SUPREME COURT OF QUEENSLAND

CITATION:	*Knott Investments Pty Ltd & Ors v Fulcher & Ors* [2013] QCA 67
PARTIES:	**KNOTT INVESTMENTS PTY LTD** ACN 000 596 798 (first appellant) **AROUND AUSTRALIA MOTORHOMES PTY LTD** ACN 096 161 161 (second appellant) **COAST RV PTY LTD** ACN 101 461 330 (third appellant) **v** **RAYMOND FULCHER AND KERYN EILEEN FULCHER (a partnership trading under the firm style or name of RAYMOND FULCHER AND KERYN EILEEN FULCHER)** (first respondents) **R & KE FULCHER PTY LTD** ACN 011 059 644 (second respondent)
FILE NO/S:	Appeal No 8596 of 2012 SC No 325 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	2 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2013
JUDGES:	Holmes and Muir JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed but only to the extent of varying the orders made on 28 August 2012 by deleting $9,601,950 in paragraph 2(c) and inserting $9,060,178 in lieu thereof and by deleting $3,033,991.90 in paragraph 2(d) and inserting in lieu thereof the sum necessary to adjust for the calculation of interest on the sum of $9,060,178.** **2. The appellants pay 50 per cent of the respondents' costs of the appeal.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – CONDITIONS AND WARRANTIES IN CONSUMER TRANSACTIONS – WARRANTIES – where the second respondent, a company controlled by the first respondents, entered into a contract of sale with the second appellant for the purchase of a Winnebago – where an air conditioning unit installed in the Winnebago caught fire and substantially destroyed the shed, and the contents of the shed, in which it was parked – where, following the fire, the first respondents elected to sell the farm land on which the second respondent conducted a tomato farming business – where the second appellant was held liable to the second respondent for breach of an implied warranty under s 71 of the *Trade Practices Act* 1974 (Cth) and s 17 of the *Sale of Goods Act* 1896 (Qld) – where the appellants were ordered to pay the second respondent damages for damage to property and economic loss – whether the second respondent's economic loss following the sale of the farm land was caused by the breach of the implied warranty

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – LIABILITY OF MANUFACTURERS OR IMPORTERS FOR DEFECTIVE GOODS – where the first appellant manufactured the Winnebago purchased by the second respondent – where the third appellant imported the air conditioning unit installed in the Winnebago – where the air conditioning unit caught fire and substantially destroyed the shed, and the contents of the shed, in which it was parked – where, following the fire, the first respondents elected to sell the farm land on which the second respondent conducted a tomato farming business – where the first and third appellants were held liable to the second respondent under s 74B and s 74D of the *Trade Practices Act* 1974 (Cth) – where the appellants were ordered to pay the second respondent damages for damage to property and economic loss – whether the second respondent's economic loss following the sale of the farm land arose "by reason that" the goods were not reasonably fit for purpose or were not of merchantable quality

DAMAGES – GENERAL PRINCIPLES – MITIGATION OF DAMAGES – PLAINTIFF'S DUTY TO MITIGATE – where the second respondent, a company controlled by the first respondents, conducted a tomato farming business – where a fire destroyed the packing shed and plant – where, following the fire, the first respondents elected to sell the farm land on which the second respondent conducted its tomato farming business – where the primary judge held that

the second respondent's loss of income was caused by the fire, notwithstanding the sale of the land – whether the loss of profits from the tomato farming business after the sale of the farm land were caused by the fire – whether the second respondent failed to mitigate its loss by not recommencing the tomato farming business – whether the loss of sugar cane revenue was caused by the sale of the farm land or the wrongful conduct of the appellants – whether the first respondents, by selling the land, received a windfall which should have been brought into account

Trade Practices Act 1974 (Cth), s 71, s 74B, s 74D, s 75AD(c), s 75AF, s 75AG, s 82
Sale of Goods Act 1896 (Qld), s 17

Boyd v State Government Insurance Office (Queensland) [1978] Qd R 195, cited
Darbishire v Warran [1963] 1 WLR 1067; [1963] 3 All ER 310; [1963] EWCA Civ 2, considered
Dimond v Lovell [2002] 1 AC 384; [2000] 2 All ER 897; [2000] UKHL 27, considered
Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158; [1969] 2 All ER 119; [1969] EWCA Civ 2, cited
Henville v Walker (2001) 206 CLR 459; [2001] HCA 52, cited
Hoad v Scone Motors Pty Ltd [1977] 1 NSWLR 88, cited
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41, cited
March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, considered
Medlin v State Government Insurance Commission (1995) 182 CLR 1; [1995] HCA 5, considered
Metal Fabrications (Vic) Pty Ltd v Kelcey [1986] VR 507; [1986] VicRp 52, considered
Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5, considered
Smailes & Son v Hans Dessen & Co (1906) 94 LT 492, considered
Sotiros Shipping Inc and Aeco Maritime SA v Sameiet Solholt (The Solholt) [1983] 1 Lloyd's Rep 605, considered
Standard Chartered Bank v Pakistan National Shipping Corporation & Ors (No 3) [1999] 1 Lloyd's Rep 747; [1999] 1 All ER 417, considered

COUNSEL: S Doyle SC, with C Jennings, for the appellants
P Hastie for the respondents

SOLICITORS: HWL Ebsworth Lawyers for the appellants
ClarkeKann for the respondents

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA**: **Introduction** The second respondent (the company), a company controlled by the first respondents, Mr and Mrs Fulcher, conducted a tomato farming business on land near Bundaberg. Central to the operation of the business was a packing shed and a packing plant constructed inside the shed. Early in the morning of 9 February 2004, an air conditioning unit on the top of a recently purchased Winnebago motor home, owned by the second respondent, caught fire. The fire spread and the shed and its contents were substantially destroyed. After a trial, the first appellant, the manufacturer of the Winnebago, and the third appellant, the importer of the air conditioning unit, were held liable to the first respondents under s 75AF and s 75AG of the *Trade Practices Act* 1974 (Cth) (the Act). The first and third appellants were held liable to the second respondent under s 74B and s 74D of the Act. The second appellant, the dealer who sold the Winnebago, was held liable to the second respondent, for breach of an implied warranty under s 71 of the Act and s 17 of the *Sale of Goods Act* 1896 (Qld). The appellants were ordered to pay the second respondent $14,757,601.34, made up of:

- $1,168,350 for property damage;
- $953,309.44, being interest on $1,168,350 at the rate of 10 per cent per annum from 9 February 2004 to the date of judgment;
- $9,601,950 for economic loss; and
- $3,033,991.90, being interest on $9,601,950 at the rate of 10 per cent per annum from 9 February 2004 to the date of judgment.

[3] The appellants appeal against the judgment in favour of the second respondent and the costs order made in favour of the respondents. The appellants seek:

- an order that the second respondent be awarded "such sum in damages as is deemed appropriate as economic loss" and interest on such sum;
- an order that "the appellants pay the respondents' costs of the proceeding to trial, to be assessed on the standard basis"; and
- an order that the respondents pay the costs of the appeal.

[4] The central issue on the appeal is whether any loss of profits from the business after the sale of the farm land can be said to have been caused by the fire. A related question is whether the second respondent failed to mitigate its loss by not recommencing the tomato farming business.

[5] Before addressing the issues ventilated in argument, it is desirable to set out the facts upon which the parties' arguments are based.

The nature and extent of the tomato farming business

[6] The business was commenced by the Fulchers in about 1984 and taken over by the second respondent in about 1990. Mr and Mrs Fulcher retained ownership of the land. Between 1994 and 2002, a number of nearby properties were purchased by Mr and Mrs Fulcher and the farming operation was expanded. At times, up to 200 employees were engaged in the business in mainly seasonal work. Between 30 and 40 of these worked in the packing shed. There were also two full time employees who worked in the packing shed office. Mrs Fulcher had the primary responsibility

for the packing shed, marketing and the keeping of records. Mr Fulcher had primary responsibility for general farming operations and maintenance.

[7] Two tomato crops a year were grown and, generally speaking, the land used for that purpose was then left to lie fallow for two years. Sugar cane was also grown on the farm for rotational cropping purposes with a maximum of 25 per cent of the land being under cane at any one time.

[8] At the time of the fire, the land used for tomato growing had been prepared for planting. Shortly after the fire, a decision was taken not to proceed with planting and Bundaberg Sugar Ltd expressed interest in purchasing the land for $4,000,000. An agreement for the sale of the land, with the exclusion of the block on which the Fulcher's house was constructed and a small area of land to be excised by subdivision to accommodate a rose growing business conducted, or to be conducted, by Fulcher Roses Pty Ltd, was entered into. The sale was completed in early 2005.

[9] Mr Fulcher obtained a quotation on 10 February 2004 for a new packing plant. The quoted figure of $799,590 did not include wiring for the shed and transport costs. The proposed packing machine had a reduced capacity so that the area under crop which it could accommodate would have been about 20 per cent less than the area farmed before the fire. The machine also had no facility for processing second or third grade fruit so that the packaging operation would take longer and involve double handling.

[10] There were other impediments to the recommencement of tomato farming operations. The farm would not have been fully operational for a period of about 18 months and no return from tomato production could be expected for about two years. Although in the months after the fire the Fulchers had available to them a substantial amount of cash, it was held by the primary judge and not disputed, that re-establishment of the business "would involve borrowing a large sum of money". Although the respondents would not have found it difficult to borrow the money had they wished to do so, they were apprehensive about incurring substantial indebtedness. They regarded avoiding debts which could not be repaid from cash flow within a year or two as a "big key to [their] success". They tried "to operate off [their] own funds", avoiding the use of their overdraft facility as much as possible. Mr Fulcher described tomato growing as "very volatile". He said that over the years he had seen many growers go broke as a result of "borrowing too much money".

[11] There were other considerations relevant to the economics of re-establishing the business. It would have taken the company "some time to re-establish a suitable team of employees" and there "may have been some difficulty in re-establishing the [company's] relationship with buyers". There was uncertainty concerning Mrs Fulcher's ability to participate in the running of the business. The reasons explain in that regard:

> "Mrs Fulcher was, and plainly remains, significantly affected by the fire. She was deeply upset by it, and has had trouble sleeping. She has sought medical attention and counselling. Judging from her response to questions about re-establishing the business, her psychological or emotional state was such that she could not have been involved in the business in the period after the fire. Indeed her responses would suggest that even now she would have difficulty with this."

[12] In response to the argument that a manager could have been employed to carry out the tasks previously carried out by Mrs Fulcher, the primary judge said:

> "Plainly that would have involved some additional cost, though perhaps not particularly significant in the context of the total operation. However, it seems to me that there is a material difference between the operation of a business such as this where the responsibilities have been divided between a husband and wife; and the operation of a business where a manager replaces one of them. Mr Fulcher's areas of expertise were different from those of Mrs Fulcher, and it may be doubted whether an employed manager could adequately replace her."

[13] Prior to the fire, the tomato business had been financially successful. Mr McDougall, an expert appointed to give expert opinion evidence by the parties, gave evidence of a net profit $2,048,088 for the crop harvested in the latter part of 2003 and profits of $983,022 and $1,759,511 respectively for the 2002 and 2003 financial years. There was a loss of $11,687 for the 2001 financial year. It was caused, in part, by the cost of setting up of the rose growing operation. Also Mr McDougall's evidence was that the tomato planting that year, 2001, was the largest of any of the years under discussion and involved the lowest yields. In his opinion, the net profit from the sale of tomatoes lost from the date of the fire to, and including, Spring 2011 was $8,998,181.

[14] The primary judge held, implicitly, that the tomato growing industry was volatile and that "some entities engaged in the industry that in the past had been successful [had] been placed in receivership or administration". He said that the respondents "had, from time to time, borrowed money to purchase additional [parcels of] land". That, however, took place in circumstances in which the respondents had available "a substantial part of the purchase price" and were "operating [a] business, generating sufficient funds to enable the relatively speedy repayment of the debt".

The primary judge's reasons

[15] The primary judge held that the company's loss of income was caused by the fire, notwithstanding the sale of the land. That loss was assessed by accepting Mr McDougall's calculation of lost income from the tomato farming business from the date of the fire until Spring 2011. Adjustments were made by Mr McDougall to allow for losses from capsicum and profits from sugar cane and watermelon growing. His calculations also had regard to weather conditions and tomato prices over the period of his calculations. No allowance was made for contingencies such as crop losses through hail, high winds or flooding or the loss of important markets. It was not contended at first instance that any such allowance should have been made.

[16] The primary judge was not satisfied that it was not reasonable for the company not to reinstate the tomato producing operation. He held that there was thus no failure to mitigate. In that regard, his Honour took into account: the fact that a considerable sum of money would have to be borrowed and expended to restart the business; there would be a delay of approximately two years before any new income would be obtained; there was a risk that the recommenced business might fail; it would take time to re-establish a suitable of team of employees; there may have been difficulty in re-establishing relationships with buyers; and there were doubts about Mrs Fulcher's capacity to resume her former role in the business.

The appellants' outline of argument

[17] The appellants advanced arguments to the following effect in their outline of argument.

[18] The test for causation in determining contractual damages is whether the company's economic loss may fairly and reasonably be considered as naturally arising – according to the usual course of things – from the breach of the implied warranties of fitness for purpose and merchantable quality.

[19] The prescribed measure of damages recoverable under s 74B and s 74D of the Act is the loss or damage arising "by reason that" the goods are not reasonably fit for purpose or are not of merchantable quality, respectively. The required causal link in s 74B and s 74D of the Act, which is analogous to the word "by" used in s 82 and "because of" used in s 75AD(c), is the common law practical or commonsense concept of causation discussed by Deane J in *March v Stramare (E & MH) Pty Ltd*,[1] namely:

> "… whether an identified negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it."

[20] The necessary causal connection may exist if the defendant's contravention is not the sole cause of the loss or damage, but materially contributed to that result.[2] The causal link may be severed by *novus actus interveniens*.[3] What might be regarded as severing the chain of causation is fact specific and contextual. The relevant principle was stated in *Medlin v State Government Insurance Commission*,[4] as follows:

> "The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage."

[21] Had the Fulchers taken prompt action after the fire to have the shed rebuilt, the company would have lost only the ability to pack and distribute tomatoes from the autumn and spring crops in 2004. Rather than rebuild, the Fulchers elected to sell most of their farm land for its market value. The sale precluded the company from conducting the tomato business. The company had no interest in the capital value of the land and was not entitled to receive any part of the proceeds of sale. The company's inability to resume the tomato business was not caused by the fire, but by a commercial decision of the Fulchers. The Fulchers had many reasons for not recommencing the tomato business. Their withdrawal from the tomato business was no different from any other circumstance in which they may have chosen to sell out. Had the Fulchers elected to rebuild the shed and reinstate its contents, there was nothing to prevent the company from continuing to conduct the tomato business.

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1 (1991) 171 CLR 506 at 522.

2 *Henville v Walker* (2001) 206 CLR 459 at 469 [14] per Gleeson CJ, 480 [61] and [70] per Gaudron J and 493 [106] per McHugh J.

3 *Henville v Walker* (2001) 206 CLR 459 at 479 [58] per Gaudron J.

4 (1995) 182 CLR 1 at 6.

[22] Consequently, profits from the business over eight years do not, "fairly and reasonably considered, naturally arise from" the second appellant's breach of contract and the defect in the Winnebago cannot, for the purposes of the Act and as a matter of ordinary commonsense, be regarded as the cause of the company's loss of profit. At their highest, the appellants are liable to the company for the loss of profits from the two crops in 2004 which would have been lost while the packing shed was being rebuilt.

[23] In selling the land, the Fulchers realised the market value of an asset that had been unavailable to them, both physically and in terms of its capital value, until the farming business had ceased. The judgment erred in not bringing into account the Fulchers' use of that $4,000,000. The Fulchers have thus received a windfall because, in addition to the capital value of the farm land, they (through the company) have been awarded the net profits from operating the business over eight years.

[24] There was a failure by the company to mitigate its loss. The primary judge's findings, based on the reasonableness of the respondents' conduct in not resuming operations due to the matters listed in paragraph [15], were inconsistent with findings made on the quantification of the respondents' damages based on forecast profits of the farming business over eight years to trial. Those calculations show that there was little or no risk in borrowing adequate funds. Furthermore, it was unreasonable for the Fulchers not to recommence the tomato business based on concerns that staff would be unlikely to return and on the possibility that Mrs Fulcher would no longer be prepared to work in the tomato business. Such matters could be resolved by engaging appropriate alternative staff. The Fulchers' accountants accepted that a business manager could have been found. The engagement of the same casual staff each year was preferred by the Fulchers because it was convenient, but new staff could have been found if necessary.

The appellants' oral submissions

[25] In address, senior counsel for the appellants expanded on the outline of submissions as follows.

[26] Reliance was placed on the following statement of principle of Deane, Dawson, Toohey and Gaudron JJ in *Medlin v State Government Insurance Commission*:[5]

> "For the purposes of the law of negligence, the question whether the requisite causal connexion exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of commonsense and experience. And that remains so in a case such as the present where the question of the existence of the requisite causal connexion is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the 'but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connexion would exist if the intervening act or

[5] (1995) 182 CLR 1 at 6.

> decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage." (Citations omitted)

[27] Senior counsel also relied on *Medlin* as authority for the proposition that the causal link between the wrongful act causing damage and the loss or damage might be severed by a subsequent event but, if the subsequent event did not wholly sever the causal link, there was no justification for "attributing causation to all events which post date [the subsequent] event".

[28] It was submitted that the primary judge's erroneous approach could be seen by the primary judge's allowance for losses on crops other than tomatoes although the fire had no impact on the growing of other crops. The inability to grow them resulted solely from the sale of the land.

[29] The following passage from *Sotiros Shipping Inc and Aeco Maritime SA v Sameiet Solholt (The Solholt)* was cited:[6]

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty. As Viscount Haldane, L.C., put it in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673 at p. 689:
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> > 'The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.'
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> As we have already accepted as being trite law, the buyers had an unfettered right in the circumstances of this case to affirm the original contract of sale or to cancel it. No question of mitigation arose at that stage. They decided to cancel and in consequence they suffered a loss of U.S. $500,000. As a matter of causation, this loss, unless avoidable by some reasonable *further* action, was directly attributable to the sellers' breach of contract."

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6 [1983] 1 Lloyd's Rep 605 at 608.

[30] Reference was made also to *Standard Chartered Bank v Pakistan National Shipping Corporation & Ors (No 3)*,[7] in which Toulson J, after referring to an analysis in a Canadian decision of *Doyle v Olby (Ironmongers) Ltd*[8] concerning mitigation of damages, said:

> "The orthodox view is that the rule as to avoidable loss is merely an aspect of the fundamental principle of causation that a plaintiff can recover only in respect of damage caused by the defendant's wrong. The rule is not that the plaintiff owes any obligation to the wrongdoer to mitigate his loss (despite the much repeated use of the phrase 'duty to mitigate'), but that he cannot recover for a loss avoidable by reasonable action on his own part because, if he could reasonably have avoided it, it will not be regarded as caused by the wrongdoer.
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> In *The Elena D'Amico*, [1980] 1 Lloyd's Rep. 75 at p. 88 Mr. Justice Robert Goff set out the principle as follows:
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> > 'First, it is necessary to look at the principle of mitigation of damage and to see what that principle really is. The principle itself is usefully summarised by Mr. Harvey McGregor in his book on Damages, 13th ed., p. 145 par. 205. The learned author there points out that mitigation can be subdivided into three separate heads:
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> > > "The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him … and cannot recover damage for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction to avoid. Put shortly, the plaintiff cannot recover for avoidable loss."'
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> I pause there to say that it is well recognized (sic) that there is no duty to mitigate in the sense of an obligation to do so; that was made clear by Lord Justice Pearson in *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 at p. 1075."

[31] The following proposition stated in *McGregor on Damages*[9] was also relied on: "the claimant must act with the defendant's as well as his own interests in mind". The learned authors cited *Smailes & Son v Hans Dessen & Co*;[10] *Darbishire v Warran*;[11] and *Dimond v Lovell*[12] in support of the proposition which was disputed by counsel for the respondents. The cases, however, do support the proposition.

[32] Channell J, in *Smailes* said:[13]

> "The ordinary principles of the law in reference to damages apply – that a man may not increase damages by unreasonable conduct. He is

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7 [1999] 1 Lloyd's Rep 747 at 758.
8 [1969] 2 QB 158.
9 McGregor, H, *McGregor on Damages*, 18th ed, Sweet & Maxwell, London, 2012 at para 7-072.
10 (1906) 94 LT 492 at 493.
11 [1963] 1 WLR 1067.
12 [2002] 1 AC 384.
13 *Smailes & Son v Hans Dessen & Co* (1906) LT 492 at 493.

> bound to act not only in his own interests, but in the interests of the party who would have to pay the damages, and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter."

[33] In *Darbishire*, it was held that a plaintiff could not recover the cost of repairs to his damaged car which exceeded twice the market price of a similar car. Harman LJ explained why:[14]

> "It may well be that the plaintiff, so far as he himself was concerned, did act reasonably and that what he got was of more value to him than the damages represented by the value of the car. The plaintiff, however, did not show that he had any special use for which this car alone was suitable, as, for instance, in his business, or anything more than that it was a sound car very well maintained and suited to his ordinary life. In my opinion the judge asked himself the wrong question. The true question was whether the plaintiff acted reasonably as between himself and the defendant and in view of his duty to mitigate the damages."

[34] *Dimond v Lovell*, relevantly, concerned whether a defendant who had negligently damaged the plaintiff's car was liable for the costs and charges of a company which carried on a business of providing loan replacement vehicles, together with additional services, to persons, such as the plaintiff, whose vehicles were temporarily unusable as a result of motor vehicle accidents. The plaintiff incurred no liability to the company which looked to defendants, or defendants' insurers, for payment.

[35] Lord Hoffman concluded that, although the plaintiff acted reasonably in engaging the car hire company, she had obtained additional benefits which were not recoverable: she was relieved of the necessity of paying a hire fee and the company conducted a claim on her behalf therefore insuring her against the risk of unsuccessful litigation. The plaintiff's recoverable loss, it was held, was the cost of hiring a replacement car at the market rate.

[36] Senior counsel accepted that for claims under the Act the "more recent authoritative approach is to recognise that the issue [that is, whether a failure to mitigate should be taken into account, was] one of causation".[15] Counsel for the respondent also accepted the correctness of this approach in relation to claims under the Act. The appellants did not seek to draw any distinction between the tests to be applied to the company's claims under the Act against the first and third appellants on the one hand and its contractual claims against the second appellant on the other. It was argued that, if anything, a contractual claimant would be in a less advantageous position than a claimant under the Act because of questions of remoteness of damage.

[37] Counsel for the respondent did not argue for a contrary approach. In view of the conclusions I have reached on causation, it is unnecessary to explore whether the application of common law principles in respect of mitigation may have made

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14 *Darbishire v Warran* [1963] 1 WLR 1067 at 1072.

15 *Henville v Walker* (2001) 206 CLR 459 at [18], [135]–[140], [164]–[166]; and *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [25], [26], [50], [84], [85].

a material difference to the outcome of the proceedings in relation to the second appellant. Nor is it necessary to explore whether there is any material inconsistency in approach between the English authorities cited by the appellants and Australian authorities such as *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd & Ors*;[16] *Hoad v Scone Motors Pty Ltd*;[17] *Boyd v State Government Insurance Office (Queensland)*;[18] and *Metal Fabrications (Vic) Pty Ltd v Kelcey*.[19]

[38] In reliance on the line of authority which required that plaintiffs do not act in disregard of defendants' interests, counsel for the appellants submitted that, although the respondents may have, from their own perspective, acted reasonably, their conduct had not been reasonable in that it failed to "take into account … what should be laid at the feet of the [appellants]". The application of these principles, it was argued, meant that the company was not justified in failing to borrow money to restart its business merely because the Fulchers were risk averse and there was some risk that the business, if commenced, would not succeed. It was said that there was a risk involved in almost all business activities but that the Fulchers had shown themselves to be effective at countering business risks in the past. The engaging of a manager to perform the work Mrs Fulcher had previously done was also something which the company could not avoid if it was to act reasonably.

Consideration of the causation issue

[39] Although I acknowledge that the appellants' argument on causation and mitigation are substantial, I am unable to accept them. As a consequence of the fire, the company not only lost its packing shed and plant, its tomato farming business was effectively destroyed. There is no suggestion that it could have conducted a profitable business pending rebuilding by continuing to grow tomatoes and having someone else pack them.

[40] It was apparent to the Fulchers that it would take approximately 18 months for the farm to be operational and another six months before any monetary returns were likely. It was also apparent to the Fulchers that, until the business could be re-established, the buyers on whom the company had previously relied would meet their requirements from other tomato growers. There could be no guarantee that the lost markets could be recaptured or that generally favourable market conditions would exist when the company returned to production. The business was volatile and Mr Fulcher had seen "many growers go broke" over the period of 20 years or so that he had been in the industry. A reason for financial failure was "borrowing too much money". Consequently, any prudent decision to recommence the business required recognition that it was a realistic possibility that the business might not be able to regain its former volume of production or profitability for an unascertainable period.

[41] The possibility that Mrs Fulcher may not have been able to resume her former role was another significant consideration. No doubt, a manager could have been employed but that would have increased the overheads and may well have increased the risk of failure. The business, in a practical sense, was conducted as a partnership with Mr Fulcher being responsible for the farm and Mrs Fulcher being

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16 [1976] 1 NSWLR 5.
17 [1977] 1 NSWLR 88.
18 [1978] Qd R 195.
19 [1986] VR 507.

responsible for the packing and marketing of the crop and the financial administration. It was a tried and proven entrepreneurial combination. The Fulchers could only speculate about whether their successful formula could be repeated if Mrs Fulcher's role was assumed by a paid manager.

[42] Much was made by the appellants of the sale of the land rendering it impossible for the company to restart the tomato business; but, the evidence supported the conclusion that the offending conduct was "itself a direct or indirect contributing cause of the [sale]".[20] The appellants' conduct was "a cause of the whole of [the company's] loss".[21]

[43] In determining whether "as a matter of commonsense and experience",[22] the decision of the Fulchers' to cease tomato growing operations after the wrongful conduct should "properly … be seen as having caused the relevant loss or damage",[23] all of the factors discussed above are relevant and must be considered in combination: they had a cumulative effect. Of particular significance was the need to borrow "a large sum of money" and the risk of failure of the recommenced business.

[44] The reasonableness of the conduct of a plaintiff in response to, or as a result of, a defendant's wrongful conduct is directly relevant to the question of whether the wrongful conduct has caused the plaintiff's loss.[24] In my view the company acted reasonably in all the circumstances.

[45] In considering the reasonableness of the respondents' conduct, principles applicable to mitigation of damages may be thought to have relevance.[25] In that regard it has been held that a plaintiff is not under "any obligation to do anything other than in the ordinary course of business [to mitigate his loss] … [and that] the plaintiff is not required to sacrifice or risk any of his property or rights".[26] In *Metal Fabrications (Vic) Pty Ltd v Kelcey*,[27] Murphy J, Brooking and Nicholson JJ agreeing, relevantly observed:

> "The respondents were under a duty only to act reasonably to mitigate their loss. This did not require them to chance their arm further, to risk any capital they might borrow too far or to take steps which would cause their financial ruin, if they failed: see *Payzu v. Saunders* [1919] 2 K.B. 581; *Lesters Leather & Skin Co. v. Home and Overseas Brokers* (1948) 64 T.L.R. 569; *Clippens Oil Co. Ltd. v. Edinburgh & District Water Trustees* [1907] A.C. 291, and *Banco de Portugal v. Waterlow & Sons Ltd.* [1932] A.C. 452, at p. 506; [1932] All E.R. Rep. 181, at p. 204.
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> As Lord Macmillan remarked in the lastmentioned case, the measures which the sufferer from a breach of contract may be driven

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20 See *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6.

21 *I & L Securities v HTW Valuers* (2002) 210 CLR 109 at 121.

22 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6.

23 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6.

24 *Henville v Walker* (2001) 206 CLR 459 at [30] per Gleeson CJ, [140] per McHugh J; and [166] per Hayne J.

25 *Henville v Walker* (2001) 206 CLR 459 per McHugh J at [130].

26 *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd & Ors* [1976] 1 NSWLR 5 at 9.

27 [1986] VR 507 at 513; see also *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88 at 100 per Samuels JA.

> to adopt 'ought not to be weighed in nice scales'. So long as the respondents can be seen to have acted reasonably and justifiably in the circumstances, they should not be debarred from recovering the actual loss flowing to them simply because it is asserted that, by taking some other course, the loss might well have been lower."

[46] The primary judge took the matters discussed above into consideration as well as the difficulties in obtaining the necessary reasonably competent work force. No error has been shown in the reasoning which led to the primary judge's conclusion that a failure to mitigate loss was not established.

Should the company's recoverable losses have included the $541,772 notional loss of net profit from the lost sales of sugar cane?

[47] Included in the damages awarded the company was $541,772 estimated by Mr McDougall to be the income from the sale of sugar cane that would have been earned had the farm not been sold.

[48] Counsel for the respondents submitted that the lost proceeds from the sale of sugar cane were recoverable as the company had been deprived of the profits it would have made but for "the events that caused the farm to be sold". A related contention was that the growing of sugar cane on its own was not a viable proposition. The evidence identified to support that proposition tended to show that sugar cane production may not have been the most financially rewarding use of the land, but it did not show that it was uneconomical for sugar cane to be grown on the land. The land was purchased by a company involved in the growing and milling of sugar cane and presumably it acquired the land for the purposes of its business.

[49] The company grew cane until the land was sold and even obtained the right to harvest a crop after the date of sale. That did not suggest that the cane growing operations were unprofitable and Mr McDougall's calculations estimated a profit for each of the years involved. If the land had not been sold, the company could have continued its cane farming operations which would have yielded a comparatively small profit. The loss of the sugar cane revenue was caused by the sale of the farm, not the wrongful conduct of the appellants. The tomato growing business was effectively destroyed by the fire. The sugar cane growing part of the business was not. Accordingly, the company failed to establish that the sum of $541,772 was a recoverable loss and the primary judge erred in including it in the award of damages and in awarding interest on it.

The $4,000,000 "windfall" issue

[50] It is convenient to now deal with the appellants' contention that by selling the land the Fulchers had received a windfall which should have been brought into account. The windfall was described as the benefit derived from the use of the $4,000,000 for the period after completion of the sale to the date of trial. Counsel for the respondents submitted that the Fulchers had received no windfall through the sale of the land as it had been their capital asset until sold and their interest in it was unaffected by the fire. In my view, that was no answer to the appellants' contention. If there had been no fire, the company would have continued using the land for its farming business and the Fulchers would not have had available to them the net proceeds of the sale of the land.

[51] The appellants' difficulty, however, is that the land was the Fulchers'. The company had no interest in the proceeds of sale and the notice of appeal did not seek to disturb the orders made by the primary judge in favour of the Fulchers.

[52] In the appellants' outline of argument, the $4,000,000 "windfall" was used in support of the appellants' causation argument. It was submitted that the windfall could be avoided if "… the Fulchers decision to sell the farm land transected any actionable causation of loss to the … Company past the completion of [the] sale, i.e. in February 2005". The sale of the land and its consequences were taken into account in the above discussion of causation. No error has been shown in the primary judge's reasons or orders in respect of the treatment of the benefits obtained by the Fulchers from the early receipt of the proceeds of the sale of the land.

Conclusion

[53] For the above reasons, I would order that:

1. The appeal be allowed but only to the extent of varying the orders made on 28 August 2012 by deleting $9,601,950 in paragraph 2(c) and inserting $9,060,178 in lieu thereof and by deleting $3,033,991.90 in paragraph 2(d) and inserting in lieu thereof the sum necessary to adjust for the calculation of interest on the sum of $9,060,178.

2. The appellants pay 50 per cent of the respondents' costs of the appeal.

[54] At first instance the parties agreed on an interest calculation which utilised different rates of interest over specified periods. It would therefore be preferable for the parties to agree on the figure to be inserted in paragraph 2(d) and I would direct that within 7 days of the date hereof the parties deliver to the registrar minutes of order to give effect to these reasons.

[55] **ATKINSON J:** I agree with the reasons of Muir JA and the orders he proposes.