1946 *Present :* **Howard C.J. and de Silva J.**

DAVID & CO., Appellant, *and* SENEVIRATNE *et al.*, Respondents.

217—D. C. Negombo, 13,031.

Damages—Breach of contract—Special loss, to be recoverable, should be matter of express terms.

Upon a breach of contract any loss resulting from special circumstances can be recovered only if the special circumstances were communicated at the time of the contract to the party from whom it is afterwards sought to recover damages.

Semble, that the rule as to the remoteness of damage is the same whether the damages are claimed in actions of contract or tort.

APPEAL from a judgment of the District Judge of Negombo. Certain parts of an oil engine were entrusted by the defendants to the plaintiff to effect repairs. The plaintiff was not at the time informed whether these parts were part of an engine in use. Nor was any date given for the completion of the work although later he was informed that the engine was required for working on a particular day. Further, the plaintiff was not informed of any special loss that would be incurred by the defendants if the engine was not repaired by a particular date. When the plaintiff sued the defendants for the cost of repairs the trial Judge dismissed his claim and, as regards the claim in reconvention made by the defendants, awarded the defendants a sum of Rs. 1,500 as damages on the ground that, owing to the plaintiff's bad work and delay, the defendants could not work their mills. One of the grounds of appeal was that the learned District Judge was wrong in awarding the sum of Rs. 1,500 as damages as they were too remote.

L. A. Rajapakse, K.C. (with him *J. M. Jayamanne* and *T. B. Dissanayake*), for the plaintiff, appellant.—The claim of the defendants in reconvention is for a breach of the contract to repair the parts of the oil engine. Damages for such breach should be the ordinary and natural result of the breach, viz., the additional expenditure incurred by him in getting the engine repaired by a competent third party. Only intrinsic damages or the direct pecuniary loss which the breach entails will be allowed—Maasdorp's *Institutes of S. African Law, Vol. 3, p. 171 (4th ed.)*; Pothier's *Obligations p. 91 (Vol. 1, Ch. 2, Art. 3)*.

The claim of Rs. 1,500 for loss of profits for the non-user of the engine is remote damages. Such damages, as they were the result of *special* circumstances which were not communicated to the plaintiff at the time of the contract, cannot be awarded—*Hadley v. Baxendale* [1]; *10 Hailsham pp. 97–98, 103–104*; Nathan's *Law of Damages in S. Africa (1930 ed.), pp. 23–24*.

Moreover, the defendants have not proved that they had any contracts or work to do and that they incurred loss by not performing them. See *Sunley & Co. v. Cunard White Star, Ltd.*[2]

[1] *(1854) 9 Exch. 341.*

[2] *L. R. (1939) 2 K. B. 791.*

7—H 16792 (8/68)

N. Nadarajah, K.C. (with him *S. E. J. Fernando*), for the defendants, respondents.—The defendants' claim in reconvention is based rather on tort than on contract. *Hadley v. Baxendale* (*supra*) applies to breach of contract only. Sometimes the dividing line between contract and tort is very fine. In the case of a tort all damages directly flowing from the act complained of may be claimed. In the case of *H. M. S. London* [1] compensation was given for the loss of the use of the vessel during the whole period of delay caused by a strike of workmen, inasmuch as the loss was "directly and immediately due to the defendants' negligence".

Assuming the cause of action to be based on a breach of contract, *Hadley v. Baxendale* can be distinguished on the ground that the special circumstances in the present case were communicated by the defendants to the plaintiff.

L. A. Rajapakse, K.C., replied.

Cur. adv. vult.

February 21, 1946. HOWARD C.J.—

In this case the plaintiff claimed a sum of Rs. 750, the cost of certain repairs to an oil engine belonging to the defendants. The defendants in reconvention claimed sums of Rs. 129 and Rs. 1,500. The District Court dismissed the plaintiff's action and entered judgment for the defendants in a sum of Rs. 1,530·69 with costs. So far as this appeal is concerned the only question that arises is whether the learned District Judge was right in awarding a sum of Rs. 1,500 as damages, because owing to plaintiff's bad work and delay they could not work their mills. It would appear that certain parts of the oil engine at the defendants' mills had become wasted and so they consulted Mr. Dronan, an Engineer and Manager of the Hunupitiya Mills. Mr. Dronan was unable to do the work and recommended the plaintiff. In a letter dated February 24, 1943 (P 1), the plaintiff agreed to do the repairs specified therein. By letter of February 26, 1943 (P 2), Rs. 375 was paid by the defendants in advance for these repairs. On March 31, 1943, the plaintiff informed the defendants (D 2) that owing to a break-down in their workshop he could not yet finish the repairs to the engine. In reply to this by D 3 dated April 14, 1943, the defendants asked the plaintiff to hurry up with the repairs as the engine was required for the working of the factory on May 1, 1943. All the parts handed over to the plaintiff to be repaired had been returned and the plaintiff's workmen remained on the defendants' premises from May 24 to June 2, 1943, trying to get the machine to work. The workmen failed as also did the plaintiff who tried on May 28, 1943. On June 10, 1943, the defendants by D 9 informed the plaintiff that the repairs had not been completed and they had entrusted the work to Mr. Dronan. They also stated that cost of these repairs would be debited to the plaintiff and they were put to further loss by the non-completion of the work.

In paragraph (12) of their answer the defendants state that in consequence of delay in getting the engine into working order and in obtaining the completed parts of the engine and in the loss of use of the said engine through the breach of contract of the plaintiff a loss of

[1] *L. R. 1914 P. D. 72.*

Rs. 2,500 has accrued to the defendants, but they restrict their claim to Rs. 1,500. The learned Judge held that the defendants are entitled to this sum as damages in view of the fact that the second defendant has stated in evidence that the engine can make 4 tons of oil a day and that the profit would be Rs. 100 a day. It has been contended by Counsel for the plaintiff—the appellant—that the learned Judge was wrong in awarding this sum as damages as they are too remote. The principle on which damages are awarded for breach of contract is stated in Halsbury's Laws of England Vol. 10, p. 97 as follows :—

> "Upon a breach of contract such damages are to be awarded as may reasonably be supposed to have been in the contemplation of both parties when they made the contract as the probable result of the breach of it. Therefore where there are special circumstances and these circumstances are communicated at the time of the contract to the party from whom it is afterwards sought to recover damages and accepted by him as the basis on which the contract is made, the damages reasonably contemplated are such as would ordinarily follow from a breach of contract in these special circumstances. If the special circumstances were unknown to the party breaking the contract, he can only be taken to contemplate the amount of injury which would arise generally from the breach in cases not affected by special circumstances. It is not enough that the party whom it is subsequently sought to make liable should be informed that a breach will result in particular loss. He must be informed of the special circumstances in which the loss will be incurred, and must enter into the contract subject to them. The information must be given at the time of entering into the contract. Information given at a later date, whether of circumstances which were contemplated by the party giving such information at the date of the contract or of circumstances which arose at a later date will not suffice".

The leading case on the subject is *Hadley v. Baxendale* [1]. In that case the plaintiffs, the owners of a flour mill, sent a broken iron shaft to the office of the defendants, who were common carriers, to be conveyed by them and the defendants' clerk was told that the mill was stopped, that the shaft must be delivered immediately and that a special entry, if necessary, must be made to hasten its delivery. And the delivery of the broken shaft to the consignee, to whom it had been sent by the plaintiffs as a pattern, by which to make a new shaft, was dolayed for an unreasonable time in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have received it and they were consequently unable to work their mill for want of the new shaft and thereby incurred a loss of profit. It was held that these circumstances not having been communicated by the plaintiff to the defendants such loss could not be recovered in an action against the defendants as common carriers.

Applying the principle formulated in *Hadley v. Baxendale* which is also the Roman-Dutch law (*vide* Nathan's *Law of Damage in South Africa, pp. 21 and 22*) to the facts of the present case, it would

[1] *(1854) 9 Exch. 341.*

appear from the letters exchanged between the parties that certain parts of the oil engine were entrusted to the plaintiff to effect repairs. The plaintiff was not at the time informed whether these parts were part of an engine in use. Nor was any date given for the completion of the work although later, on April 14, he was informed that the engine was required for working on May 1. Nor was the plaintiff informed of any special contracts that would be lost if the engine was not repaired by a particular date. The circumstances do not show that the profits of the mill must be stopped by an unreasonable delay in the completion of the repairs. Another engine might have been working at the time. The special circumstances were not communicated to the plaintiff by the defendants.

It has been argued by Counsel for the respondents that the plaintiff has not only been guilty of breach of contract, but has also been negligent and committed a tortious act. In such circumstances it is maintained that the measure of damages that may be awarded is calculated on a different principle to that laid down in *Hadley v. Baxendale.*

With regard to this contention it is manifest from a perusal of the defendants' answer and particularly paragraph (12) that the defendants founded their claim for Rs. 1,500 on breach of contract. There was no suggestion in the answer that the plaintiff had committed a tortious act. Our attention was invited by Counsel for the respondents to *H. M. S. London (1914) P. D. 72.* But I observe that in his judgment in that case Sir Samuel Evans stated that it was settled law that the rule as to the remoteness of damage is the same whether the damages are claimed in actions of contract or tort and referred to the case of *The Notting Hill* (1884) 9 P. D. 105 at p. 113. In *H. M. S. London* damages were awarded for loss of the use of the vessel whilst she was in dry dock for repairs resulting from a collision caused by the negligence of the defendants. Sir Samuel Evans in his judgment cited with approval extracts from the judgments of the Court of Appeal and House of Lords in the case of *The Argentino* reported in *13 P. D. p. 201* and *14 A. C. 519.* From those extracts it would appear that both Courts took the view that in the case of an innocent ship disabled by an accident the consequence of the offending vessel's tort is that the owner of the innocent vessel loses for a time the use which he would have otherwise had of his vessel. Such loss of use is the direct and natural consequence of the collision and therefore recoverable as damages. In my opinion, therefore, there is nothing inconsistent in the cases of *H. M. S. London* and *The Argentino* which deal with damages awarded to the owners of innocent vessels damaged in collisions and the principle laid down in *Hadley v. Baxendale (supra).*

For the reasons I have given the damages of Rs. 1,500 awarded for loss of profits cannot be allowed to stand. This part of the judgment of the District Court is set aside and judgment must be entered for the respondents for Rs. 30·69 in place of Rs. 1,530·69. As the appellant has only partially succeeded in his appeal he will be allowed half the costs of the appeal to this Court.

DE SILVA J.—I agree.

Appeal partly allowed.