevented him from taking that course. The question arises whether it should be held that the appellant is debarred from claiming such part of the damages as is attributable to his failure to take the necessary steps in mitigation, when he was unable to take those steps because of his lack of means. The answer must be in the negative."

206. It is clear that mitigation must be taken into account when assessing damages however if lack of means is the reason for no mitigatory steps being taken then the plaintiff should not be disadvantaged.

207. In the present case, the Plaintiff was aware of the Defendant's business and it should have been within Mr Brown's reasonable contemplation that if the repairs took too long to complete the Defendant would suffer some loss from the use of the vehicle.

208. If Mr Brown's evidence could be accepted that Mr Kerr's advice to him at the time of entering into the contract was that he intended to use the vehicle "to pull a float" then it is likely the Defendant could claim only loss of earnings for the truck being used to pull a float during the time it was unreasonably kept in the workshop. If Mr Kerr's evidence could be accepted

that Mr Brown advised him that the truck would be ready within two weeks, then the Defendant could claim the loss of use of that vehicle within the reasonable contemplation of the Plaintiff. It is clear Mr Brown knew what the business of the Defendant was and therefore it should have been within the reasonable contemplation of the parties that the truck would be used for that business. Applying the reasoning in *Burns v M.A.N. Automotive (Aust) Pty Ltd* it would then be the Defendant's responsibility to mitigate his loss and arrange a replacement truck to do the work that was not being done by the truck under repair.

209. On either scenario the Defendant has not produced sufficient evidence to prove its loss of profits claim. If Mr Brown's version is accepted there is no evidence of the value of using the truck to pull a float and the alternatives to that. If Mr Kerr's version is accepted there is insufficient evidence to establish the earning capacity of the truck and no evidence of the Defendant making any effort to mitigate his loss by arranging for the use of another vehicle. There is no evidence that the failure to mitigate loss was caused by the Defendant's inability to arrange for another truck to undertake the work. There was some evidence of the cost of the hire of another vehicle however the Defendant's feeble attempts to give evidence of the expenses his business may not have to pay for if he had hired a vehicle did not satisfy me to the requisite standard.

210. The Defendant has proven that the delay is unreasonable but failed to discharge its burden of proof to show that delay has led to lost profit and therefore the Defendant's counterclaim for loss of profits must fail.

211. **Agreement – payments made:** There was some evidence adduced about an agreement to pay reached between Mr Kerr and Mr Capponi and while the Plaintiff is not suing upon that agreement, the evidence must be considered in assessing the reliability of the evidence of Mr Kerr and Mr Brown.

212. It is the evidence of Mr Capponi that Mr Kerr agreed to pay off a drastically reduced invoice, parts only, at $5,000.00 per month and that agreement was reneged on by Mr Kerr leading to these proceedings. Mr Brown's evidence is that he left that negotiation to Mr Capponi and stated in examination in chief that although he was aware that Mr Kerr had made some payments, he wasn't sure what they were because "I don't really do the books but I know Guy was happy with that - the proceedings and that they'd agreed to and a couple of payments had come through".

213. Mr Kerr accepted that he had a conversation with Mr Capponi about the payment of the invoice produced to him with parts only on it. According to Mr Kerr, he and Mr Capponi discussed the approximately $3,000.00 charge for miscellaneous parts and Mr Capponi agreed to deduct that amount from the invoice. They also had some discussions regarding the need for work on the air-conditioning. He did not accept he agreed to pay $5,000.00 per month on the reduced bill but rather advised Mr Capponi he would take the invoice and think about it.

214. Mr Capponi also gave evidence that the two subsequent payments made by the Defendant were as a result of him chasing up the payments pursuant to the agreement. Strangely however neither of those payments were multiples of $5,000.00, instead were payments for particular sections of the invoice.

215. When cross-examined about how invoice number 4561 was complied Mr Capponi indicated that he knew that there was likely to be a problem with payment for the job and that is why he separated the parts into different parts of the job. He created a manual invoice which was not the usual practice of the business. I have no doubt that one of the reasons he knew the payment was going to be a problem was because he was aware of Mr Kerr's dissatisfaction as to the delay in completing the job.

216. What is also unusual is that the first invoice produced to Mr Kerr is an invoice without any labour charge on it. Mr Capponi says he discussed this with Mr Brown who agrees he took the labour charge off the bill.

217. This was not a situation where the labour charge was deducted as part of the negotiations the Plaintiff had already decided to deduct the labour charges before making any serious attempts to get payment from the Defendant.

218. The actions of Mr Kerr, Mr Brown and Mr Capponi subsequent to this alleged agreement do not support their oral evidence.

219. In relation to Mr Brown, it is inconceivable that a small businessman who has just written off $30,000.00 worth of labour would not have any interest in the payment of such a large debt to his company. By saying he left all the negotiations to Mr Capponi and had no idea what payments had been made, Mr Brown was attempting to distance himself from the alleged negotiations for what reason is unknown. It is alleged by Mr Kerr that Mr Brown took a great interest in this debt and even threatened to double the cost should Mr Kerr not pay and perhaps that is the reason why he wanted to distance himself from the invoices as drawn.

220. In relation to Mr Kerr, the fact that he made substantial payments after his discussions with Mr Capponi and he made no complaint to Mr Capponi about the issues he had with the vehicle at that time casts doubt on his evidence that he was having the issues with the truck that he now claims as defective workmanship.

221. In relation to Mr Capponi while he gave evidence of an agreement with Mr Kerr for $5,000.00 per month, the fact that agreement was not recorded anywhere in writing given the previous difficulties he said he had getting the invoice paid is in the least curious. It is clear he was uncomfortable about some of the charges included in the invoice eg the charge for miscellaneous parts, deducting that amount without argument given that the

Plaintiff had already written off $30,000.00 labour. Mr Capponi was also challenged on the process by which he came to add certain parts to the invoice. Mr Capponi accepted that the purchase orders for parts do often not go out with a job number on them and that is added later. His explanation for that process was to keep the suppliers from knowing who the Plaintiff's customers were. That explanation when challenged, was not supported, even if the job number was on the purchase order it was conceded by Mr Capponi that there was no way that the supplier could link that customer number to a customer unless they were able to access the Plaintiff's computer. When cross-examined on this issue it was clear that Mr Capponi was trying to justify sloppy practices and creating an explanation which could not be substantiated. This issue highlighted Mr Capponi's desire to justify the Plaintiff's business practices and casts doubt on the voracity of his evidence about his discussions with Mr Kerr.

222. Mr Capponi showed great interest in the outcome of these proceedings. He was present throughout the five days even after he gave evidence on the first day. His attachment to the outcome is unusual for an employee of a business. Mr Capponi has worked for Mr Brown for several years and his involvement in these proceedings would suggest that he feels some personal interest in the result. The reason for Mr Capponi's unusual level of interest is not clear and it is not for me to speculate, however it is open to me to view his evidence in light of that interest. Mr Capponi clearly wanted a positive outcome for the Plaintiff. His attempt to justify the sloppy business practices of the Plaintiff regarding purchase orders as previously discussed indicates to this court that he was willing to put a spin on his evidence to suit the Plaintiff's purposes and to get that positive outcome.

223. In light of the above I cannot be satisfied that an agreement was reached between Mr Capponi and Mr Kerr for the payment of a certain amount and in any event if there were an agreement there was a clear repudiation of that agreement when Mr Kerr did not make the alleged promised payments. On

the Plaintiff's version that repudiation of the agreement is what led to this litigation. On the Defendant's version he paid what he thought was reasonable and refused to pay any more until the truck was fixed.

224. **Conclusion**: The unreliability of the evidence of Mr Kerr, Mr Brown and Mr Capponi led to the finding that the terms of the contract were uncertain in price, timeframe and to some extent the scope of works. It was therefore then necessary to consider whether the Defendant had gained some benefit from the work undertaken by the Plaintiff and what value should be placed on that benefit. Entangled in the analysis of any benefit received by the Defendant was the issue of whether the workmanship of the Plaintiff was so poor that there was no benefit. I also had to decide whether the faulty workmanship caused further loss to the Defendant in the form of necessary repairs undertaken by Mr Lock.

225. Setting aside the issue of workmanship I preferred the evidence of Mr Lock over that of Mr Smith in relation to the hours spent on the job and found that the time claimed was unreasonable. Taking into account the concessions made by both experts I came to the conclusion that 160 hours was reasonable for the whole of the job including the rebuilding of the Cummins engine. The benefit gained by the Defendant was a truck which was able to be used in his business when previously it had been all but retired by him.

226. In relation to the Defendant's counterclaim, while I found that there was unreasonable delay in the completion of the work the claim for loss of profits was not substantiated because of a paucity of cogent reliable evidence. The repairs undertaken by Mr Lock while found to be necessary could not be found to be necessitated by the poor workmanship of the Plaintiff and therefore are not claimable from the Plaintiff. The claim for total lack of consideration and repayment for those monies already paid must also be dismissed for reasons set out above. The claim for damages to

rectify the slope of the engine also fails because a lack of evidence of the cost of rectification.

227. Given all of the above my orders are :

1. Judgement in favour of the Plaintiff for $10,826.10

2. The Defendant pay the Plaintiff interest at 10.5 % per annum on the judgement sum from the date of commencement of proceedings up to judgement and continuing

3. Judgment in favour of the Defendant on the counterclaim for liability for rectification for the engine slope but for failure to produce evidence to establish that loss, nominal damage. Awarded at $100.00

4. Balance of Defendant's counterclaim is dismissed

5. I will hear the parties on costs

Dated this 24th day of April 2009

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Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE