IN THE SUPREME COURT OF QUEENSLAND Appeal No. 537 of 1986

FULL COURT

BEFORE:

Mr. Justice Kneipp

Mr. Justice Demack

Mr. Justice Carter

BRISBANE, 9 SEPTEMBER 1987

BETWEEN:

R.G. & D. PULLEN trading as PULLEN PASTORAL COMPANY (Plaintiffs) Respondents

-and-

G.M. BARTOLO (Defendant) Appellant

JUDGMENT

MR. JUSTICE CARTER: In this case the appeal was the defendant's appeal and the cross-appeal was the plaintiffs. The Court was constituted by my brothers Kneipp, Demack and myself. I am authorised by my brother Demack, with whom my brother Kneipp agrees, to say that the appeal should be dismissed with costs. My brothers Kneipp and Demack would order that the cross-appeal be allowed with costs, that the judgment be set aside and that the judgment for the plaintiffs in the action be varied so that there is judgment for the plaintiffs in the sum of $5,613.80 with

costs to be taxed and interest on the said sum of $5,613.80 at the rate of 12 per cent per annum from 1 November 1985.

My brothers would order that the counterclaim be dismissed with costs. I am authorised by my brother Demack to publish his reasons, and I am authorised to say that my brother Kneipp is in agreement with those reasons. For myself I would order that the plaintiffs' cross-appeal should be dismissed with costs. I would allow the defendant's appeal with costs. I would set aside the judgment appealed from and order that there be judgment for the defendant against the plaintiff for $7,829.20 with costs to be taxed. I publish my reasons.

The order of the Court therefore will be that the appeal is dismissed with costs, the cross-appeal is allowed with costs, the judgment in the court below is set aside and that there be judgment for the plaintiff in the action in the sum of $5,613.80 with costs to be taxed and interest on that sum at the rate of 12 per cent per annum from the first day of November 1985.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 537 of 1986

FULL COURT

BETWEEN:

R.G. & D. PULLEN Trading as PULLEN PASTORAL COMPANY (Plaintiff) Respondent

AND:

G.M. BARTOLO (Defendant) Appellant

KNEIPP J.

DEMACK J.

CARTER J.

Reasons for Judgment delivered by Demack J. and Carter J. on the 9th September, 1987.

Kneipp J. concurring with those reasons of Demack J.

Carter J. dissenting.

"Appeal dismissed with costs. Cross appeal allowed with costs. The Judgment of the Court below is set aside. Judgment for the plaintiff in the action in the sum of $5,613.80 with costs to be taxed and interest on that sum at the rate of 12% per annum from the 1st November, 1985."

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 537 of 1986

BETWEEN:

R.G. & D. PULLEN trading as PULLEN PASTORAL COMPANY (Plaintiff) Respondent

- and -

G.M. BARTOLO (Defendant) Appellant

JUDGMENT - DEMACK J.

Delivered the Ninth day of September, 1987.

This matter involves an appeal and a cross-appeal from a decision of the District Court at Mackay. I shall, for convenience, refer to the parties as plaintiffs and defendant. The plaintiffs R.G. & D. Pullen alleged by their claim that the defendant G.M. Bartolo owed the sum of

$5,613.80 in respect of harvesting done by the plaintiffs for the defendant.

The defendant admitted that harvesting was performed but alleged by way of counterclaim that it was a condition of the engagement of the plaintiffs by the defendant that the plaintiffs would carry out the harvesting work in a competent and workmanlike manner. The counterclaim alleged that the plaintiffs did not carry out the harvesting work in a competent and workmanlike manner so that a great deal of grain was not harvested. The counterclaim was in the sum of $13,195.05. In the reply and answer, the plaintiffs admitted that it was a term of the agreement between the parties that the plaintiffs would carry out the harvesting work in a competent and workmanlike manner.

The question of further and better particulars was raised and by a letter dated 24th October, 1986 the defendant gave the following particulars -

> “The way in which the plaintiff failed to carry out harvesting in a competent and workmanlike manner was that it cut the wheat to low and to fast causing an unacceptable level of wheat loss.”

Judge Loewenthal, who heard the action, gave judgment for the plaintiffs on the claim and for the defendant on the counterclaim. He assessed damages on the claim in the sum claimed and on the counterclaim in the sum of $7,227.55. Overall he gave judgment for the defendant in the amount of $1,613.75.

Both parties have appealed. The defendant's appeal alleges that his Honour made an arithmetical error in assessing the damages on the counterclaim. The plaintiffs agree that this arithmetical error was, in fact, made and that if the defendant can establish his counterclaim he should recover judgment on the whole action in the sum of $7,829.20.

The substantial issue argued then on appeal concerned the plaintiffs' cross-appeal. The matters raised in the cross-appeal are stated as follows:—

"(1) The trial judge erred in finding that if the rear end loss was excessive, that the plaintiff/respondent was responsible, whatever its cause.

(2) That the trial judge erred in finding that if the wheat stalks were cut too low, and thus caused excessive rear end loss, that this was the responsibility of the plaintiff/respondent.

(3) That the trial judge erred in finding that the plaintiff/respondent failed to carry out the harvesting work in a proper and workmanlike manner, having regard to the fact that, as His Honour the trial judge found, the defendant/appellant instructed the plaintiff/respondent to cut the stalks low throughout the harvesting of all fields.

(4) The trial judge erred in not finding that if there was excessive rear end loss, such loss was not the result of the plaintiff/respondent failing to carry out the work in a competent and workmanlike manner.

(5) The judgment was wrong in and contrary to law.

(6) That the judgment was against the evidence and the weight of the evidence."

The argument on appeal really turned upon the question of the extent and nature of the contract between the parties. It was submitted on behalf of the plaintiffs that the contract was to do a workmanlike job and that it was not a contract to produce a particular result. In substance the defendant's contention was that the findings of the learned trial judge of excessive rear end losses of grain proved a failure to do a workmanlike job. In my opinion,

when this kind of issue is raised, this court can only decide the matter on the material contained in the record.

As I have indicated, the allegation made by the defendant was that the plaintiffs would carry out the harvesting work in a competent and workmanlike manner. The defendant gave particulars of the breach of that obligation, namely that the harvesting was done too fast and too low. At the conclusion of the hearing, Loewenthal D.C.J. discussed with the parties the question of giving judgment as he was reaching the end of his sittings at Mackay. When the parties agreed that he should prepare written reasons for judgment that would be read over by the Registrar in Mackay at a later date, he addressed counsel saying, “I want you to deal with one aspect, and that is assuming the loss is due on my findings to cutting too low or driving too fast, what is your client's response or answer.” Nothing is recorded by way of answer but in the light of the pleadings and particulars it would seem to me that his Honour's comment could only mean that he was directing attention to the issue that the pleadings and particulars raised before him. That issue was that the defendant was alleging a breach of a condition of the contract of employment in specific particulars. That breach was the breach which was alleged to have occasioned the defendant's loss and consequently in the ordinary course of things that breach would need to be proved before the defendant could recover damages.

Early in his judgment his Honour said:—

> “What is in dispute is whether the harvesting was done properly without causing excessive losses. There are no disputes on the legal position. It was clearly implied that the plaintiffs should carry out their work with reasonable efficiency and not cause any excessive grain losses to the defendant.”

In effect each side on the appeal drew some comfort from this statement about the essence of the dispute. For the defendant it was urged that this meant that if there

were excessive grain losses this proved that the contract had not been performed in a workmanlike manner. For the plaintiffs it was said that excessive grain losses were simply evidence that could point to a breach of the contract but that this did not amount to proof of particular breaches of obligation.

His Honour proceeded to discuss the evidence about the mechanics of harvesting wheat and noted that there are always some rear end losses with a harvester and that this is taken as acceptable provided that the losses are not greater than three per cent of the crop total.

During the course of the trial the contention that the machinery was travelling too fast seems to have dropped out of the picture and the evidence concentrated in part on the question of whether the harvesting was done by cutting the stalks too low. In respect of that, his Honour made the following findings:—

> “From the evidence before me, including photographs, it appears that in all the fields the header height of both the Plaintiffs' and the Defendant's machines was set to cut the stalks fairly low. Two explanations had been given for them. The Plaintiffs state that they were specifically ordered by the Defendant to cut low in order that the stalks could form the bulk for animal feed after the necessary additives had been mixed with them. The Defendant says that he requested the Plaintiffs to cut stalks low in the Brigalow Field as in this field the wheat was not of consistent height and in order to ensure that all the heads were removed, he required the machines to be set low. This would not explain why his own machine was set low in all fields, particularly as it was not used in the Brigalow Field. I accept that the Defendant instructed the Plaintiffs to cut the stalks low throughout the harvesting of all fields.”

His Honour then discussed the number of grains per square foot that could be found after harvesting and which constitute a maximum acceptable rear end loss. He then continued:—

> “Excessive rear-end loss may be due to a number of causes. The header mechanism itself may be defective. It may be incorrectly adjusted. It may be affected by the speed at which the header is driven and possibly it may be affected by the height at which the stalks are cut. I say possibly, in this regard, because Dr. Tullberg, an expert in the field of grain harvesting, has given evidence that the Massey-Ferguson 850 machine had adequate capacity to handle the quantity of wheat found in the relevant paddocks, together with any straw caused by low cutting of stalks.
>
> On the other hand, a Mr. Lambert, an official in the Department of Primary Industries who has also had substantial experience in harvesting wheat, is of the opinion that harvesting stalks low would cause an excessive rear-end loss. I find it unnecessary to resolve this disagreement.
>
> If the rear-end loss was excessive due to the stalks being cut too low, it would nevertheless fall within the responsibility of the Plaintiffs, who held themselves out as competent to harvest and who should either have adjusted the front plate to a higher level or at least sought instructions from the Defendant who has no expertise.”

His Honour then proceeded to discuss the circumstances in which the excessive rear-end loss was discovered and discussed the evidence about the extent to which this loss was excessive.

He then said:—

> “To summarise on my findings, there was a greatly excessive rear-end loss during the harvesting. The cause of this loss has not necessarily been explained by the evidence although low cutting of stalks might well have been a factor.
>
> The Plaintiffs are responsible for the loss whatever its cause insofar as it exceeded 3 per cent of the crop. The loss as deposed to by Mr. Lambert was substantially in excess of 3 per cent.”

That passage was the subject of considerable debate on the appeal. In my opinion his Honour is doing nothing more than summarising the passages that I have previously quoted. In my view, his summary is not simply the remainder of the first sentence in that last passage that I have quoted. His summary in effect, is the whole passage of four sentences. This summary, in effect, involves his Honour adopting what is now the defendant's argument. In other words, his Honour has adopted by way of summary the view that if there is evidence of excessive rear-end loss this, in itself, proves bad workmanship and consequently it proves a breach of the plaintiffs' obligation to the defendant. That was not the way the action was pleaded.

The plaintiffs contend that they did not contract to produce a particular result in terms of the amount of wheat harvested. They contend on appeal that they had the obligation in accordance with the pleadings and if they are to be found to be in breach of that obligation it must be by virtue of the particulars that were given. This contention, in my opinion, is correct and indeed basic to the action.

The particular about travelling too fast was effectively abandoned in the course of the trial so that the particular of harvesting too low was the one that remained in issue. As his Honour has found that the defendant directed the plaintiffs to harvest at a particular level, any grain loss resulting from that did not, in itself, demonstrate a breach of the plaintiffs' obligation to the defendant. The plaintiffs were simply in the position of doing the best job possible within the confines of the instructions given by the defendant. It was not pleaded that the plaintiff was employed to advise on how to minimise rear-end loss.

As I said earlier, in my opinion, this court can only decide the matter according to the record. I have quoted the pleadings and the particulars that were given under those pleadings and referred to his Honour's question at

the end of the trial which seems, in my view, to keep alive the particulars that were referred to. In those circumstances, the dispute between the parties had to be resolved upon the basis that the defendant undertook to prove a breach of the plaintiffs' obligation in two particulars. One of those particulars was not pursued. His Honour declined to find that the other particular had been proved. He also found that the height at which the wheat was cut was determined by the defendant's instructions. In those circumstances, the defendant's counterclaim should have failed.

In my opinion, the cross-appeal should be allowed. The judgment should be set aside and the judgment for the plaintiffs in the action varied so that there is judgment for the plaintiffs in the sum of $5,613.80 with costs to be taxed and interest on the said sum of $5,613.80 at the rate of 12 per cent per annum from the 1st day of November, 1985. The counterclaim should be dismissed with costs, and the defendant should pay the plaintiffs' costs of the cross-appeal. The appeal should be dismissed.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 537 of 1986

FULL COURT

BETWEEN:

R.G. & D. PULLEN trading as PULLEN PASTORAL COMPANY (Plaintiff) Respondent

AND:

G.M. BARTOLO (Defendant) Appellant

JUDGMENT - CARTER J.

Delivered the Ninth day of September, 1987.

This appeal and cross-appeal arise out of an action tried in the District Court at Mackay in which the plaintiff, a harvesting contractor sued the defendant, a

wheat farmer for moneys allegedly owing by the latter on account of harvesting work done by the plaintiff in harvesting the defendant's wheat crop. The defendant counter-claimed for damages for breach of contract and claimed to set off against any moneys found to be due and owing by the defendant to the plaintiff the quantum of such damages. The quantum of the plaintiff's claim, viz. $5,613.80, does not appear to have been an issue at the trial and the learned trial Judge found that sum to be owing by the defendant to the plaintiff. His Honour also found that the plaintiff was in breach of the implied term of the contract, viz. that the harvesting he carried out in a competent and workmanlike manner, and he assessed the defendant's damages at the sum of $7,227.55. He gave judgment for the defendant for the sum of $1,613.75.

The defendant appeals on the ground that the quantum of the defendant's damages was incorrectly assessed and this is conceded by the plaintiff. The Court was informed at the outset of the appeal that the agreed proper assessment was $13,443.00 and that the defendant was, subject to the plaintiff's cross-appeal, entitled to judgment for $7,829.20. The plaintiff's cross-appeal puts in issue the correctness of the judgment that the plaintiff was in breach of the implied term of the harvesting contract and that having regard to the findings made by the learned trial Judge the defendant was not entitled to success on the counterclaim.

Because of the way in which the matters were argued on appeal, it is necessary to look at the pleadings and to the evidence in order to see how the issues were litigated at the trial. It is only necessary to look at the counterclaim and at the answer to it. Paragraph 4(b) alleged the usual implied term of the contract “that the Defendant (sic) would carry out the harvesting work in a competent and workmanlike manner”. Paragraph 5 continues:

> “5. In breach of the condition referred to in paragraph 4(b) hereof, the Plaintiff did not carry out the said harvesting work in a competent and workmanlike manner in

that a great deal of grain was not harvested and the Defendant has thereby suffered loss, particulars of which are as follows:—

(a) Area harvested by Plaintiff was 202 hectares;

(b) Loss per hectare was 1.77 tonnes giving a total loss of 357.54 tonnes;

(c) Acceptable loss per hectare was .06 tonnes, a total of 12.12 tonnes;

(d) The total unacceptable loss was therefore 345.42 tonnes.”

The primary allegation of the defendant was that the harvesting work was not carried out in the required manner “in that a great deal of grain was not harvested” namely 345.42 tonnes. I pause to mention that in the harvesting of wheat a loss of 3 percent of the crop is regarded as an acceptable loss. The case for the defendant was that in this case the loss of grain was at an unacceptable level and as a consequence of that fact the harvesting had not been carried out as required by the contract and the consequential loss was then particularised. The answer of the plaintiff admitted that the contract was subject to the usual implied term but denied the matters alleged in paragraph 5 of the defence. It was therefore a clear issue to be litigated as to whether that had been an excessive loss of grain. The answer further alleged that in the course of the harvesting operation the plaintiff's harvester and employee operated “in conjunction with a machine operated by the Defendant on his servant or agent.” and that “if any areas were not adequately harvested” that occurred “solely in the areas harvested by the defendant's machine” and accordingly the plaintiff was not liable. Pleadings closed in June 1986 with the delivery of the plaintiff's reply and answer. From the pleadings the issues were clearly enough defined -

(a) Had there been an unacceptable level of grain loss? and

(b) If there had been, that loss had occurred only in the areas harvested by the defendant's machine and employee.

The evidence discloses a clear contest at trial in relation to this issue - particularly the issue as to whether there had been an unacceptable loss of grain as a result of the harvesting work carried out by the plaintiff's machine and operator and the submission of counsel for the defendant who had been counsel at the trial confirmed this.

The defendant's evidence identified the areas in which the plaintiff's machine and operator worked and the areas worked by the defendant's own machine. Harvesting was completed on 2nd October, 1985 and a few days later there was a heavy downpour of rain. Shortly thereafter a massive growth of sprouting wheat appeared in the windrows along which the plaintiff's harvester had deposited stalks and other trash discarded by the harvester at its rear end during the harvesting process. This phenomenon was inspected by, among others, a representative of the Department of Primary Industries. The evidence was that the growth of young wheat evidenced a rear end loss of grain during harvesting substantially in excess of the acceptable level. The evidence also established that in the course of harvesting, it is proper practice for the operator after proceeding some distance to leave his machine and to examine the ground at the rear in order to ascertain the amount of grain lost through the rear end of the harvester. The number of grains lost within a representative area is then counted and the efficiency or otherwise of the harvesting operation is then assessed. The evidence for the defendant was that the massive growth along the windrows in the areas examined had resulted from the rear end loss of grain very substantially in excess of the acceptable level.

For the plaintiff reliance was placed upon the evidence of the plaintiff Ronald George Pullen and of the plaintiff's employer Michael Joseph Gaskin who operated the harvester for the plaintiff on the occasion in question. The following extracts from the evidence of each plainly discloses proof of the matters pleaded in answer to the defendant's claim. Pullen gave this evidence-in-chief:

“During the course of the harvesting operation, did you have occasion to check the ground?— I did.

What did you notice about it in terms of seed loss?-- It was quite satisfactory.

What do you mean by ‘satisfactory’? What seed loss did you notice?-- Well, the amount of seeds were virtually nominal (sic).”

In the cross-examination of Pullen the following appears:

“You said that to inspect the seed loss was virtually a hands and knees job and so you got down side by side with him?-- Yes.

And you saw three seeds in a three-foot area?-- Correct. Three seeds only?-- Correct.

On that basis the crop obviously was not dropping any seeds prior to being harvested?-- I can't answer that. I only inspected behind the header trail. Maybe those seeds could have been there prior to harvest.

That is what I am asking you?-- And the header therefore could have been losing none.

That is exactly what I am asking you. What you saw was a crop that had probably left three seeds at the most in the area that you inspected?-- Yes.

If it was a crop which had suffered a lot of pre-harvest losses, you would expect to find a lot more seed on the ground, wouldn't you?-- No.

Why is that?-- Because pre-harvest loss can be sectionalised by stress in certain areas within the paddock.

Did you, in walking around the paddock or in all the paddocks which your driver harvested - did you at any time see any seed loss?-- No.

You have heard evidence of your expert that seed loss at the density that was seen by the Department of Primary

Industry's man would clearly be evident to the naked eye?-- Yes.

And yet you saw none in your walks around the area?-- None of that proportion whatsoever.

You were not there all the time or on every day, were you?-- No.

What sort of inspections did you carry out for seed loss?-- Relatively extensive. Every time I was there I was inspecting.

Is it something that you were concerned about - seed loss?-- As a competent operator or contractor or any person involved in the harvesting of grain, regardless of what your capacity or your position is, everybody in a wheat field has to keep an eye out for this.

Did you get down on your hands and knees to go around these areas looking for any wheat loss? I would say yes.

You would say yes?-- Yes.

Did you actually?-- Yes.

So on several occasions when you went inspecting for wheat loss you got down on your hands and knees?-- Yes, because they are only minute particles. You can't see them that easily.

Once again, you disagree with the evidence given by Dr. Tullberg that if there was the wheat loss of the magnitude seen by the D.P.I. man ——-?-- Yes.

It would be readily seen?-- If there is wheat loss of that magnitude you would have no trouble in seeing it.

Do you suggest that Mr. Lambert, the D.P.I. man, did not see the wheat loss he is talking about?-- Well, he - can you repeat the question, please?

Are you suggesting that Mr. Lambert did not see the wheat loss he is talking about?-- I doubt he would have seen the loss to that extent by any stretch of the imagination.

So you are suggesting he is completely wrong when he says there was extensive wheat loss?-- Definitely.”

The witness Gaskin gave this evidence-in-chief:

“What happened after you went into the crop?-- I started harvesting, went approximately 100 yards or so and stopped and got out to check the sample of grain loss.

Do you remember what you found on that occasion?-- I found that the sample was clean and I couldn't find any grain loss.

What you are talking about when you say the ‘sample’, is that the sample of wheat in the bin?-- That is the end product, the sample of wheat you get from the top of the bin.

What did you do to check for wheats loss?-- There is a small rectangular table at the rear of the machine at the back of the sieves where the material passes across before it goes on to the ground. You check there for any seed and also you get down on the ground and have a scratch around to find any seed on the ground.

Did you make any further adjustments before you continued?-- No adjustments were made at that stage.

Did you then go about harvesting?-- Yes.”

In cross-examination the following occurred:

“At no time did you find any substantial grain loss?-- No.

Correct me if I am wrong, but I have your evidence recorded as you never found any seed loss; is that so?-- As I have said previously, when initially setting up the machine I found cracked grain and immature kernels which the wheat harvester will automatically dispense off.

But apart from that, did you ever find any seed loss?-- No.

How would you check for seed loss?-- You check the table at the back of the machine and scratch around on the ground.

When scratching around on the ground, is that a hands and knees job?-- Obviously.

So you spent time on your hands and knees behind the header on many occasions?-- I do it with every crop.

Well, on many occasions with this crop?-- Yes.

On a daily basis?-- Daily basis.

More often than daily?-- As I stated, I used to do it first thing in the morning and usually after lunch; not every time after lunch, obviously, because sometimes lunch was just not had.

So certainly each time after starting and after travelling 100 or 200 yards?-- That's correct.

In the morning?-- Correct.

And maybe after lunch on some days?-- Yes.

What about at the end of the day, you didn't have a look around then?-- No.

And the check that you were doing at that stage was of any seed loss in the tray of the machine itself as well as the hands and knees job on the ground?-- The seed loss, seed sample, clean on the tray and also looking at the ground.

Did it surprise you when you went back on 4 December to see the strip germination?-- Not so much surprised me; I, not having a lot of experience with wheat, it surprised me in that manner, but knowing that immature wheat and cracked wheat can shoot, I put it down to that."

The learned trial Judge resolved this fundamental issue of fact in favour of the defendant. In the following passage from the judgment His Honour, whilst rejecting as unreliable the evidence of Lambert, an agronomist employed by the Department of Primary Industries, as to the test method used by him to quantify the amount of rear end loss, nevertheless accepted that the loss was grossly excessive

and “greatly above the 3 percent maximum which is regarded as acceptable”. His Honour said:

> “I accept, without in any way being critical of Mr. Lambert whom I believe to be a conscientious and truthful witness, that the method adopted by him gives invalid results. What does appear from Mr. Lambert's evidence and which I find supported by remarks which the Defendant and Mr. Lambert say the male Plaintiff made at a later inspection, is that the number of sprouts from grain seeds appearing in the windrows was grossly excessive and greatly above the 3 per cent maximum which is regarded as acceptable. In this respect I refer to the evidence of Mr. Pullen and Mr. Gaskin, both of whom say that when they did the test run and removed the straw and chaff, there were virtually no seeds to be seen on the ground. It seems to me that a large number of seeds would necessarily have been seen because of accepted losses and the density to which I have referred to above. I have some doubt whether they ever inspected as they claimed to have done. In the nature of things there must have been a fairly substantial number of seeds in the windrow even if the header was being operated with great efficiency.”

It is in my view clear that the learned trial Judge clearly perceived the relevant issue when he wrote at the beginning of his judgment:

> “What is in dispute is whether the harvesting was done properly without causing excessive losses. There are no disputes on the legal position.”

Immediately before he proceeded to assess the defendant's loss he said in his judgment:

> “To summarise on my findings, there was a greatly excessive rear-end loss during the harvesting. The cause of this loss has not necessarily been explained by the evidence although low cutting of stalks might well have been a factor.
>
> The Plaintiffs are responsible for the loss whatever its cause insofar as it exceeded 3 per cent of the crop. The loss as deposed to by Mr. Lambert was substantially in excess of 3 per cent.

> Having rejected Mr. Lambert's method of calculation is not the end of the matter. I must assess damages as best I can on the material before me.”

For myself, I cannot avoid the conclusion that having regard to the issue raised by the pleadings, the learned trial Judge correctly addressed that issue, resolved the issue of credibility necessarily raised by it and found that there was a rear end loss of grain which was much in excess of the acceptable loss. He found, on that account, a breach of the implied term and he then assessed damages.

The principal submission of counsel for the plaintiff at the appeal, who was not the counsel at the trial, was that the learned trial Judge had left open the question of the cause of this excessive loss. He took up that part of His Honour's judgment wherein the learned trial Judge summarised his findings, which I have set out above. In particular he emphasised the phrase - “although low cutting of stalks might well have been a factor”. Counsel submitted that passage in the judgment could mean one of three things - that the learned trial Judge could not determine the exact cause of the excessive loss or that the likely cause was that the wheat was cut too low or that the learned trial Judge had not resolved the cause of the loss at all. It was submitted that if one or other of the first two alternatives was correct, the defendant necessarily failed. In respect of the second it was submitted that the low cutting had been done at the request of the defendant. If the third alternative interpretation was correct it was submitted that the issue remained to be determined by the learned trial Judge and this Court should order accordingly.

This submission of counsel for the plaintiff rests on the fundamental premise that it was essential that the learned trial Judge identify the exact cause of the excessive rear end losses. In my view this submission is in error. The competent and workmanlike performance of the harvesting work would not have produced an unacceptable level of loss of grain. Since as the learned trial Judge

found there was a loss greatly in excess of 3 percent of the crop, the implied term of the contract had been breached. It was not incumbent on him to go further and to seek to identify the exact cause of that excessive loss. He identified possible causes in his judgment when he said:

> "Excessive rear-end loss may be due to a number of causes. The header mechanism itself may be defective. It may be incorrectly adjusted. It may be affected by the speed at which the header is driven and possibly it may be affected by the height at which the stalks are cut. I say possibly, in this regard, because Dr. Tullberg, an expert in the field of grain harvesting, has given evidence that the Massey-Ferguson 850 machine had adequate capacity to handle the quantity of wheat found in the relevant paddocks, together with any straw caused by low cutting of stalks.
>
> On the other hand, a Mr. Lambert, an official in the Department of Primary Industries who has also had substantial experience in harvesting wheat, is of the opinion that harvesting stalks low would cause an excessive rear-end loss. I find it unnecessary to resolve this disagreement.
>
> If the rear-end loss was excessive due to the stalks being cut too low, it would nevertheless fall within the responsibility of the Plaintiffs, who held themselves out as competent to harvest and who should either have adjusted the front plate to a higher level or at least sought instructions from the Defendant who has no expertise."

Clearly the real issue had been determined by His Honour's finding that the rear end loss was excessive. Whilst the evidence traversed the possible causes of rear end loss of grain during the harvesting process - matters about which experts apparently disagree - the fact remains that there was a rear end loss greatly in excess of that regarded in the industry as acceptable for harvesting. Whatever the reason for that loss might have been in this case, the learned trial Judge was satisfied that there had been a breach of the implied term by reason of the excessive loss and he gave judgment accordingly.

Counsel for the plaintiff at the appeal sought to support his argument by reference to a letter dated 24th October, 1986 from the solicitors for the defendant to the solicitors for the plaintiff. It reads:

> “We have received advices from Counsel that the Answers of Further and Better Particulars sought by you are as follows:—
>
> ‘The way in which the Plaintiff failed to carry out harvesting in a competent and workmanlike manner was that it cut the wheat too low and too fast causing an unacceptable level of wheat loss'.”

I mentioned above that pleadings had closed in June 1986. This letter was written only three days before the trial commenced, and was handed to the learned trial Judge by counsel for the plaintiff at the beginning of the trial. It is clear however from the pleadings and from the manner in which the issues at the trial were litigated that the letter was not intended to displace the issue which was joined by the counterclaim and the answer to it. Much of the evidence focussed on such matters as the speed at which the harvester ought to be operated, the height at which the stalks of wheat should be cut, the capacity of this particular harvester to function efficiently irrespective of the height at which the stalk was cut and such like matters. However in my view it is clear that the letter of particulars was designed to give notice to the plaintiff of the matters which would be advanced as causes of “the unacceptable level of wheat loss”. Proof of the latter fact remained the fundamental issue for the defendant. The attempt at exposing the cause or causes of that loss became the subject matter of the letter of particulars but as the learned trial Judge pointed out, correctly in my view, it was unnecessary for him to find the specific cause of the loss once he had found that the level of rear end loss was at an excessive and unacceptable level and that on that account the harvesting operation had not been executed in a competent and workmanlike manner. It was on that account that the learned trial Judge observed:

> “The cause of this loss has not necessarily been explained by the evidence although low cutting of stalks might have been a factor.”

The latter part of the sentence which refers to the “low cutting of stalks” is merely an aside and cannot be taken to be other than the identification of a possible reason for the unacceptable loss which was found to have occurred. In my view that passage clearly shows that the learned trial Judge had properly addressed the primary issue. The question as to why the loss was so unacceptably high could not be resolved, having regard to the evidence. It was in my view not incumbent upon him to make a specific finding as to the exact cause of the loss.

In my view the defendant's appeal should be allowed and the plaintiff's appeal should be dismissed. I would set aside the judgment appealed from and order that there be judgment for the defendant for $7,829.20 with costs to be taxed. I would order the plaintiff to pay the defendant's costs of the appeal and cross-appeal.