IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000077
[2021] NZHC 3585

BETWEEN	PHILIP WILLIAM ROUTHAN AND JULIE VERONICA ROUTHAN AS TRUSTEES OF THE KANIERE FAMILY TRUST Plaintiffs
AND	PGG WRIGHTSON REAL ESTATE LIMITED Defendant

Hearing:	3 - 13 August and 1 September 2021
Appearances:	D R Kalderimis and O T H Neas for Plaintiffs M E Parker and J Eckford for Defendant
Judgment:	21 December 2021

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 21 December 2021 at 3 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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Introduction

[1] In 2010 Philip and Julie Routhan were looking to buy a dairy farm in the Kokatahi/Kowhitirangi Valley on the West Coast. In due course, and after an offer to purchase another property was rejected, they decided to buy a farm owned by Cooks Stud Farms Ltd through their family trust, The Kaniere Family Trust (the Trust). While the farm's infrastructure was run down, it was close to the 73 hectare run-off block the Trust already owned, and was said to produce an impressive 103,000 kg of milk solids (kgMS) per season from 260 cows off the 105 hectares. Indeed, both Mr Routhan, and Mr Cook, the vendor, referred to the farm as having "rockstar" qualities.

[2] However, the Routhans say those production figures were not correct. The average was in fact around 98,000 kgMS per season, and was sharply declining. When the purchase settled in December 2010, the farm was on track to produce just 85,000 kgMS for the 2010/2011 season.

[3] In their first few years of farming the Routhans struggled to see why they were not producing milk solids at the level which was represented to them by the real estate agency, PGG Wrightson Real Estate Ltd (PGG). They spent money re-seeding the property to get better pasture, they brought in supplementary feed, and, in due course, they cancelled the lease of cows from the vendor thinking the quality of that herd was the reason 103,000 kgMS remained unattainable. However, they could not sustain their farming operation as costs continued to exceed income by a significant margin. Eventually, they were forced to sell both the farm and the run-off at a loss. They were left with nothing.

[4] The Routhans now, in their capacity as trustees of the Trust, sue PGG for misrepresenting the farm to them, including in a proposal document PGG prepared for the Trust to inform its purchase.[1] They say, had they been told the truth about the farm's production trend, they would never have bought it. Instead, they would have bought and farmed an alternative, and cheaper, farm in the area. Their loss, quantified

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[1] I will generally refer to the plaintiffs as the Routhans for convenience, albeit they are suing PGG in their capacity as trustees.

in evidence at $3,184,000, is the sum of losses incurred by the Routhans which they say they would not have suffered had they known the true position and instead bought an alternative farm.

The pleadings

[5] The Routhans' claim against PGG pleads five causes of action. The first claim is made under the Fair Trading Act 1986 (FTA). It alleges the representations as to the average production of 103,000 kgMS over the previous three years, and the failure to disclose that the vendor had refused to confirm and certify information about the farm including its production figures, constituted misleading conduct by PGG in breach of s 9 of the FTA.

[6] The second through to the fourth causes of action are all claims alleging negligence. The first of these is a claim that PGG is vicariously liable for the negligence of its agents. The second is a claim against PGG directly for failing to take reasonable care to obtain the vendor's confirmation and certification of the information on production levels before providing it to the Trust. The third is a claim alleging PGG is vicariously liable for the negligent misrepresentations made by its agents to the Routhans regarding the farm's production levels.

[7] The fifth cause of action is brought in deceit. It alleges that by failing to disclose the vendor's refusal to confirm the information PGG provided in the proposal document, PGG, through its agent, demonstrated reckless disregard for the truth or otherwise of that information, and this constituted deceitful conduct, causing loss.

[8] PGG denies all the Routhans' claims. It says the cause of action under the FTA is statute-barred and the claim in deceit is untenable. In response to the claims in negligence, PGG says the Routhans brought their misfortune on themselves. PGG questions whether the representation in the PGG Proposal document was relied on and points to a disclaimer on that document. PGG also alleges the Routhans conducted inadequate due diligence, were inexperienced farmers, and failed to mitigate their losses once it became apparent the farm could not produce at the level represented. Further, PGG challenges the Routhans' calculation of loss saying, at best, they can

only claim the difference between the value of the farm as represented and its value based on the correct production levels. This is quantified by PGG at $50,000.

Factual background

[9] The Routhans both came from Hokitika on the West Coast. Mrs Routhan grew up on a dairy farm and had experience working on her family's dairy farms. Mr Routhan was a fifth generation West Coaster who had become a successful businessman. He was a director of Plumbing World (NZ) Ltd and NZ Plumbers Merchants Ltd. In 1995 he was awarded New Zealand "Young Executive of the Year" and in 1996, won the award for Management Excellence at the World Young Business Achiever Awards held in Ireland. He was later appointed Chairman of the Plumbers, Gasfitters and Drainlayers Board.

[10] The Routhans planned to buy a dairy farm in the Kokatahi/Kowhitirangi Valley through the Trust. They were both trustees of the Trust, along with their co-trustee, Mr Reginald Garters, who was himself an experienced company director. The Routhans' assets were all placed in the Trust, and at the time they purchased the farm, the net asset position of the Trust was around $1,500,000. This comprised the net proceeds of sale of their home in Karori, Wellington, and of land they owned in Hokitika. It also comprised their equity in the 73 hectare run-off farm block on Whites Road, Hokitika, that they acquired from Mrs Routhan's family and developed from swamp land to a farmable block.

[11] In late 2009, they approached Mr Daly, a Senior Rural Salesperson with PGG, about their plans to purchase a dairy farm. They first put in an offer to buy a dairy farm (the Moynihan property) situated opposite their run-off block which produced 102,000 kgMS from 283 cows on 105 ha. The offer was $4,000,000 to purchase it as a going concern, including the herd. However, another rural real estate agent, Ms Shari McLaughlin of CRT Real Estate (CRT), convinced the owner she could get more for the farm and the Trust's offer was declined.

[12] In early 2010 Ms McLaughlin provided the Routhans with CRT advertising brochures for other dairy farms for sale in the Hokitika area. These brochures included one for Farm 258 on the Kaniere-Kowhitirangi Road, Hokitika, which was owned by

Cooks Stud Farms Ltd, a company operated by Mr Nelson Cook. That brochure said that Farm 258 had been "[a]veraging 103,000 kgms for the last 3 seasons from approx 260 cows on a grass based system with half the herd wintered off each year". The brochure was prepared before the end of the 2009/2010 dairy season so the statement related to the 2006/07, 2007/08 and 2008/09 seasons.

[13] At around the same time, the Routhans became aware that the neighbouring farm to Farm 258, Casa Finca, was also for sale. It was milking approximately 360 cows on 112 hectares. Mr Routhan initiated negotiations through Mr Daly in mid-2010 with a view to purchasing Casa Finca.

[14] Having identified Farm 258 as a potential purchase, Mr Routhan gave the CRT brochure to Mr Daly and asked him to approach Mr Cook, on a confidential basis, about the possible sale of his farm. If Farm 258 was for sale, Mr Routhan asked Mr Daly obtain details about production and price. Another season had ended since the CRT brochure had been prepared and Mr Routhan wanted to confirm the milk solid production levels being achieved because, as Mr Glennie, an agribusiness consultant, explained, the record of annual production is a key metric in assessing the merit of a dairy farm.

[15] The parties had agreed a chronology recording that Mr Daly first met with Mr Cook on 7 September 2010, received confirmation there had been no change to the average production for the 2009/2010 season, and the contract was then prepared after this information had been provided to Mr Routhan in both oral and written form. However, the actual chain of events was muddied in oral evidence.

[16] One cause of this problem was that Mr Daly's diary recorded, on 3 September 2010, "prepare contracts Casa Finca, Cook" and, on 7 September, "Phil Routhan – sign contracts". Counsel for PGG sought to use these diary entries to suggest the information subsequently supplied by PGG, particularly in the proposal document relating to Farm 258, was not relied on by the Trust to purchase the farm because they had already committed to its purchase. The likelihood some steps had been taken by Mr Daly in respect of the Trust's purchase of Farm 258 before 7 September 2010 was reinforced by the fact that title searches for the farm were

obtained by Mr Daly on 3 September 2010. There were also discrepancies in evidence over when and how Mr Daly contacted Mr Cook and what Mr Cook said about production levels on Farm 258. For these reasons, it is necessary for me to consider the evidence on these events in some detail to determine what, on the balance of probabilities, actually occurred.

[17] Mr Routhan's recollection was that he gave Mr Daly the CRT brochure and asked him to approach Mr Cook about the farm and get production details and price, but not to disclose the identity of the potential purchaser. While he says it took some time for Mr Daly to arrange to meet with Mr Cook, when he did so in late August or early September 2010, he stopped in at the Routhans on his way back to the office. Mr Daly then told Mr Routhan he had secured the listing of the farm and there had been no change to the purchase price of $2,800,000 or to the average production of milk solids for the 2009/10 season. Buoyed by that news, Mr Routhan contacted Rabobank saying that it looked like they were set to proceed with purchasing the farm. Rabobank said it needed everything in writing from the agent and so Mr Daly was contacted and asked to provide that information.

[18] This resulted in an important document being prepared by Mr Daly. It was described on the cover as the "Kowhitirangi Proposal" and stated that it was prepared for the Kaniere Family Trust (the PGG Proposal). Mr Daly acknowledged that much of the information he put in the PGG Proposal was taken directly from the CRT brochure. However, he updated that information based on his understanding of what Mr Cook had told him. He also amended the number of Westland Milk Product shares to be transferred on sale so that they matched the production levels as he understood them to be.

[19] The key statements in the PGG Proposal included:

(a) the average production for the last three years was 103,000 kgMS from 260 cows;

(b) the number of shares to be provided from Westland Milk Products Dairy Company was 103,000 shares (not 95,000 shares as in the CRT brochure);

(c) in the section entitled "supplements" it stated "[a]pprox half herd wintered off and 115 bales baleage made on"; and

(d) the farm "follows recommended programme" for fertiliser and the Ravensdown recommended fertiliser plan for 2009/10 season, which had been included in the CRT brochure, was attached.

[20] The Routhans immediately provided the PGG Proposal to Rabobank and to the Routhans' farm consultant, Mr Ross Bishop. Mr Routhan says they all relied on the PGG Proposal and, in particular, the consistently high kgMS figure to proceed with the purchase of the farm. The Routhans subsequently visited the farm on 13 October 2010, and the sale and purchase agreement was concluded after that.

[21] Mr Cook did not recall his first contact with Mr Daly as being a visit in person but, rather, that Mr Daly contacted him by telephone to ask if the farm was for sale. Mr Cook confirmed it was and that the price was $2,800,000. He recalls a subsequent meeting with Mr Daly, before he knew who the purchasers were, where Mr Daly had the CRT brochure with him. At that meeting various matters were discussed regarding the farm's operation and the sale terms. However, Mr Cook denied that he confirmed the milk production levels. He said he recalled that "production had been pretty consistent for the last couple of years, after a peak when I had an outstanding farm manager". He said if Mr Daly had asked him to confirm the actual production figures, he would have told him to go to the dairy company because it was not his practice to give out production figures and he would rather figures were obtained directly from the dairy company to avoid confusion.

[22] Mr Cook said there was a further face to face meeting with Mr Daly on 10 October 2010, approximately a week before the sale and purchase agreement was signed, and that was when he signed an agency agreement, although he did not have any particular recollection of doing that. He said, in evidence-in-chief, the agency

agreement included a document described in evidence as the "West Coast information sheet", which set out the information about the farm that was included in the PGG Proposal. However, in questioning, he simply could not recall being given this information sheet, and initially was adamant that the first time he saw that document was well after the farm was sold. He accepted, however, that he had altered, by hand, the average milk production figure for the last three years to 97,000 kgMS on that document, but he could not recall when that occurred.

[23] Mr Daly said, in evidence-in-chief, he first contacted Mr Cook on 7 September 2010 and he took the CRT brochure with him. He says he made notes on the inside cover of the brochure as he spoke to Mr Cook. These recorded the following:

> Chris Lord sharemilker worked for Kim Subritzsky
>
> $2.8 mill L+B
>
> 260 cows can be anything, has his elite cows on place would like to keep could sell 100 around $1400 to $1500
>
> $80K machinery
>
> 130 cows wintered on.
>
> 115 baleage made on …

Mr Daly says he also asked about the farm's milk production and was told it was "still the same", that is, 103,000 kgMS.

[24] Mr Daly says he then confirmed to Mr Routhan that the farm was for sale and he "probably" would have communicated that the average production was still 103,000 kgMS as that was what Mr Cook had told him.

[25] He then recalls being asked to prepare a document with information about the farm for the bank. He said at that stage he needed to get back to Mr Cook to confirm the listing details and get an agency agreement signed, but Mr Cook was difficult to get hold of because it was calving season. Nevertheless he created the PGG Proposal, using the CRT brochure as a base, but updating it with the information Mr Cook had given him at the 7 September meeting. He says he dropped the PGG Proposal off to

Mr Routhan on 10 September 2010, which is confirmed by his diary note of the same day. On 9 October 2010, he says his diary records that he met with Mr Routhan to sign the contracts offering to purchase both Farm 258 and Casa Finca.

[26] He confirmed that it was not until 11 October 2010 that he was able to meet with Mr Cook to sign the agency agreement, although he had prepared it much earlier. He also brought a document, the West Coast information sheet, which he acknowledged was in fact a copy of relevant pages from the PGG Proposal which set out key information about Farm 258. The agency agreement was backdated to 1 September 2010. Mr Daly left the West Coast information sheet with Mr Cook because Mr Cook had said words to the effect of "I need to check production. I'll have to get back to you". Thus, although the agency agreement recorded, "Rural Information Sheet Completed" by the placement of a tick in the "yes" box beside this statement, in fact the information sheet for the farm had not been completed, as Mr Cook still retained it to check production figures.

[27] After Mr Daly gave his evidence-in-chief, Mr Parker then took Mr Daly to his 3 September entry which read "prepare contracts Casa Finca, Cook" and to his 7 September entry which read "Phil Routhan – sign contracts". However, Mr Daly could shed no light on these entries, nor could he explain the entry on 8 October which said "Phil Routhan, discuss contracts redo contracts". He simply did not recollect the events that those entries related to.

[28] Taking all that evidence into account, it is clear that Mr Routhan expressed interest in the farm prior to 7 September 2010 and Mr Daly took some steps in anticipation of a purchase proceeding, including obtaining searches of the relevant titles. He may even have prepared a draft contract in anticipation of an offer being made, but, as he confirmed in cross-examination, it was not his role to prepare the actual agreement for sale and purchase. That was done by Mr Curragh.

[29] Whether or not draft contracts were prepared, I am satisfied no steps were taken to present a signed contract to the vendor until after PGG confirmed to Mr Routhan that annual production for the farm was still 103,000 kgMS and provided that advice to the Routhans in the PGG Proposal. Indeed, Mr Daly confirmed that Mr Routhan

had not committed to the purchase of the farm before getting this information. This conclusion is supported by the fact Mr Cook could only recall a contract being presented to him for signing on 18 October 2010, about a week after the agency agreement was entered into. Furthermore, neither Mr Routhan nor Mr Daly had any recollection of a contract for the purchase of the farm being signed prior to the preparation of the PGG Proposal and it is improbable that the Trust would have gone so far as to present an offer to purchase Farm 258 without having applied for funding from the bank. Thus, whatever steps were taken to prepare an agreement for sale and purchase prior to the Routhans receiving the PGG Proposal, the Routhans did not commit to proceeding with the purchase until confirmation of the production figures.

[30] In terms of how and when Mr Daly first contacted Mr Cook, I think Mr Cook's recollection is likely to be more accurate. That is, there was an initial phone call with Mr Cook followed by an in person meeting where the details in the CRT brochure were discussed. I say this because Mr Daly found it difficult to recall the details of the transaction, possibly because it was one of many sales he handled, whereas for Mr Cook, it was a less routine event, and he recalled the events with more certainty.

[31] However, nothing turns on when and how Mr Daly contacted Mr Cook. What is important is what Mr Cook told Mr Daly about production levels. In that regard, I am satisfied Mr Cook did not confirm that milk production for the most recent season was 103,000 kgMS. Mr Cook was adamant he would not have given a specific number but would have checked that with the dairy company. Furthermore, that was consistent with what both he and Mr Daly said he did when he was given the West Coast information sheet that accompanied the agency agreement. Rather than sign off the production levels in that document, Mr Cook said he wanted to check them. Similarly, he said that when the CRT brochure was prepared he told the CRT salesperson, Ms McLaughlin, to go to the dairy company for production figures.

[32] I consider it likely that Mr Cook did say something to Mr Daly about production levels having "been pretty consistent for the last couple of years after a peak when I had an outstanding farm manager" because that was his understanding at the time, and Mr Daly may have assumed the reference to consistency meant production was still at 103,000 kgMS per annum. However, had Mr Daly been given

a specific number by Mr Cook, I expect he would have noted that on the CRT brochure, along with the other key details which he did make a note of.

[33] The events which followed are relatively clear. Mr Cook signed the sale and purchase agreement for Farm 258 at a price of $2,800,000 on 18 October 2010. The agreement contained a number of terms and conditions which included:

(a) A condition specifying that the purchase price was inclusive of "103,000 Westland Milk Products Dairy Company shares owned by the Vendor". This was because it is a constitutional requirement of that company that every farmer shareholder must hold one share for every kilogram of milk solids they are to supply.

(b) A condition that the purchaser would continue with the "farm employment contract currently in effect until the end of the season". This condition was included at Mr Cook's request so that the current manager of Farm 258, Mr Christopher Lord, would have ongoing employment on the farm.

(c) A condition recording that "the Purchaser(s) will lease approx 260 dairy cows from the Vendors".

(d) A standard due diligence clause.

[34] The agreement initially included a settlement date of Friday, 19 November 2010. That was altered to Monday, 20 December 2010. The Routhans signed the amended agreement on 19 October 2010.

[35] On 8 November 2010, Mr Routhan for the Trust also signed an offer for the sale and purchase of Casa Finca for $4,200,000 which was to be presented to the vendor. Two days later, the Trust's agreement for sale and purchase of Farm 258 became unconditional.

[36] PGG also produced an internal document regarding the sale of Farm 258 entitled "Particulars of Real Estate Sale". It recorded various details about the farm

including that milk production was 103,000 kgMS. It also included a checklist to ensure completion of relevant documentation, including an agency agreement. Even though an agency agreement had not been completed as required because the rural information sheet had not been completed, the box confirming the agency agreement was complete was ticked and the document was signed off by Mr Michael Curragh, Mr Daly's manager. Mr Routhan says he was supplied a copy of this document when he asked for a copy of the PGG in-house complaints and disputes procedure which he signed on 18 October 2010. He says the repetition of the production figure on this document gave him confidence that PGG had completed proper checks of this information.

[37] The Routhans' funding for the two proposed farm purchases was to come from a combination of the Trust's existing equity, finance from Rabobank of $4,800,000 and a loan from a wealthy friend of the Routhans, Mr Tony Timpson, totalling $1,500,000 (the Timpson loan).

[38] Rabobank's funding was confirmed only after the bank sought and was provided with a considerable amount of information from the Routhans. A loan application was made by the Trust on 15 September 2010 for the funding for the proposed purchase of both farms. It recorded core information about the properties being purchased, including the seasonal production figures. PGG provided Rabobank with a market appraisal of the Trust's run-off block dated 16 September 2010 which valued it at $1,610,000. Rabobank also produced a valuation report dated 17 September 2010 for Farm 258 which cited the figures as to productive capacity which had been provided in the PGG Proposal.

[39] The bank required a letter from Mr Timpson confirming the terms on which his loan was provided, and, specifically, that there would be no immediate requirement to repay the debt, that interest would be at bank deposit rates only, and it would be subordinated to the Rabobank debt. When that confirmation was obtained, Rabobank recorded the Timpson contribution would be "treated as equity" as there is "no requirement for this to be repaid", and "budgets have been prepared allowing for this to be serviced at 3.5 per cent as agreed with Timpson". The Timpson loan was advanced from Marama Trading Company Ltd and was never formally documented,

although the Routhans' solicitors set out their understanding of the proposed terms of the loan in an email to Mr Timpson and he replied to that email confirming their understanding was correct.

[40] The bank also required budgets to be prepared by the Trust. Mr Ross Bishop, the Trust's farm consultant prepared initial budgets for both farm purchases, which were each described as "draft budget for potential purchase" and were prepared using three different assumptions as to the pay out per kilogram of milk solids, ranging from $5.80 per kgMS to $7 per kgMS.

[41] Indeed, with Mr Bishop's advice, the Routhans considered they could produce 112,000 kgMS, being a small increase on the existing production because of the benefits of utilising the 73 hectare run-off block. This would allow the entire herd to be winter grazed on the run-off block and extra feed to be produced from it so the farm would be a milking platform only and not need to produce any supplemental feed.

[42] The bank then produced a detailed report dated 18 October 2010 before approving the finance. It described the two properties that were to be purchased, and recorded that Farm 258 was producing 980 kgMS/ha and described this as the farm's "SQ [status quo] production capacity".[2] The bank assessed the Routhans as having limited farming experience, but the combination of Mr Routhan's previous business experience and achievements, and the employment of experienced farm managers and a local farm consultant, gave the bank confidence they could run the farms, and the application for finance for the purchase of both farms was approved.

[43] On 17 December 2010, the Trust entered two cow lease agreements with Mr Cook's company, one for the lease of 270 dairy cows for the balance of the 2010/11 season and the second for the lease of 300 dairy cows and 75 heifer calves for the following two seasons from 1 June 2011 to 1 May 2013.

[44] The agreement for sale and purchase of Farm 258 settled on 20 December. On 21 December 2020, the owner of Casa Finca advised that she no longer wished to sell, so the Routhans were left to farm Farm 258 in conjunction with the run-off block.

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[2] Being the figure reached if 103,000 kgMS is divided by the total farm area of 105 ha.

[45] Although Mr Cook's farm manager, Mr Lord, was kept on, he left in early 2011, shortly after the Routhans took over the farm, and the Routhans began managing the farm themselves on a fulltime basis.

[46] Almost as soon as the Routhans took over the farm, they noticed that production was down on the figures which had been represented to them. They had not received any information from Westland Milk Products about Mr Cook's production in the first half of the 2010/2011 season, so they were unaware of what production levels Mr Cook had been achieving prior to them taking over the farm that season. However, total production for the 2010/2011 season was 85,189 kgMS, almost 20,000 kgMS less than they had anticipated.

[47] For the next few years, Mr Routhan says he and his wife did everything possible to track down why they were not achieving the production levels they were told the previous owner had consistently achieved. First, on Westland Milk Products' recommendation, they contacted a well-known and respected semi-retired dairy farmer, Mr Allan Bradley. He had recently sold his farm and agreed to advise them on running the farm on a monthly retainer. He ended up working on the farm once a week and giving the Routhans extensive advice.

[48] The Trust also engaged Chris Tibbotts, a field specialist from PGG Wrighton Ltd, to provide advice on the farm's pasture. Mr Tibbotts said the pasture consisted of older types of grasses and a large amount of weeds. Mr Bradley recommended they take soil samples and send them to Ravensdown Ltd for analysis. Ravensdown recommended they apply extra fertiliser to boost grass production. In 2011 they spent $42,081.55 more on fertiliser than they had budgeted for. Mr Bradley also recommended they bring in supplementary feed to support the cows and they spent a total of $47,379.87 on extra feed and transportation of that feed in the 2010/11 season.

[49] In October 2011, Mr Tibbotts and an extension agronomist from PGG Wrightson Ltd, Mr Chris Sanders, visited the farm, and Mr Sanders advised full renovation of the pasture. As a stop gap measure, on Mr Sanders' advice, they direct drilled top quality plant on to the pasture in an effort to reduce the feed deficit, at a cost of $38,430.24.

[50] This investment to achieve the represented production figures meant the Routhans were spending more on the farm than they were earning in income, and the bank began putting enormous pressure on them to improve their milk production. The bank questioned what the Routhans were doing differently and why they were not achieving the same production levels as the previous owner. To assist, Mr Timpson advanced another $300,000 to the Trust in 2012/2013 which was used for on-farm expenses, including for a feed pad and barn, to maximise utilisation of feed in order to improve production. Mr Timpson was willing to provide a further $120,000 in June of that season but unfortunately passed away before any further money was advanced.

[51] The Routhans' capital expenditure in pursuit of achieving the seasonal production of 103,000 kgMS was significant. It included:

(a) installing a new concrete feed pad and standoff area for feeding supplementary feed to the cows and to remove them from pasture in wet weather at an approximate cost of $440,000;

(b) completely refencing the farm to control stock at an approximate cost of $250,000;

(c) replacing and renewing the entire pasture of the farm over a three year period at an approximate cost of $150,000;

(d) applying additional fertiliser at a cost of $150,000 more than they had budgeted for;

(e) replacing the water supply system at an approximate cost of $116,000 to provide sufficient water for the stock;

(f) installing feed troughs into the cow shed to feed palm kernel extract at an approximate cost of $8,000; and

(g) resurfacing the laneways and replacing culverts to enable the cows easy access to the milking shed twice per day at an approximate cost of $150,000.

[52] In 2013, to lift income levels, the Routhans decided to milk the cows during winter. However, this resulted in a shortage of grass in the spring. For that reason, and also because of the time required to prepare for an arbitration over the cow leases (which is discussed below), the Routhans decided to reduce from twice a day milking to once a day, which resulted in very low production for the 2014/2015 season.

[53] One of the issues the Routhans considered might be contributing to the poor production, was the quality of the cows they were leasing. Mr Bradley, who was assisting them with the practical running of the farm, inspected the cows and concluded that they were poor milk producers. As a result, on 25 November 2011, the trustees sent a letter to Mr Cook saying they wished to terminate the lease agreement on 31 May 2012. Mr Cook claimed there was no right to cancel and claimed the lowered production was because the Routhans were inexperienced farmers. He sued the Trust for wrongful cancellation of the lease.

[54] In due course, an arbitrator was appointed and, as part of preparation for the hearing, the Trust's lawyers asked for disclosure of certified milk solids production certificates from Mr Cook. Initially, Mr Cook would not release the certificates but eventually they were obtained directly from Westland Milk Products with Mr Cook's permission. The Trust received these at some point after 16 October 2014. They revealed that milk solids production had not been at the levels which had been represented in the PGG Proposal. The actual production figures were as follows:

Season	**Production Level**
2007/08	107,921 kgMS
2008/09	97,930 kgMS
2009/10	90,337 kgMS

[55] The figures showed the average across the previous three years was 98,730 kgMS. More importantly, though, the Trust says they show a steep decline in production suggesting the high levels that had been achieved were not sustainable. This was the very antithesis of the information PGG had supplied which suggested the

farm had continued to average 103,000 kgMS for four years in a row. Curiously it was around this time that the West Coast information sheet came to light with a handwritten amendment on it made by Mr Cook which crossed out 103,000 kgMS and instead wrote above it the figure 97,000. It is unclear when this was delivered to the PGG sales office, although the Routhans say it was delivered after the correct production level figures were produced for the arbitration. I do not need to resolve whether this is true or not. What is clear is it was never conveyed to the Routhans before they purchased the farm.

[56] The Trust was unsuccessful in the arbitration. Although the misrepresentation of the farm's production figures was traversed in evidence, the arbitrator held he had no jurisdiction to consider claims arising out of the sale and purchase agreement. He also found there was no implied term in the lease that the cows supplied would be able to provide the same amount of milk solids as the farm had been represented as achieving under Mr Cook's company's ownership. This meant the Routhans were not entitled to cancel the contract and the arbitrator awarded a sum in damages to Mr Cook's company, along with costs.

[57] The Routhans now say that, had they known the true production data for the farm, they would never have concluded that there was something wrong with the cows and cancelled the lease. The declining production over the three seasons prior to purchase would have put them on inquiry and alerted them to the fact the farm was not consistently producing 103,000 kgMS. That, in turn, would have led them to identify why such outstanding results were being achieved earlier.

[58] The information which they now have received as a result of preparation for this hearing shows that the high production in the earlier seasons was achieved as a result of the following factors:

(a) Nitrogen (N), in the form of urea, was being applied to the farm at extremely high levels (350-400 kg/ha of N as compared with the Ravensdown recommendation of 147 kg/ha of N), as evidenced by the fertiliser purchase records of Mr Cook and Mr Lord's diary entries regarding the application of fertiliser.

(b) Not only was half the herd wintered off the farm, but all the heifers (being the younger cows which had not yet calved and were not milk producing) were also kept off the farm, usually on one of Mr Cook's run-off blocks.

(c) The farm was not sustaining a herd of 260 cows, but a materially lower figure as indicated by Livestock Improvement Corporation records which suggested an average of 233 cows were on the farm during the period covered by the PGG Proposal.

[59] As a consequence of the expenditure on improvements to the farm in the hope of increasing production to 103,000 kgMS, and of defending the cow lease arbitration on the basis they were entitled to cancel it because of the low production, the Routhans' financial position went steadily backwards. Every year they made a loss and that was exacerbated by the fact that the pay-out from Westland Milk Products for the 2014/15 and 2015/16 seasons plummeted to $4.95 and $3.62 per kgMS down from pay-outs of $6.34 and $7.57 per kgMS in the previous two seasons.

[60] Eventually, Rabobank told the Routhans the farm and run-off block had to be sold and they were marketed for sale from 2018. To compound the problem, values of West Coast dairy properties had slumped since the Trust purchased. The properties were sold in late 2020, with the farm selling for $1,500,000 and the run-off for $761,000. The Trust has been unable to repay the Timpson estate which now appears to have written this loan off, and the Trust is left with nothing after repaying the bank loans.

[61] Mr Routhan says had Farm 258's seriously declining production for the 2009/2010 season been accurately conveyed to them, they would have made different choices. They would have made further enquiries about production which would have revealed the marked decline in production levels from the 2007/2008 season. That would also have revealed that Farm 258 could not produce an average of 103,000 kgMS consistently, as a stand-alone farm, and using normal amounts of nitrogen fertiliser. As a result, the Trust would not have purchased the farm (noting Mr Cook was adamant he would not have accepted a lesser price for the farm). Instead,

the Trust would have purchased an alternative farm in the general locality, with consistent, reliable production. To do that would have involved selling the run-off as that was the most economic course of action. In those circumstances, the Trust would not have lost the farm through forced sale in a depressed market and would not have suffered the financial losses now.

Limitation defences

[62] Before considering the substantive claims, I consider it sensible to decide if any of them are statute-barred as PGG claims.

The defendant's submissions

[63] PGG pleads limitation defences to:

(a) the FTA claim; and

(b) the "new" causes of action pleaded in the third amended statement of claim (and retained in the fourth amended statement of claim).

The parts of the claim said to be new causes of action are the general negligence claims and the references to non-disclosure in the FTA claims, negligent misstatement, deceit and under the FTA.

[64] Before deciding whether a limitation defence applies to any cause of action, it is necessary to set out some further aspects of the timeline of events. The provision of the erroneous production figures giving rise to the claims, occurred before settlement of the farm purchase on 20 December 2010. However, the Routhans say they did not know this information was incorrect, until they received the actual production figures from Westland Milk Products in the context of the cow lease arbitration in October 2014. The parties then agreed to a "standstill" agreement commencing on 20 October 2016, which suspended the statutory limitation periods. That agreement terminated on 14 February 2018, the day after the plaintiffs' first statement of claim was filed. PGG says, therefore, the six year statutory limitation for any claim expired on 14 February 2018, with the result that any new causes of action

pleaded in the third and fourth amended statements of claim are statute-barred by s 11 of the Limitation Act 2010.

[65] In respect of the FTA claim, that must be made within three years from when the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.[3] PGG says this means the trustees should have brought their claim by 17 December 2013, because they were, or ought to have been, aware of the misrepresentation regarding production levels as at 17 December 2010. This is when the Trust's solicitors are alleged to have received information from the vendor's solicitors which could reasonably have enabled the plaintiffs to have discovered the error. This information was a Quotable Value: Desktop Estimate Certificate dated 15 December 2010, and provided to the Trust solicitors on 17 December 2010 which said that the "Production estimate" for the 2010/2011 season was 90,000 kgMS.

The plaintiffs' submissions

[66] The Routhans, however, say it is clear they were not aware there had been a misrepresentation until late 2014. Mr Routhan had no recollection of seeing the Quotable Value document. More importantly, the Routhans had no reason to assume the problems they had in achieving the represented production levels was as a consequence of misleading or deceptive conduct in contravention of the FTA. That did not occur until the production records were requested and received in late 2014. Accordingly, the three year limitation period did not expire before the standstill agreement was entered into.

[67] In respect of the other pleaded limitation defences, Mr Kalderimis, for the Routhans, submits that the amendments do not affect the essential basis of the case brought against the defendant. Describing PGG's conduct as involving non-disclosure did not involve new factual allegations and did not affect the essence of the claim against PGG. The same is true for the addition of the general negligence causes of action. They are, in essence, a reformulation of the existing negligent misstatement claim. None of the amendments can be said to require investigation of factual or legal

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3 Fair Trading Act 1986, s 43A.

matters different from what have already been raised, so they are not amendments which would engage limitation defences.

Discussion

[68] The allegation that the amendments to the pleadings introduced by the third amended statement of claim are statute-barred turns on whether they essentially raise a new cause of action or merely provide further particulars of a cause of action already pleaded. As was said by the Court of Appeal in *Transpower New Zealand Ltd v Todd Energy Ltd*:[4]

> A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" …

[69] This does not preclude new factual matters being introduced which were not referred to in the prior pleading. In *ISP Consulting Engineers Ltd v Body Corporate 89408*, the Court of Appeal said:[5]

> [22] The issue is whether the Owners were setting up a new case, in the sense of making new allegations that would involve the investigation of an area of fact of a new and different nature, or a new and different legal basis for a claim not put forward in the earlier pleading. To put the question more generally, does the Second [consolidated statement of claim] have an essentially different character from the First [consolidated statement of claim]? The assessment is objective and the consideration must be of the substance of what is pleaded, rather than the form.

[70] In the present case, the first statement of claim pleaded three causes of action under the FTA, in negligence and deceit. It was clear, from the outset, that the claims alleged not just that the statements made as to production levels were incorrect, but that there had been a failure to verify the contents of the statements and a failure to follow PGG's own procedures to verify them. While PGG says the allegation of failing to disclose that the vendor had not verified the statement as to production levels when asked to, was a fresh allegation, it was, in my view, simply another factual

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4 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

5 *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA160, (2017) 24 PRNZ 81 (footnotes omitted).

element supporting the existing claims in negligence, and under the FTA. It did not alter the substance of them.

[71] Similarly, the amendment did not alter the substance of the existing claim in deceit which alleged that the statements were made with "reckless disregard for their truth". The non-disclosure subsequently pleaded was simply a further supporting fact. Furthermore, while the original claim in negligence was split into three separate claims on the later amended statement of claim, it had, from the outset, alleged both negligence in PGG's procedures for obtaining and verifying the information as to production levels, and the making of negligent statements to the plaintiffs. The substance of the allegations has not changed as a consequence of separating the allegations into discrete pleadings of negligence and negligent misstatement. Thus, none of the amendments to the claims are statute-barred and I can go on to consider them in substance.

[72] The challenge to the FTA claim is on the basis it is statute-barred from the outset by s 43A of the FTA. This turns on when the fact there was misleading conduct that had caused or was likely to cause loss, was reasonably discoverable for the purposes of s 43A of the FTA.

[73] PGG submits provision of the document entitled "Quotable Valuations Desktop Estimate Certificate: Tax & Duty Purposes" should have brought to the Trust's attention the fact that the production figures were wrong. I do not agree. There was no evidence the Routhans saw this document. In any event, I consider the nature of the document would not have alerted the Routhans to the existence of a claim under the FTA.

[74] The document was entitled "Desktop Estimate Certificate" which clearly signalled the limitations on the information it relied on. More importantly, the reference to 90,000 kgMS was described as a "production estimate" for the current season. There was no suggestion the figure was verified from actual data. The document was prepared to apportion the sales price as between land value and the value of various improvements for tax purposes. It did not purport to present a concluded view on production levels for the farm. There would therefore have been

no reason for the Routhans to consider this information overrode the information they had expressly sought from the vendor via its agent on production levels.

[75] The true production levels were actually discovered in late 2014 in the context of the cow lease arbitration when the Routhans sought and finally obtained records from Westland Milk Products. I address whether it was reasonable for the Routhans to make any other enquiries earlier than this at [105] below, and conclude it was not. Because they believed they had obtained this data directly from the vendor and through proper processes, they could not reasonably have been expected to question it, even when they were not achieving the same results.

[76] Accordingly, the cause of action under the FTA arose in late 2014, and their claim under the FTA, filed on 13 February 2018, was filed in time, taking into account the effect of the standstill agreement.

[77] As no aspect of the claim is statute-barred, I go on to consider those causes of action.

The claims in negligence

[78] The Routhans make three claims in negligence. Two of these claims allege "process negligence" against PGG and its agents respectively. The third of these claims alleges that PGG, through Mr Daly and Mr Curragh, made negligent misrepresentations (or misstatements) as to the farm's production levels, which they relied on.

[79] All three claims rest on the factual matrix described above, whereby PGG and its agents were negligent in obtaining, verifying and then conveying the information about production levels, particularly after Mr Cook declined to verify the production figures which PGG had already presented to the Routhans. The Routhans say that PGG and its agents owed a duty of care to follow a proper process with respect to gathering and then conveying material information to them about Farm 258. That duty was breached and resulted in the losses claimed by the Routhans. Given the overlapping nature of all three claims in negligence it is appropriate to combine the discussion of issues arising in respect of all three claims.

Did PGG owe a duty of care to the Trust?

The plaintiffs' submissions

[80] The Routhans acknowledge that whether a duty of care is owed in any particular case is a fact-specific question. However, real estate agents can and have been held to owe duties of care to prospective purchasers.[6] Here, they say the circumstances point to a duty of care arising, having regard to the settled considerations of proximity, foreseeability of harm, and the relevant policy considerations.[7]

[81] The Routhans say they were in a proximate relationship with PGG. PGG was engaged because the Routhans sought out Mr Daly to obtain the agency to sell Farm 258 to them due to his experience and reputation. He was then specifically asked by the Routhans to confirm the most recent season's milk solids production. It was reasonable for the Routhans to have relied on PGG to do its job properly, particularly when Mr Routhan had made a specific enquiry about seasonal production. Accordingly, it was foreseeable that PGG's failure to do so could cause loss to the Routhans.

[82] The Routhans say it is clear they relied on PGG's representation, not just to reach the view the farm was an attractive prospect, but in considering whether it was a viable purchase for the Trust. The trustees' reliance on these figures was also picked up by Rabobank and its internal records show reliance. The bank documents appear to have substantially reproduced the material details of the PGG Proposal, spelling mistakes and all. There are repeated statements in the Rabobank credit submissions setting out this expectation of production. For example, in the Rabobank credit review dated 8 April 2015, it states "[c]lient was banked on the premise of the property doing 100,000 kg mS". The bank expected these production targets to be achieved saying, in a credit review on 4 November 2013, "[t]here are no excuses left for these not to occur".

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6 For example, *McCullagh v Lane Fox and Partners Ltd* [1996] 1 EGLR 35 (CA) at 45-48; and *Johnston v Colliers International New Zealand Ltd* [2019] NZHC 2711 at [42]-[46].

7 As discussed in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341.

[83] The Routhans also say this reliance was reasonable. Mr Denley, who gave expert evidence for the plaintiffs on the obligations of real estate agents, said a prospective purchaser is entitled to rely on the accuracy of any information provided by the real estate agent. Here, the repetition of the representations as to production levels made through Mr Daly's oral representations, the PGG Proposal, and the Particulars of Real Estate document provided to Mr Routhan before settlement, all provided reasonable assurance as to their reliability. The presence of a due diligence clause in those circumstances does not make reliance unreasonable.[8]

[84] Mr Lewis and Mr Glennie also confirmed there was no reason for a reasonable purchaser to question the PGG Proposal's accuracy and they confirmed that production figures were particularly important to farm buyers in 2010.

[85] The Routhans assert that there are no policy considerations pointing against the recognition of a duty. The duties which the Routhans claim were owed to them are also consistent with those imposed on real estate agents by the Real Estate Agents Act 2008 and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, both of which were in force in October 2010. These include, at r 6.4, that "[a] licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client."[9]

[86] In addition, the duty does not conflict with any duties PGG or its agents may have owed to the vendor. It was in everyone's interest for information about Farm 258 to be collected and confirmed through a sound process which included having the vendor check and verify that information before it was passed on to prospective purchasers. Furthermore, the duties are narrow, relating to information collation and provision. They could have been complied with, at minimal cost and inconvenience, and they would not impose an unreasonable burden on PGG.

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8 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, [2010] 11 NZCPR 879 at [53].

9 Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, r 6.4.

The defendant's submissions

[87] While PGG acknowledges a duty of care may be owed by a real estate agent to a purchaser, it says, having regard to the two-stage inquiry articulated in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey*, this is not a case where a duty of care should be found to exist.[10]

[88] A duty of care can be owed where a purchaser relies upon the agent's skill, the agent knew of that reliance, and the information provided by the agent was not qualified by any limitation of liability.[11] However, in the present case:

(a) the plaintiffs did not rely upon Mr Daly's representation (or, such as it is, any representation by Mr Curragh);

(b) Mr Daly was not aware of any such alleged reliance and, to the contrary, knew that the trustees:

(i) were professionally advised, obtaining both legal advice from its lawyers and farm advice from Mr Bishop;

(ii) had visited the farm on a number of occasions, including meeting Mr Cook, and it was reasonable to infer that the discussions would include the production levels and how that was achieved;

(c) Mr Daly did not profess to have any farm consultancy expertise; and

(d) the PGG Proposal contained a prominent disclaimer limiting liability.

[89] In light of those circumstances, Mr Parker submits that it would not be reasonable to impose a duty of care having regard to:

(a) the degree of proximity or relationship between the parties; and

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10 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey* [2005] 1 NZLR 324 (CA) at [58]–[65].
11 *Barrett v J R West Ltd and Ors* [1970] NZLR 789 at 793–794.

(b) other wider policy considerations that tend to negate, restrict or strengthen the existence of a duty.

[90] When deciding whether there is the requisite degree of proximity between the parties Mr Parker referred to *Johnston v Colliers* where it was said:[12]

> … an assumption of responsibility by the defendant adviser and foreseeable and reasonable reliance by the plaintiff advisee, are key considerations. Similarly, a known purpose, an ascertainable plaintiff (or class) and knowledge that the advice is likely to be acted on without independent inquiry are also relevant considerations …

[91] In this case, Mr Parker submits the Trust was not a vulnerable party. Indeed Mr Routhan emphasised his significant business acumen and this points against a duty being recognised. As was said in *Todd on Torts*:[13]

> … [o]n the other hand, if a person is well positioned to look after himself or herself a duty may be thought to be inappropriate. The court is concerned with the steps a person could reasonably have taken to look after his or her own interests.

Here the Trust had other means to protect itself, including by means of the due diligence clause it included in the contract. It could also have made provision of the production figures, or at least warranty of the same, a term under the contract. There was no reason for PGG to expect the plaintiffs would act on the representations without independent inquiry, including through their obligation to undertake due diligence under the agreement for sale and purchase.

[92] Furthermore, Mr Parker submits that any liability imposed by the duty of care contended for should be proportionate to any wrongdoing. As PGG is not a farm adviser, but at best an information provider, it should not be held to be liable to the Routhans to the same extent as if it had advised on the prudence or detail of the purchase of the farm.

[93] PGG also submits that in considering the relevant scope of the duty of care, it is helpful to ask:[14]

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12 *Johnston v Colliers International Ltd* [2019] NZHC 2711 at [29].
13 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [5.4.03].
14 Todd, above n 13, at [20.3.02].

> … [W]hether the plaintiff's loss is within the scope of the duty or the risk created by the defendant's conduct. This approach has gathered support in recent times and is well accepted.

[94] Mr Parker points out that a defendant is not obliged to protect the plaintiff against all losses which might eventuate but only for losses suffered by the plaintiff which were connected with the irregularities and the risk they posed.[15]

[95] The principle that a defendant is not obliged to protect a plaintiff against all consequences of its future activities was clearly expressed in the House of Lords decision in *South Australia Asset Management Corp v York Montague Ltd* (SAAMCO).[16] This case focused on the nature of the duty that valuers owed to lenders and in particular, whether it was to advise the lenders as to a course of conduct, or whether it was simply to provide the lenders with information in which they could make their own decision. The principle that PGG relies on from SAAMCO is:[17]

> … that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong.

[96] Similarly, in *Hughes-Holland v BPE Solicitors*, where the defendant has provided information as opposed to advice, then:[18]

> … even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of it being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision.

[97] Thus, where a defendant was the provider of "information", as opposed to advice, it can only be responsible for the foreseeable financial consequences of the

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15 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).
16 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL).
17 At 214.
18 *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599 at [41].

information being wrong.[19] It is only losses which would not have been suffered if the advice had been correct that are recoverable.

[98] Applying those principles to the present case, Mr Parker submits it was clear that PGG and Mr Daly were no more than information providers. They were not advising on the prudence of purchasing the farm and therefore cannot be held responsible for matters that are beyond the scope of any relevant duty they may owe to the trustees.

[99] In deciding whether a duty of care exists in this case and what its scope may be, Mr Parker lists an extensive range of considerations which he submits should be taken into account. These include:[20]

(a) the Routhans brought the idea to purchase the farm to Mr Daly;

(b) they did so with knowledge of the contents of a CRT Brochure for the farm which had been produced the year earlier;

(c) they had engaged a farm adviser, Mr Bishop;

(d) they were proposing a joint purchase of the farm along with Casa Finca and obtained forecasts and budgets for the combined purchase only;

(e) they did not ask Mr Daly to obtain actual production figures from either Mr Cook or, with his permission, from Westland Milk Products;

(f) although they visited the farm before purchase, they did not make enquiries of Mr Cook about the system of farm management or how the production levels were achieved;

(g) they had no experience owning or running a dairy farm nor did they seek any training; and

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19 *Manchester Building Society v Grant Thornton* UK LLP [2019] EWCA Civ40, [2019] 1 WLR 4610 at [54].

20 PGG's submissions listed 23 points, but this summarises the key issues raised.

(h) there was a lack of contemporaneous documentation by the Trust regarding what they considered before entering into agreements for the sale and purchase of Farm 258 and Casa Finca.

[100] In all these circumstances, PGG argues that no duty of care arose (particularly, taking into account the disclaimer which I discuss separately below). In any event, Mr Parker submits the Routhans were contributorily negligent by failing to carry out any meaningful due diligence and the scope of the duty did not extend to protecting the plaintiffs from the losses claimed as these are a result of their own failures and other intervening factors that are not attributed to the alleged representations.

Discussion

[101] I consider it clear that a duty of care arose (leaving aside for the moment, the effect of the disclaimer). The real disputes, which I address later, relate to whether:

(a) the disclaimer negated that duty;

(b) the losses claimed flowed from the breach of that duty; and

(c) the plaintiffs were contributorily negligent and/or failed to mitigate their loss.

[102] While in the present case, three causes of action were pleaded in negligence, I think they are all captured by the negligent misstatement cause of action. The so-called "process negligence" claims simply identify the deficiencies in how PGG through its agents obtained the information which was then provided to the Trust, particularly in the PGG Proposal. These deficiencies in process resulted in the negligent misstatements being made and not retracted or qualified, and which were relied on by the Routhans to their detriment, which is the nub of their complaint.

[103] As loss would not be foreseeable unless the Routhans were relying on the representations made by PGG and its agents, it is sufficient to focus on the elements of the cause of action for negligent misstatement. These were framed by the Court of

Appeal in *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* as follows:[21]

> (a) Proximity: the parties must be in a relationship of proximity, or a "special relationship". This requires that the adviser knew for what purpose the advice was wanted, knew the advice would go to the plaintiff … and knew the advice would likely be acted on without independent inquiry …
>
> (b) Policy: wider policy reasons must not exclude a duty of care in the circumstances …
>
> (c) The ultimate question: whether, having regard to (a) and (b), a duty is fair, just and reasonable.
>
> (d) Specific reliance and loss: the plaintiff actually relied on the advice and suffered loss in consequence.

[104] Here, I have no doubt that the parties were in a relationship of sufficient proximity. Mr Daly was approached by the vendors directly, and specifically asked to obtain information about the farm's production levels. As an experienced rural real estate agent, it can be inferred he knew the importance of production levels to the purchasing decision. The relevance of this information to the purchaser of a dairy farm was accepted by all the expert witnesses, although PGG's witnesses emphasised it was just one factor among many that a purchaser would take into account. In any event, it was clearly relevant to the Routhans as it was the subject of a specific enquiry before they committed to the purchase.

[105] I am also satisfied Mr Daly and PGG knew the advice would be relied on. Mr Daly acknowledged as much in cross-examination and, in my view, there was no reason for him to believe there would be an independent inquiry into the production figures he provided. There were only two sources of information about production levels: the vendor and Westland Milk Products. Westland Milk Products would only release the information with the vendor's permission so an approach to the vendor was essential. Given the Routhans knew Mr Daly had gone to the vendor directly to obtain the information they had no reason to undertake any other enquiry on this issue.

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[21] *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650 at [85] (footnotes omitted).

[106] In the circumstances of this case, where Mr Daly was asked to put together a proposal with the key farm metrics on it for the express purpose of applying for finance from the bank, I am satisfied he knew the information on production would be relied on and acted on without further inquiry and that it was material to the Trust's decision to purchase.

[107] There are, as the Routhans submit, no wider policy reasons which would exclude a duty of care in the circumstances. The duty to take care when assembling information about a property being offered for sale, to avoid passing on misleading or incorrect information, is entirely consistent with the real estate agent's statutory duties and a duty to take care to avoid negligent misstatements is fair, just and reasonable.

[108] In the present case, I also have no doubt the Routhans actually relied on the advice to enter the purchase, for the reasons outlined in their submissions. As Mr Routhan said in evidence:

> In working with Mr Bishop, Julie and I were aware of the long-term averages of milk production per cow and per hectare in the locality and across the West Coast. The 103,000 KG/MS figure translated per cow to 396 and per hectare to 980. We knew from our research that these were seriously good figures, … This was the business case for buying the farm.

[109] Mr Routhan also confirmed it underpinned the business case for retaining the run-off. Based on advice from Mr Bishop the Routhans considered they could achieve an additional 9,000 kgMS production above the 103,000 kgMS, by having access to the run-off block of 73 hectares as well. This was because the run-off would enable them to make supplementary feed and give them the ability to keep young replacement stock on it, so they could run more cows (300 in total) over the two properties. Even if the annual milk solid production per cow reduced to just over 373 kgMS per cow, they calculated they could potentially achieve 112,000 kgMS off the two properties.

[110] It is also clear that the bank relied on the 103,000 kgMS figure. The staff dealing with the Routhans repeatedly referred to it in their documents, both to advance the initial funding, and in the regular credit reviews. It was integral to the Routhans' decision to purchase and to the bank's decision to advance funding.

Does the disclaimer negate a duty?

The defendant's submissions

[111] The PGG Proposal had a standard form disclaimer on the third page. It read as follows:

> *Please note: PGG Wrightson Real Estate Limited is acting solely as the selling agent for the vendor, and is not responsible for the accuracy and completeness of information supplied by the vendor either directly or via PGG Wrightson Real Estate Limited, whether contained in an information memorandum or otherwise. PGG Wrightson Real Estate Limited has not verified such information and PGG Wrightson Real Estate Limited is not liable to any party, including the purchaser for the accuracy or completeness of such information. Potential purchasers and investors should also note that the Vendor is responsible for obtaining legal advice on any securities law aspects associated with the proposed transaction, and that PGG Wrightson Real Estate Limited is not a promoter for securities law purposes, but is solely acting in its professional capacity as a selling agent.*

[112] PGG says it is clear that a party can modify or exclude tort liability by use of appropriate disclaimers and the wording of this disclaimer is more than sufficient and reasonable notice to a purchaser that the information is provided on the basis of no or limited liability. PGG refers to cases where clear disclaimers were sufficient to protect a defendant from liability. For example, in *McCullagh v Lane Fox and Partners Ltd*:[22]

> The use of disclaimers to insulate the estate agent, the estate agent's principals, from responsibility for representations made by estate agents is common place … [The purchaser] had complete freedom of contract and was in a position to negotiate on an equal footing with the vendor.

The plaintiffs' submissions

[113] The Routhans, however, say that even on its own terms, the disclaimer on the PGG Proposal is narrowly framed. It only purports to exclude liability for the accuracy of information "supplied by the vendor". That distinguishes it from the more general disclaimer used in PGG's marketing brochures where PGG claims it "is not responsible for the accuracy and completeness of the information contained in this document". In other words, the disclaimer seeks to protect against pure "conduit" liability where information is passed from a vendor to a purchaser in accordance with proper processes. It does not exclude liability for information which was not supplied

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22 *McCullagh v Lane Fox and Partners Ltd* [1996] PNLR 205 (CA) at [239].

by the vendor nor, in the plaintiffs' submission, for information that is supplied in a way that conflicts with the real estate agent's statutory obligations or with the agency's own internal policies and processes.

[114] Here, for reasons already discussed, the Routhans say Mr Daly prepared the PGG Proposal without authorisation from Mr Cook and in reliance on his own understanding of what information should go in it. When he did belatedly secure an agency agreement, he did not, as PGG required, have the PGG rural information sheet confirmed by the vendor. Accordingly, the disclaimer does not negate liability.

Discussion

[115] I accept the plaintiffs' submission that the disclaimer is narrowly framed and that it only protects the agent from liability where information is obtained from a vendor and passed to a purchaser, and where the agent is given no reason to doubt the accuracy of the information. In the present case I have found that Mr Cook did not orally confirm that milk production levels in the most recent season were 103,000 kgMS. Mr Daly prepared the PGG Proposal with limited information obtained directly from Mr Cook and made an incorrect assumption that production figures averaged 103,000 kgMS for the past three seasons. He also unilaterally altered the number of dairy company shares which would transfer on settlement, reinforcing the inaccurate representation. This information did not fall within the scope of the disclaimer and it cannot relieve PGG from liability if that information was reasonably relied on and caused loss.

Was the duty breached?

[116] This question is straightforward and PGG did not seriously challenge the evidence from Mr Denley and Mr Crews that Mr Daly's actions were not those of a reasonably prudent real estate agent and resulted in incorrect information being relayed to the Routhans as purchasers.[23] In summary, the deficiencies were:

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[23] There were minor objections taken to aspects of the evidence of Mr Denley and Mr Crews, saying they veered into submissions and questions of law, but none of these objections undermined the substance of their evidence which was that PGG and its salesperson fell well short of the conduct expected of a reasonable rural real estate agent.

(a) Mr Daly sought and provided material information about the farm orally to the Routhans as prospective purchasers and he prepared and provided the PGG Proposal and the sale and purchase agreement before he had a signed agency agreement with Mr Cook, thus breaching his obligations under the Real Estate Agents Act 2008.

(b) Mr Daly incorrectly represented to Mr Routhan that there had been no change to the average milk production figures following the 2009/2010 season when this was not true, then repeated those misrepresentations in the PGG Proposal.

(c) Mr Daly failed to verify key details about the farm including the milk production figures. As Mr Crews explained "[o]btaining independent verification of information that may be material to prospective purchasers is not optional."

(d) Mr Daly did not advise the Routhans that Mr Cook was unwilling to commit to the production figures when these were presented to him for verification.

(e) When the agency agreement was belatedly arranged, Mr Daly inappropriately stated the farm had been listed over a month earlier, used the prospectus he had already prepared and passed on to the vendor instead of PGG's own template rural information sheet, and allowed the vendor to sign it despite the fact that key details were not included which should have been.

(f) PGG, through Mr Curragh, failed to properly supervise Mr Daly through the sales process. Instead Mr Curragh signed a form which confirmed that an agency agreement had been completed when it had not, as no rural information sheet was attached as required. Mr Daly himself acknowledged in cross-examination that the process of completing the agency agreement "misfired".

[117] There is no doubt that Mr Daly's conduct, in particular by providing information to the Routhans which had not been verified by gathering the information in accordance with PGG's promulgated processes, led to Mr Daly passing on critical, but incorrect, information to the Routhans, knowing the importance of that information to their purchase. There was, as the plaintiffs claim in their pleadings:

(a) a breach by PGG and its agents of its duty to take reasonable care, including following proper procedures for obtaining and verifying information about the property to avoid or prevent harm to purchasers, such as the trustees, of inaccurate or misleading information;

(b) a breach of a duty not to make negligent misrepresentations.

The claim in deceit

The plaintiffs' submissions

[118] The Routhans say that once Mr Daly knew the information he had provided them was no longer reliable because Mr Cook had declined to confirm the production figures, his failure to tell them amounted to deceit.

[119] In making that submission, Mr Kalderimis relied on *Amaltal Corp Ltd v Maruha Corp*, which gave the following summary of the tort:[24]

> The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the claimant should act in reliance on such a representation and the claimant in fact does so, the defendant will be liable in deceit for the damage caused.

[120] *Amaltal* goes on to say that conduct which amounts to deceit may include silence where a failure to speak distorts the truth of previous statements or where "a true representation is rendered false by a subsequent and known change of

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[24] *Amaltal Corp Ltd v Maruhaa Corp* [2007] 1 NZLR 608 (CA) at [46] citing J F Frederic, W H B Lindsell and Anthony M Dugale *Clerk and Lindsell on Torts* (18th ed, Sweet & Maxwell, London, 2000) at [15–01].

circumstances".[25] The requisite state of mind is shown where a false representation has been made:[26]

> …
>
> (1) knowingly, or
>
> (2) without belief in its truth, or
>
> (3) recklessly, careless whether it be true or false … [t]o prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.

Thus, again citing *Almatal*, Mr Kalderimis asserts that "conscious indifference" to the truth is sufficient to establish deceit.[27]

[121] In the present case he says Mr Daly's conduct demonstrated a conscious indifference to the truth. While any representations that were made before 11 October when he met with Mr Cook to sign the agency agreement amounted to innocent misconduct, once he knew Mr Cook would not confirm the production details, his state of knowledge changed. Mr Daly now knew that the production details were no longer reliable.

[122] Mr Kalderimis places significant weight on the cross-examination of Mr Daly on this point. In it, Mr Daly agrees he knew Mr Cook might not confirm the production figures, but instead adjust them, and gives the following responses to Mr Kalderimis's questions:

> Q And so you knew that until Mr Cook came back to you the information in the prospectus on which the draft SPA was based was not completely reliable?
>
> A Correct.
>
> Q And you also knew that unless and until you said something Kaniere Family Trust would continue to rely reasonably on the information in the PGG prospectus?
>
> A Yes
>
> Q Without being aware that it was actually under review?

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25 At [47].
26 *Derry v Peek* (1889) 14 App Cas 337 (HL) at 374.
27 *Amaltal Corporation Ltd v Maruha Corp*, above n 24, at [49]–[50].

A That's correct.

…

Q So your understanding was that Rabobank would continue to rely on the information in the PGG prospectus?

A Yes it would be.

Q And you knew that if Mr Cook were subsequently to alter the information provided, this could, in turn, alter the basis on which the Kaniere Family Trust was looking to purchase the farm.

A That could be possible, yes.

Q And on the basis on which Rabobank was prepared to finance the farm?

A Yes, potentially.

Q Am I right that you figured that these possibilities might not amount to anything and that you relied on the prospect that Mr Cook would come into the office and confirm the figures, and everything would be okay?

A Well I didn't think he would come into the office, but I was probably maybe expecting, maybe a phone call. I was more reliant on I guess on the processes within the I suppose in the office to address the missing page.

Q But this wasn't really an administrative problem was it. It wasn't really for the office to sort out for you. This goes to the heart of your duties as a real estate agent. A representation had been made, people are relying on it, you needed to put it right.

A I guess as I mentioned before with the changed agency agreement, yeah there [is] an issue with the two-part thing which was, be a little bit confusing I guess at the time and yeah I didn't, but obviously followed up.

Q And the result was that the Routhans were not able to make a fully informed decision to enter, enter the transaction because they didn't know something you did which is the production data was unconfirmed.

A Correct.

[123] Mr Kalderimis submits that this exchange demonstrates Mr Daly had, at best, a conscious indifference to the truth of the representation as to production figures, which he knew the Trust and the bank were relying on. While an explanation is not required for why he chose not to alert Mr Routhan, Mr Kalderimis suggests it would have been awkward for Mr Daly to explain that he had created the PGG Proposal

without authorisation from Mr Cook, and Mr Daly accepted that this was so. Accordingly, Mr Kalderimis submits that the elements of the tort of deceit are made out leading to the loss which is claimed. If established, contributory negligence is not a defence to the tort of deceit (although, the obligation to mitigate loss still applies) and all the losses flowing are claimable.[28]

The defendant's submissions

[124] Mr Parker, for PGG, submits the evidence does not show that Mr Daly's actions reached the required threshold to establish deceit. PGG also cites the decision in *Amaltal*, where it was said:[29]

> The critical features of the tort are therefore that the representor must have lacked an honest belief in the truth of his statement; "carelessness" is not to be equated with "dishonesty"; and even recklessness in the sense of gross negligence will not suffice, unless there is conscious indifference to the truth.

[125] In this case, none of the representations were made when Mr Daly knew his statement to be untrue. The most he knew was that Mr Cook had not confirmed the 103,000 kgMS average figure, not that it was untrue. In Mr Parker's submission, the evidence does not show that Mr Daly made the representations knowing they were false, or without belief in their truth, or recklessly, careless whether they were true or false.

[126] To the extent the claim is made against Mr Curragh, Mr Parker submits there is simply no evidence put forward by the Routhans and there can be no allegation of deceit against him, whether personally or, as an agent of PGG.

[127] Mr Parker reminds the Court that the burden of proof is on the plaintiff to prove fraudulent intent and requires a high degree of probability in relation to a claim in deceit.[30]

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28 *Standard Chartered Bank v Pakistan National Shipping Corp* [2003] 1 AC 959 adopted in *Amaltal Corporation Ltd v Maruhaa Corp*, [2009] NZSC 40, [2007] 3 NZLR 192, at [23]; and *ASB Securities Ltd v Geurts* [2005] 1 NZLR 484 (HC) at [87].

29 *Amaltal Corp Ltd*, above n 24, at [50].

30 *Continental Insurance Co v Dalton Cartage Co Ltd* [1982] 1 SCR 164; *Bater v Bater* [1951] P35 (CA) at 57.

Discussion

[128] There is no allegation of deceit prior to the signing of the agency agreement on 11 October 2010 where Mr Cook declined to approve the listing information. Up until this point, Mr Daly (mistakenly as I have found) understood Mr Cook as confirming the previous production levels when in fact he had not done so.

[129] However, this is not a case where, on 11 October 2011, information came to light which showed Mr Daly's earlier representations to be false. Rather, it was information which meant they may or may not be true. But Mr Daly's evidence demonstrates he had a reasonable expectation that Mr Cook would have got back to him if there was any change. He held Mr Cook in high regard, noting he was one of the most respected farmers in the valley and believed "if he was doubting something I am sure you know he would have got back to me". He also assumed that the office processes would follow up on "the missing page" of the agency agreement. In other words, while Mr Daly knew there was some uncertainty over the production figures, he expressed confidence that if they were wrong, this would be advised in a timely way and certainly before settlement.

[130] In my view, that expression of belief falls short of the threshold for deceit. It was clearly negligent for him to have failed to contact Mr Cook himself to confirm the listing information was correct before the contract was entered into. He should not have assumed that either administrative staff or Mr Cook would make sure that happened. However, his actions fall short of the threshold to establish deceit and this cause of action fails.

The Fair Trading Act claim

The plaintiffs' submissions

[131] The same factual matrix which supports the plaintiffs' claims in negligence are relied on to support a claim under s 9 of the FTA. Specifically, the Routhans claim that the failure to disclose the true production levels constituted misleading and deceptive conduct by PGG as a real estate agency in trade, which caused the Trust to suffer loss.

[132] In closing submissions, the plaintiffs sought to introduce a number of other representations under this cause of action. These included:

(a) Farm 258 had not been run as a stand-alone farm, but in conjunction with Mr Cook's other farming properties;

(b) the stocking rate was lower than the 260 cows as represented;

(c) half the herd was not wintered off early, but younger and low producing cows were also kept off the farm;

(d) more dry feed was used than the 115 bales of baleage made on farm as stated;

(e) significantly more nitrogen was applied to the farm than the 146 units N/ha represented.

[133] The Routhans say that the information contained in the PGG Proposal falsely represented that Farm 258 had achieved consistently high production in recent years based on a low input stand-alone farming system. They say it was objectively reasonable for a person in a position of the Routhans to have been misled. The representation was made both in writing and orally. Mr Daly had confirmed that he had secured the listing and it was reasonable for the Routhans to believe that he had verified the material details about the farm which he was passing on to them.

[134] Importantly, the Routhans say the disclaimer in the PGG Proposal did not deprive the conduct of its misleading or deceptive quality. Both the Trust and its bank relied on the representations contained in the PGG Proposal and it was not unreasonable for them to do so.

The defendant's submissions

[135] If the Court does not accept that the FTA claim is time-barred, PGG's case is that the claim should fail as the Trust did not act as a reasonable purchaser having

regard to the considerations identified by the Supreme Court in *Red Eagle Corporation Ltd v Ellis*. There it was said:[31]

> The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimants' situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived.

[136] Thus, as for the tort causes of action, there needs to be consideration of the role of the defendant in the transaction, the relationship between the parties, the nature of the representation and the knowledge of the parties.

[137] In addition, the plaintiffs' own contribution to any loss which is suffered must be taken into account.[32]

> Another operating cause of loss or damage may perhaps have been the claimant's own conduct in failing to take reasonable care to look after his or her own interests. The court should therefore ask itself whether the claimant's carelessness, if there were any, should be regarded as the sole or a contributory operative cause of the loss.

[138] Here, PGG argues that the Routhans did not act as reasonable purchasers, Mr Daly was only a conveyor of information, the parties were in a standard commercial transaction on equal footing, and in any event, the Routhans' own conduct should be regarded as the sole cause of the loss, or at least so substantial to cause a reduction in any award under the FTA.

Discussion

[139] There can be no real doubt that the representations made as to production levels were objectively misleading. It was not correct to say that average production over the last three seasons was 103,000 kgMS. I also have no doubt that a reasonable person in the Routhans' situation would likely have been misled or deceived. The representation was not simply provided orally, but also in a formal document, the PGG Proposal, which was expressly prepared for the purpose of deciding whether the purchase was bankable and funding provided for it. It was reinforced by PGG's amendment to the number of dairy company shares to be transferred at sale.

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31 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
32 At [30].

Mr Bishop, the Routhans' farm adviser, also relied on these figures, and used them to suggest even higher production was possible if the run-off was used in conjunction with the farm. Rabobank staff similarly accepted the representation at face value and relied on it.

[140] A complicating fact in the present case is that the pleaded misleading conduct of PGG relates only to the statement about production levels. The other misleading representations contained in the PGG Proposal, as set out at [132] above, were not pleaded as misleading conduct under the FTA. Nevertheless, they formed the context in which the misleading statement as to production levels was given and cannot be ignored when assessing the effect of that statement. As was said in *Red Eagle*:[33]

> The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering for the loss or damage.

Here, the misleading statement as to production levels was not the only statement in the PGG Proposal which misled the Routhans. However, it was the most potent one, and was material to the decision to purchase the farm.

[141] Having satisfied myself that it was objectively reasonable for the claimant to be misled in all the circumstances, the real issue in this case is what loss flows from the misleading conduct, and whether the Trust's carelessness (if any) should be regarded as the sole or a contributory operative cause of the loss.[34] These issues are discussed in the following sections.

Causation and loss

The plaintiffs' submissions

[142] The Routhans say PGG's conduct in making the misrepresentations contributed materially and substantially to the losses that they have suffered over the past decade. As a consequence of PGG's misrepresentations and associated non-disclosure, they entered into a transaction for a farm that they could not have

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33 *Red Eagle Corporation Ltd v Ellis*, above n 31, at [28].
34 At [30].

succeeded in, because it was predicated on the attainment of production levels using a farming system they could not replicate.

[143] As already explained, the Routhans claim compensatory damages to put them in the position they would have been in had the breach not occurred. That is, the difference between the losses they suffered as a result of the farm purchase compared with the position they would have been in had they purchased an alternative farm.

[144] The notional alternative put forward by the Routhans in evidence is the purchase of 212 Municipal Road, a farm they could have purchased for just $2,500,000 (including dairy company shares). It had approximately the same land area as Farm 258, but had a higher standard of improvements and had an average efficient production of 85,000 kgMS. On the balance of probabilities, the Routhans say they would have purchased this alternative farm, or a notional equivalent, and it is appropriate to assess damages on this basis. They also say they would have sold the run-off under that scenario because the business case for retaining it would not have been there.

[145] Mr Kalderimis submits that the approach to damages under the FTA is analogous to the tortious measure. It is to put the claimant in the position they would have been it, but for the wrong. It is accepted that contractual expectation damages cannot be sought under the FTA.[35] However, the Routhans are not asking the Court to consider what would have happened had Farm 258 actually been able to produce 103,000 kgMS under normal conditions, but to determine what would have happened if the transaction had not proceeded and the Routhans had purchased an alternative farm.

[146] The Routhans say there is no doubt that the representation as to production levels was relied on to proceed with the purchase. This is supported by the following evidence:

(a) Both Mr Routhan and Mr Garters were impressed with the production levels being achieved from an apparently low input system.

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35 *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 26 and 40.

Mr Garters' evidence was that the "main basis for the excitement" was "the stable historic average production of 103,000 kg/ms".

(b) Mr Routhan was firm that they would never have considered buying Farm 258 had they known of the declining production and plummeting 2009/2010 results, especially if the PGG Proposal had accurately conveyed the unorthodox and bespoke farming system that was in fact needed to support production.

(c) Had the true average of the previous three years been provided, this would have prompted enquiries that would have revealed Farm 258's plummeting production and that production for the most recent season was around 90,000 kgMS.

(d) The Routhans' experts confirmed that the change in production levels would have been an "obvious warning sign" and "would have been cause for significant concern to a potential purchaser". As Mr Glennie said "had the Routhans known the previous season yielded, 90,337 [kgMS] and the current season was producing similarly, the red flags would have flown. I cannot imagine they would have ploughed on in the same way."

(e) The defendant's expert, Mr Savage, agreed that if the variations in production levels had been disclosed, this would have sparked further enquiries. These enquiries would have included such questions as whether different amounts of fertiliser were used in the different seasons, or whether there were different stocking levels, or different amounts of supplementary feed. Mr Savage agreed that that would have likely revealed that there were other representations in the proposal that appeared to be wrong. That, in turn, would have made it clear that the farm was unsuitable for the Routhans' resources and purposes.

[147] Although Mr Savage suggested the more likely outcome would have been a negotiation on price, the Routhans says that option can be "safely discarded". While the Routhans' expert rural valuer, Mr Hancock, considers that Farm 258 was properly valued at around $2,300,000, Mr Cook's valuer, Mr Hines, continues to value the farm at $2,900,000 and Mr Cook was resolute that he would not have sold the farm to the Routhans at a lower price than was agreed. The Routhans say this means it is realistic to assume that, on the balance of probabilities, they would have brought a farm such as 212 Municipal Road with stable production at 85,000 kgMS and for sale at a lesser price.

[148] In this alternative scenario, the experts were agreed the sensible decision was to sell the run-off. A farm producing 85,000 kgMS simply did not require a 73 hectare support block and, as Mr Lewis said, with lower primary production levels "the benefit of freeing up capital and reduc[ing] debt levels becomes more compelling".

[149] Although PGG suggests the Routhans would not have sold the run-off because of their attachment to it as a family-owned block and given the investment they put into it, Mr Routhan and Mr Garters both confirm they had considered selling it, and the rationale for retaining it rested on the forecast production for Farm 258. Furthermore, the Routhans had sold previous family properties and were willing to make tough business decisions if they made sense.

[150] Finally, the Routhans reject PGG's argument that the Routhans' venture with Farm 258 was doomed to fail, even if it had produced 103,000 kgMS, on the basis that it was overleveraged from the start. In the Routhans' submission, many of these arguments were based on theoretical constraints on prudent funding which were not necessarily relevant or applicable to this purchase. These include a claim that a loan should be amortised over a 20 year period and that the debt to equity ratio was too high from the outset, when that was based on treating the Timpson funding as a standard loan and not, in practical terms, as equity.

[151] The Routhans say that Mr Lewis' evidence is far more realistic in assessing the viability of the farm business. A farm business is not unviable simply because for some years it would have produced a loss or negative cashflows. Had Farm 258 been

able to achieve 103,000 kgMS, Mr Lewis' calculations show that the business was sustainable despite the tough low pay-out seasons of 2015 and 2016. Furthermore, Mr McAra, a chartered accountant called by PGG, conceded that if he used average milk pay-outs as known at 2010 and adopted one of Mr Lewis' assumptions as to capital expenses or drawings, the farm would achieve an almost break-even budget.

[152] However, the Routhans say the correct question is not how Farm 258 would have performed if it could produce 103,000 kgMS. The real issue is that the disastrous losses that they suffered were inextricably and substantially connected to the misrepresentations because without them they would not have bought the farm. It is not possible to conclude, on the balance of probabilities, such losses would have occurred anyway. The correct way to measure and calculate loss in this case is to ask what would have been different had they brought an alternative farm. If any adjustments are required for contributory negligence they can, and should, be addressed within that damages model.

The defendant's submissions

[153] PGG submits that its actions did not cause the Trust's claimed loss as:

(a) there were numerous actions breaking the chain of causation or, alternatively;

(b) the loss would have occurred anyway.

[154] In submitting that the chain of causation was broken, PGG relies on the principle articulated in *North Shore City Council v Body Corporate 188529*, where Tipping J, for the majority said:[36]

> [83] It is clear that the plaintiff's own conduct may go beyond contributory negligence and become the real cause of the damage. This is simply a plaintiff-based example of what was traditionally called a novus actus interveniens. That was a convenient label to describe a new cause which intervenes and removes all causal potency from the original negligence. The intervening cause can arise from the conduct of a third party or from the conduct of the plaintiff himself.

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[36] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 (footnotes omitted).

[155] PGG says that there are multiple causes of the Routhans' loss and they are unrelated to PGG's actions. The Trust would have failed to turn a profit and ultimately would have been forced to sell its assets, regardless of whether the purchase was of the farm, Casa Finca, Municipal Road, or any other property.

[156] In support of that submission, Mr Parker says the Trust failed post-settlement to make any enquiry about, or obtain details of, the farm system used by Mr Cook, including the actual production figures for previous years. This was a substantive failure, particularly when the Routhans learnt almost immediately that production was far below what had been anticipated. Mr Parker says Mr Routhan admitted in cross-examination that he "wouldn't be the least bit surprised" if he had asked Mr Cook for the production numbers shortly after the Trust took over, which demonstrated he appreciated this was an important piece of information in understanding how Mr Cook achieved those numbers.

[157] There is also evidence, Mr Parker says, that the Routhans adopted poor farming systems. For example, they struggled to feed the cows sufficiently to maintain their health or a reasonable level of production and this led to the decision to reduce milking to once a day on more than one occasion.[37] PGG is also critical of the Routhans for undertaking what it describes as "extraordinary levels of expenditure". For example, $500,000 was spent in the first year of operation alone. PGG says their expenditure was unsustainable and reflected the poor business sense of the Routhans. Much of the expenditure was considered unnecessary by Mr Savage, one of PGG's expert farm consultants. This included construction of the calf shed, cow shed and wintering barn.

[158] Instead of tightening their belts when it became clear that the farm was producing a consistent loss, the Routhans borrowed a further $300,000 from Mr Timpson, ostensibly to improve production and that sum in part was spent on a 600 cow feeding pad at the run-off, despite the farm never having had more than 300 cows. By the end of the 2012/2013 milking season Mr McAra considers it was clear that the farm was not going to be viable and remedial action needed to be taken.

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[37] While Mr Parker referred to three seasons, I am satisfied this occurred briefly in 2011 and 2014-2015, not over three seasons as the submissions for PGG suggest.

[159] The Routhans also undertook a significant re-grassing programme which took up to 30 per cent of total pasture out of use at a time. This, too, contributed to a decline in production and therefore profit, which PGG says cannot be attributed to its impugned conduct.

[160] A further intervening factor relied on by PGG is what it describes as Rabobank's "unreasonable" maintenance of the farm. In November 2011, Rabobank recorded concerns about the quality of the cows, the failure to achieve historic production levels provided by the vendor, poor grass quality and lack of farming experience. By September 2012, Rabobank had identified the need to control the Trust's expenditure, recording that the client "is now focused on cost containment and has agreed to halt all further capital expense unless approved and authorised by the bank". By 2013, it was clear (and even the Routhans' expert, Mr Glennie agreed), that the farm's financial position was "perilous". By June 2015, Rabobank had identified that budgets based on previous performance showed significant cash deficits going forward which indicated the "business is no longer viable", and the Trust's account with Rabobank was placed into special asset management at around the same time.

[161] Although Rabobank realised the farm was unsustainable, and required sale of one or both properties from 2015 on, and set deadlines for doing so, that did not occur until 2020. In Mr Parker's submission, Rabobank did not act prudently, either in initially extending credit for the farm, or in realising its security once the farm's operation was clearly unviable. In short, there are multiple events which PGG says broke the chain of causation, and the Routhans' loss cannot be said to flow from PGG's misstatement of production levels.

[162] If the Court gets to the position where it is considering granting relief, PGG submits that the tort measure of damages is relevant to both the negligence claims and the claims under the FTA. Thus, if any loss can be attributed to reliance on the claimed misrepresentations, then the proper approach to damages is the difference between the estimated value of the farm with the represented production figures as compared to that with actual production figures. PGG resists any suggestion that damages for a

misrepresentation can include expectation damages.[38] This approach has been adopted in a number of cases, including in the recent case of *Roberts v Jules Consultancy Ltd (in liq)* where the Court of Appeal said:[39]

> The normal measure of loss in such a case … is the difference between the price paid and the value of the property received in return. That is the approach the Judge adopted, correctly.

[163] However, in *Roberts v Jules Consultancy Ltd (in liq)*, the Court accepted that the purchaser would not have proceeded with the purchase of a leaky home had he not been misled and it was, therefore, a no transaction case. Should the Court accept that this was a no transaction case and Municipal Road or another alternative farm would have been purchased, PGG says the viability of the business run by the Trust would not have been significantly different. PGG's evidence is that the alternative farm was not a viable business venture as it would have been unable to make a profit. Mr Parker points out that even on the Routhans' experts' evidence, the likely profit of the alternative farm over a period of five years would have been only $9,747, which was hardly a viable business venture.

[164] If the proper measure of damages is the difference between the value of the farm as represented and of that purchased, PGG's evidence, using Mr Hines' valuation is that it would have been a difference of $50,000 ($2,950,000 with production of 103,000 kgMS against $2,900,000 on 97,000 kgMS). He says the plaintiffs adduce no alternative evidence as to the difference in price between the property with production as represented and with the correct production figures.

[165] In respect of the assertion that the Routhans would not have purchased the farm but a property such as the Municipal Road farm, PGG says that alternative scenario is not credible. First, Municipal Road was sold to a local farmer on 29 October 2010, almost simultaneous with the negotiation of the sale of Farm 258. There was no evidence that Municipal Road was being actively marketed at the time, or that the Routhans showed any interest in purchasing it. The purchaser was an ex-employee of Mr Cook and was likely to have made a direct approach to Mr Cook for the purchase

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38 *Cox & Coxon Ltd v Leipst*, above n 35.

39 *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 at [72] (footnote omitted).

of the farm. PGG also submits that Municipal Road was too modest for the Routhans' ambitions, noting at the time they were aiming to purchase both Farm 258 and Casa Finca, and earlier they had tried to purchase the Moynihan Farm, producing 102,000 kgMS, for a purchase price of $4,000,000.

[166] Finally, PGG rejects the Routhans' method of quantification of its loss, saying it is without any foundation or authority. PGG assumes that the approximate amount of $3,000,000 which is claimed is a combination of the loss of the Trust's equity of $1,500,000, plus the loss of the Timpson loan of $1,500,000.

[167] Mr Parker submits that damages are usually assessed at the time of purchase. Although the Court may choose a later date when it is just to do so, the reason for adopting the time of sale as the appropriate time for fixing loss is that this avoids the calculation of damages being affected by extraneous factors for which the defendant cannot reasonably be held responsible.[40] This points against calculation of loss in the way it is approached by the Routhans.

[168] While in *Clemance v Hollis* damages were assessed at the time of hearing because the plaintiff could not have known the true productivity of the orchard for 12 to 18 months after purchase, Mr Parker submits that the true productivity of the farm could and should have been identified prior to settlement, or very shortly afterwards. PGG also submits that questions of remoteness of damage arise in this case, pointing out that the plaintiff must show not just that the defendant caused the damage for which the plaintiff seeks recovery, but also that the kind of damage was not too remote from the defendant's act or omission. The damage claimed must be reasonably foreseeable by the defendant when the tort was committed and must be a "real risk" not one that is far-fetched or fanciful.[41]

[169] PGG submits that on the facts of this case, the only reasonably foreseeable loss is the notional loss of the value of the property at purchase, plus any possible sum of loss that might have been incurred before any intervening event broke the chain of

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40 *Clemance v Hollis* [1987] 2 NZLR 471 (HC).
41 *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308 at [39].

causation, which the defendant says occurred as soon as the plaintiffs were aware actual production was below that represented.

Discussion

[170] Both counsel referred me to the decision in *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand*, and I accept it is a useful statement of the approach to be taken to the issue of causation.[42] There it was said:[43]

> The basic question remains whether there is a causal connection between the defendant's default and the plaintiff's loss. …. the answer to this question will not be resolved by the application of a formula but by the application of a Judge's common sense. The Judge needs to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the default and the loss in issue which can be identified and supported by reasoned argument.

[171] The act or omission by the defendant must constitute a "material and substantial cause of [the plaintiff's] loss".[44]

[172] In considering the issue of causation in this case, the first question to address is what would have occurred if the updated figure of approximately 98,000 kgMS average production over the last three seasons had been inserted in place of the outdated three season average of 103,000 kgMS.

[173] PGG says this was a minor change and would not, on its own, have prompted a re-evaluation of the decision to purchase. First, the size of the change was within the range of variation which can occur on West Coast farms from season to season. It also would not necessarily have alerted the Routhans to a decline in production. To demonstrate this, Mr McAra produced a hypothetical table of milk production levels over a four year period to show there could be a lower average production level for years two, three and four, than for years one, two and three, without there being a clear declining trend in production. The point of this was to demonstrate that it could not be assumed that the provision of the correct production figures would have alerted the

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42 *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA).
43 At 408.
44 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28].

purchasers to a declining trend and so prompted the kind of enquiries which would have made them decide not to proceed with the purchase.

[174] However, I reject that analysis. It was clearly important to the purchasers that there was a stable high level of production from this farm. That is why they expressly asked Mr Daly to confirm this. PGG knew the Routhans had the CRT brochure reporting the average production for the three seasons beginning with the 2006/07 season. A drop of four per cent in the rolling three year average would have signalled there had been a "significant drop" in the most recent year, which in fact there was. Furthermore, I accept Mr Lewis' evidence that the hypothetical scenario presented by Mr McAra, was not plausible because it assumed a year where the production was unrealistically high at 120,000 kgMS.

[175] In my view, given the weight the Routhans placed on the high and consistent level of milk production as a reason for purchasing, the drop in production would have prompted further enquiries. As Mr Lewis said, it would have "set alarm bells ringing and put the potential purchaser on notice that the historic production average could not be relied on". I accept his evidence that the shift in average between the 2006/2009 seasons and the 2007/2010 seasons would have prompted further enquiries. These would, in turn, have revealed the details of the drop in production in the 2009/2010 season and given a "reasonable farmer … serious misgivings about proceeding further". That was supported by Mr Savage who agreed the decline in production in the most recent season would have prompted enquiries about the reasons for that, and would likely have identified changes in fertiliser use, stocking rates and use of supplemental feed as possible reasons for the changes in milk solid production.

[176] Those opinions were confirmed by Mr Routhan who said "we would not have purchased the Farm had we known the truth about its historical production". He said it was "especially important to me to be able to trust the Farm's inherent capacity because I already knew I would need to invest a significant amount to improve the infrastructure on the Farm". He also said that he was "doubtful that I would have been able to secure lending from Rabobank in those circumstances, given their willingness to back me seemed to be based on the outstanding production figures that were represented to me". For all these reasons, I do not accept that if the updated figure had

been stated in place of the three year average, it would have been of no consequence and the Trust would have purchased the farm in any event.

[177] The next issue to consider is whether there were intervening factors causing the Trust's loss which were unrelated to PGG's actions and which broke the chain of causation between the misrepresentations and the Trust's loss.

[178] The first issue is whether Rabobank acted prudently in extending credit to the Trust at the outset to purchase the farm, or in failing to realise its security as soon as the farm's financial situation was considered to be perilous.

[179] Mr Dillon, a rural banking expert, gave evidence for PGG, saying he did not consider Rabobank acted prudently in extending credit to the Trust for the purchase of Farm 258. In his view, the Timpson loan should have been classified as a loan to the Trust, and if it was, the Trust entered the transaction with very little equity (21 per cent). This was below what he said a prudent lender would require for a customer with an unproven track record such as the Routhans. He also considered that Rabobank used low farm working expenses when undertaking its credit assessment ($3.10 as compared with the Dairy NZ 2009-10 West Coast-Tasman average of $3.53). With a change to the assumed farm working expenses and with the addition of other allowances he considered Rabobank should have made, there would have been little surplus available to amortise debt ($36,000 per annum). The time it would have taken to pay off the debt was simply too long in his view and this pointed to the imprudence of the lending. He was also critical of Rabobank for not revisiting the entire viability of the original credit terms when the Casa Finca sale did not proceed.

[180] However, I consider that when Mr Dillon's evidence was tested, it could not be shown that Rabobank acted unreasonably in the circumstances as known at the time. I accept that, in 2010, it was common for farm purchases to proceed on an interest only basis and without a strict requirement that a loan should be amortised over a set period as Mr Dillon suggested. Furthermore, the farm did have adequate debt servicing ability in 2010. While Mr Dillon was critical of the debt to equity ratio, that depended entirely on how he characterised the Timpson funding. While I accept that in legal form, this funding was a loan, I consider Rabobank acted reasonably in

treating it as "quasi-equity" which is the term used to describe the Timpson funding in Rabobank's internal records.

[181] In reality the Timpson loan, which came with no requirement for security, no expiration term, well below market interest rates and which would not expire at any time that the borrower could not afford to repay it, was not funding that would threaten the ongoing viability of the business. I am satisfied those were the terms on which Mr Timpson advanced the loan and that Rabobank sought and obtained confirmation that it was advanced on those terms before assessing the viability of funding the purchase. In summary, I do not consider Rabobank acted imprudently when it advanced the funds to the Routhans.

[182] The next issue is whether Rabobank was imprudent to allow the situation to continue once the farm's position was considered to be in difficulty. However, one of the problems with this argument is that the bank, like the Routhans, understood the farm was capable of producing 103,000 kgMS reliably. It believed the Routhans needed to be accommodated while they took steps to achieve this, including re-sowing the farm pasture, and improving the quality of the herd. By the time the Routhans had learnt of the misrepresentation and unsuccessfully defended the cow arbitration, it was 2015. By then, the milk pay-out had plummeted and farm values on the West Coast had dropped as a consequence.

[183] At this point, the bank recognised that property prices had declined and had revised their internal valuations for the two properties to $2,240,000 for the farm and $850,000 for the run-off. However, it also recognised that with the "current decline in commodity prices", and the fact there were quite a few other properties on the market at the time, the properties would have "subdued appeal". Implicitly, the bank concluded it was not a great time to sell. Instead, the special asset management section of the bank put the Trust under close supervision and tight constraints and looked to support the trustees through this tight period while they considered "an exit or rehabilitation strategy".

[184] I do not consider this decision was causative of the loss. By this point, the losses claimed had already been suffered and the bank records show that at least

initially, it preferred a managed sale, recognising that a forced sale would likely be at a discount from the sale price otherwise achievable.

[185] The same criticism of not selling one or both properties at this point is made of the Trust. However, I consider it was reasonable for the Trust to defer such steps to see if it could resolve matters with PGG without litigation. That may have enabled it to weather the difficult years of 2015 and 2016 and avoid the need to sell one or both properties at a loss.

[186] The Trust also did consider a possible sale of the run-off block in 2015. However, as the bank recorded in April 2016, this was just a verbal offer and the purchaser wanted the Trust to do development work, at a cost between $150,000 and $250,000, which was money that the Routhans simply did not have. It was unsurprising in those circumstances that that sale did not proceed. Although the properties were being marketed from 2018 onwards, they only sold, at a considerable discount, in 2020.

[187] I am satisfied that from the point the Routhans realised they had not bought the farm which had been represented to them, they already had, effectively, no equity in the property and had lost their capital investment in it. Thus, I do not consider either the Routhans' or the bank's failure to sell more promptly, was causative of the Trust's loss.

[188] The balance of the matters raised by PGG are, in my view, more properly considered in the discussion of contributory negligence which follows below.

[189] That then leads to the question of loss. Loss is quantified by the plaintiffs' witness, Mr Glennie, at $3,184,000. He explains this is calculated by adding:

(a) the additional loss of value of $1,442,000 on the sale of the run-off, and Farm 258 over the expected decline in value for comparable properties;[45]

[45] It was bought for $2,800,000 but sold for $1,500,000.

(b) the loss of $680,000 invested in capital developments; and

(c) interest costs of $1,062,000 which could have been saved if an alternative farm purchase had proceeded.

This contrasts with the defendant's calculation of loss which they say should be based solely on the difference in value of the farm as represented and with the true average production levels, which is only $50,000.

[190] I can readily dismiss the suggestion that the loss is simply the difference in value between the property with production at 103,000 kgMS averaged over three years, and one with average production around 98,000 kgMS over three years. First, that ignores the fact that the misrepresentation induced the Routhans to buy a farm which had also been misrepresented in other material ways, albeit those other misrepresentations emanated from the vendor, rather than PGG. In fact, this was a farm which was only capable of producing between 80,000 to 90,000 kgMS on a stand-alone basis, and I have found that PGG's misrepresentation was a material factor in inducing the purchasers to buy this farm and so was a material and substantial cause of their loss.

[191] Furthermore, this is not a case such as *Harvey Corporation Ltd v Barker*, where the plaintiffs did not plead that they would have done something else if they had known the true position and would have been better off in doing so.[46] Here, that is exactly what the Routhans say would have happened, and with valid reasons for doing so. Thus, while I accept that both the tortious measure of loss and s 43 of the FTA are directed against the making of a false representation as opposed to the failure to perform it, this does not prevent a plaintiff from proving they are worse off as a result of the representation being made because they changed their position in reliance on it.

[192] In the present case, the Routhans are not asking to be put in the position that they would have been in if the farm had performed as represented, and I accept they could not properly ask to do so. Here, I am satisfied that if the Routhans had known the true situation as to the production levels, which is the key metric that led them to

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46 *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA).

buy the property (and the bank to fund it), they would not have bought it. They would have bought another property.

[193] I accept, however, that it is unlikely that the alternative property would have been Municipal Road for the reasons PGG advances. Municipal Road was not marketed for sale on the open market and it was likely to have already been subject to an agreement to purchase at the time the Routhans would have been investigating Farm 258's production levels. Furthermore, I accept the Routhans were ambitious and had considerable confidence and self-belief. They may well have sought a larger property and one where they borrowed a similar amount to that borrowed to fund the purchase of Farm 258. There are simply too many variables to say that the Municipal Road purchase scenario is, on the balance of probabilities, the accurate comparator.

[194] For this reason, I do not accept the loss calculations set out in closing submissions for the plaintiffs is the appropriate measure of the Trust's loss. It assumes the plaintiffs' current net asset position would have been $2,725,490 as opposed to their net asset position as a consequence of purchasing the farm which is effectively zero.

[195] Instead, I consider the losses which are proved as a consequence of the representations are the losses suffered by committing to this farm purchase, being the loss of equity in the farm and run-off through the forced sale in 2020 and the loss of investment in capital developments on the farm. However, the suggestion that the Routhans would have, but for the representations, saved $1,062,000 in interest is simply too speculative to be taken into account. I consider they were likely to have borrowed an equally large amount for a different farm purchase.

[196] It follows, therefore, that because of the representations which induced the Routhans into this property purchase, the Trust has suffered a loss being the difference between the additional loss of value on the farm properties suffered as a consequence of the forced sale, being $1,442,000, as well as the $680,000 of investment in infrastructure and improvements on that property which was not reflected in the sale

price. Those losses total $2,122,000, and represents their losses under the negligence and FTA causes of action.

[197] The remaining issue is whether there was contributory negligence by the Routhans which should reduce that amount.

Contributory negligence

The defendant's submission

[198] If the Routhans are successful in establishing their claims in negligence or under the FTA, PGG argues that any losses the Routhans can recover must be significantly (if not, entirely) discounted because of their own contributory negligence.

[199] This argument relies on s 3(1) of the Contributory Negligence Act 1947 which states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

[200] In making that judgment, the Court will consider whether the plaintiffs acted reasonably in all the circumstances.[47] That can be assessed by considering the following questions:[48]

(a) What, if anything, did the plaintiffs do that contributed to their loss?

(b) To what degree were those actions or inactions a departure from the standard of the reasonable person?

(c) What was the causative potency of those actions or inactions in relation to the damage suffered?

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47 *Hooker v Stewart* [1989] 3 NZLR 543 (CA) at 547.

48 *Findlay v Auckland City Council*, High Court Auckland CIV-2009-404-6497, 16 September 2010 at [64].

[201] Here, PGG maintains the Routhans made multiple errors that contributed to the losses they suffered and should be taken into account whether the claim is in negligence or under the FTA. In particular, it says the Routhans:

(a) carried out minimal and inadequate investigation of the farm despite requiring the insertion of a due diligence clause in the contract, and, in particular, failed to check the information relayed by PGG, saying, as Mr Routhan did: "I just relied on what was in the PGG Proposal";

(b) insisted on the purchase being carried out in a rush and mid-season;

(c) did not take the opportunity to obtain important information regarding the farm system during the meetings it had with the principal of the vendor company, Mr Cook;

(d) did not take opportunities to obtain important information, including actual production figures from the vendor or Westland Milk Products, nor to make sufficient enquiries of the vendor or his farm manager when, shortly after settlement, the Routhans knew the represented production figures were not being achieved;

(e) failed to reassess the viability of the farm purchase once the purchase of Casa Finca was no longer going ahead;

(f) obtained advances from Rabobank for the purchase of Farm 258 based on the estimated combined production of both the farm and Casa Finca and on the basis of inadequate forecasts for the farms and the run-off property obtained from Mr Bishop;

(g) used information that was not fit for or intended to be used for supporting the business case for the viability of the farm purchased, such as the financial forecasts of Mr Bishop;

(h) failed to recognise that the farm was unviable from the outset given the funding and debt loading structure it was to adopt;

(i) failed to take sound agribusiness advice as to the most profitable farm system either before or after purchase;

(j) made poor decisions such as moving to once a day milking and embarking on significant re-grassing that led directly to a drop in production;

(k) unreasonably embarked on capital expenditure, such as in relation to the 600 cow feed pad, which had no bearing on production or productivity;

(l) failed to obtain and provide optimum feed for the cows in order to obtain high production; and

(m) imprudently treated loans from Mr Timpson or his company as effectively monies that would never need to be repaid.

[202] Allied to this, PGG says that the Routhans also failed to mitigate their losses, saying a plaintiff cannot recover damages for losses that would have been avoided had the plaintiff taken reasonable steps in response to a defendant's wrong.

[203] In Mr Parker's submission, the most obvious step the Routhans could have taken to mitigate their loss would have been to sell the farm when it became clear to them it was never going to be profitable. It should have been clear following one or, at the latest, two milking seasons that the farm was not going to be profitable. If the properties had been sold by, say, 2014, Mr Hinds' valuation evidence is that there would have been no loss in capital value of the farm properties. Indeed, there was a verbal offer to purchase the run-off for approximately $1,900,000 (albeit on the basis that a significant level of capital work was to be undertaken), which was an increase in the value of that property from its value of $1,600,000 at the date of purchase.

The plaintiffs' submissions

[204] The Routhans' primary response is that these allegations (which all effectively amount to claims of contributory negligence) rely heavily on the benefit of hindsight.

The fact that it is now possible to think of ways the Trust's problems could have been avoided does not mean that the Routhans acted unreasonably. The starting point is that there was no reason for the Routhans to doubt the PGG representations at the time. There were no obvious red flags raised to suggest the information warranted further investigation.

[205] The Routhans also say that they did complete due diligence in line with standard practice in 2010, as confirmed by Mr Lewis's evidence. They relied on financial forecasts and analyses prepared by their farm adviser, Mr Bishop, using the figures provided by PGG. That business planning was also cross-checked by Rabobank's analysis. They initially retained the Cooks' existing farm manager Mr Lord and then employed a replacement, Mr Bradley, to advise them when Mr Lord left. The Routhans also visited the farm prior to settlement, and met with Mr Cook and Mr Lord. However, there was no need to complete additional due diligence on the production figures given the Routhans understood PGG had obtained this information directly from Mr Cook and could reasonably assume those figures had been verified by him. Mr Routhan clearly explained why he did not independently seek this information from Mr Cook. He trusted that Mr Daly had, as he had asked, got the production details from Mr Cook so there was no need for him to seek them from Mr Cook directly as "I already had that information in the PGG Proposal".

[206] While Mr Bishop's various budgets were all labelled draft, this appeared to be Mr Bishop's practice. It did not mean he did not know or expect that funding would be sought on the basis of this work. Indeed, his emails sent in the days immediately after the Trust received the PGG Proposal showed that he was aware that his budgets were being provided to the bank for funding purposes. Furthermore, he was involved in the initial stages of arranging the cow leases from Mr Cook, so it was not credible for him to suggest he did not know the purchase of Farm 258 was going ahead using his budgets.

[207] While PGG argues that the Routhans failed to undertake adequate financial analysis, this was effectively a criticism of the work of Mr Bishop. Mr Bishop saw the PGG Proposal and produced budgets that the Trust and Rabobank then worked

into more orthodox forms.[49] While there is a criticism that there was no standalone budget prepared for Farm 258, Rabobank was able to understand and pro-rate Mr Bishop's combined budget for the purposes of funding the purchase of Farm 258. The upshot was that Rabobank was comfortable that Farm 258 could produce 980 kgMS/ha and PGG has not identified how the failure to purchase Casa Finca as well contributed to the Trust's loss.

[208] In terms of the Routhans' competence and experience, PGG's inference that management skill was required to achieve 103,000 kgMS from Farm 258 ignores the fact that this level of production was only achieved by using sophisticated farm management practices, excessive supplementary feed and fertiliser, and access to run-off blocks to maintain the low or non-producing members of the herd. While the Routhans had not previously owned or run a dairy farm, Mr Routhan had experience milking cows and in business, Mr Garters had experience in farm administration and Mr Bradley spoke highly of Mrs Routhan's practical farming knowledge and work ethic.

[209] Furthermore, the Routhans took professional advice. For example, on the advice of Westland Milk Products, they sought out the assistance of Mr Bradley, an experienced dairy farmer. They obtained and followed advice on fertiliser use from Ravensdown and Ballance, and followed advice on pasture improvement from PGG Wrightson. The Routhans reject the criticism of them not employing a highly experienced farm consultant such as Mr Lewis or Mr Savage, saying that many small farms operate reasonably without the benefit of such assistance.

[210] The Routhans also reject the assertion that it was naive of them to think that production could be improved on the represented levels to 112,000 kgMS per season. That criticism failed to take account of the impact of the misrepresentations. If 103,000 kgMS had been consistently achieved on Farm 258 using a relatively simple farming system, then it was reasonable in that context to believe an uplift in production might be achieved with the additional 73 hectares that were available using the Routhans' run-off block.

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[49] While those budgets no longer exist the plaintiffs say it is clear they did at the time.

[211] The Routhans also reject the suggestion that the losses were attributable to negligent farm management practices. Those arguments failed to account for the ongoing impact of the misrepresentations on subsequent farming decisions. When it became clear, soon after purchase, that production was dramatically below what was expected, the Routhans began searching for answers and made farm management decisions they would not have made had the misrepresentations not have been made. It was not until late 2014 that they learned that the historic production had been misrepresented and not until 2020 or 2021 that they learnt exactly how that production had been achieved. In the interim, they had been led to take numerous steps, all on professional advice, to achieve those production levels.

[212] The Routhans also say that some of the evidence which is critical of the Routhans is tainted by personal interest. For example, Mr Cook had been in dispute with the trustees over the cow leases and Mr Davis, a farm adviser, had worked for Mr Cook for more than 20 years and had given evidence on his behalf many times. Ms Crowhen, a farm product sales person, was critical of Mr Routhan after he stopped using the Turbo N product she was selling on the advice of his usual fertiliser agent from Ballance.

[213] In any event, the farm management practices that have been criticised are all explicable and reasonable in the circumstances the Routhans found themselves in. For example, they moved to once a day milking as a response to a shortage of feed and the expert farm advisers acknowledged that this was an acceptable strategic decision to make to take the pressure off cows. The criticism of the Routhans applying insufficient nitrogen was also unreasonable. It stemmed, in part, from a misunderstanding of Mr Bradley's assertion in his evidence for the cow arbitration that "[n]o more than 100 kg per hectare should be used". In evidence he clarified that when he said that, he was referring to the amount of urea (which contains nitrogen) that should be applied per hectare per application, not per year. While Ms Crowhen suggested that the Routhans had gone 'cold turkey' on the nitrogen", that was denied by Mr Routhan. Mr Routhan's own evidence was that he followed advice on the appropriate level of nitrogen to use, including from representatives of Ravensdown and Ballance. He applied some 265 units of nitrogen per hectare in the 2010/11 season but, following the advice of Mr Bradley, reduced the amount of nitrogen use for a time to help the

pasture recover from historical overuse. From 2014, expenditure restrictions from the bank limited the amount of nitrogen that could be applied.

[214] In terms of the criticisms of the Trust's stocking decisions, the Trust leased 287 cows from Mr Cook who did not suggest the herd size was excessive. The reason the Trust increased the size of the herd from what they understood was previously milked on Farm 258 was because the cows used were lighter weight than the Holstein Friesian cows that had been run on the farm and the Routhans had the additional support of the run-off.

[215] The criticism by PGG's expert farm consultant, Mr Savage, of the Routhans replacing the herd they leased from Mr Cook with a substandard quality of cow was not based on evidence, but rather on his reading of the 2015 arbitration award. The suggestion that the cows and pasture were in poor condition was also based on selective evidence. For example, Mr Savage only saw the farm in 2020, shortly before its forced sale, so could not fairly critique the Routhans' performance in the preceding years. That evidence did not accord with Mr Bradley's evidence that the cows were never underfed and animal welfare was never compromised. It also did not line up with Rabobank's internal reports following farm visits that reported positively on the health of the livestock.

[216] In response to the criticism of capital expenditure on the farm, the evidence of Mr Lewis and Mr Glennie explains what was done and why, and most of the expenditure was incurred in chasing the 103,000 kgMS production figure. This expenditure did not cause the farm to fail. Similarly, the re-grassing was undertaken on advice, knowing it would impact on production for a time, but again, hoping it would in due course help achieve the 103,000 kgMS figure.

[217] The claim that the failure to achieve the expected production levels ought to have triggered inquiries about the accuracy of the past production figures fails, in the Routhans' submission, to account for the effect of PGG's repeated confirmation of those figures during the transaction. The most obvious possibilities for the Routhans at the time was that they were doing something wrong or there was something wrong with the cows. The difficulties they had in obtaining cow records from Mr Cook for

the purpose of the arbitration only served to discourage enquiries about other matters such as past production. The Routhans say they could only have reasonably discovered the figures had been misrepresented when that was revealed during the cow lease arbitration in late 2014.

[218] Finally, the Routhans respond to the alleged failure to sell the run-off in 2015. In fact, the Routhans signed an agency agreement in 2017 to sell the run-off and obtained a market appraisal in 2018. One factor in delaying that was the prospect that their claim against PGG would settle in the interim, but in any case, the Routhans were not unwilling to sell the run-off in 2015. Mr Routhan had a verbal offer for the run-off but it required the Trust to undertake significant development works which it did not have the money for. The Trust counter-offered with a price to allow for the requested works, but the prospective purchaser was not willing to proceed on that basis.

Discussion

[219] It is difficult not to have sympathy with the Routhans given the circumstances they faced after acquiring Farm 258. They put their heart and soul into the operation of the farm and reached out for advice from a number of appropriate sources. While it is true that they knew production was down dramatically in the very first year, it does not follow that they must have known, as a result, that the representations were untrue. For the reasons already discussed, I consider they reasonably assumed they had obtained the farm's production figures from the primary source, Mr Cook, and so the failure to achieve this figure must have lain within their farming system.

[220] PGG has, in my view, criticised the steps taken by the Routhans with the benefit of hindsight. However, that does not mean that the Routhans were negligent. As Anderson J said in *Cumberworld Contracting Ltd v Foseco (NZ) Ltd*, "[n]egligence in foresight cannot be assumed from the ease with which a cause may be appreciated with hindsight".[50]

[221] I am satisfied the Routhans completed adequate due diligence of the farm purchase and this was also the view of Mr Lewis who considered the Routhans

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[50] *Cumberworld Contracting Ltd* v *Foseco (NZ) Ltd v* (1993) 5 TCLR 534 (CA) at 544.

conducted adequate due diligence for a purchase in 2010. For the reasons already explained, I consider it was reasonable for them to rely on the production figures which they understood had been obtained directly from Mr Cook. Those figures were then reflected in the budgets prepared by Mr Bishop, who was familiar with the farm. They were also adopted by Rabobank for the purposes of its own analysis of the viability of the purchase. While the bank did not accept some of the assumptions in Mr Bishop's first draft budgets (for example, it thought the working expenses were too low and amended them), it clearly found them an adequate base for the bank's purposes.

[222] I found Mr Bishop's attempts to distance himself from the budgets he prepared, saying they were in draft only and he did not know they were being provided to the financiers, implausible. The email exchanges he had with the Routhans at the time contradicted his evidence. For example, on 14 September 2010, he emailed the Routhans saying "as discussed, here's the extra budget. Hope everything goes well with the financiers". The logical inference is that he downplayed the level of assistance he provided because, at the time, he was being sued as a third party. Similarly, his assertion that he had no idea that the purchase of Farm 258 was proceeding until it had settled was implausible when he was involved, at least in the initial stages, in arranging the lease of cows from Mr Cook. Those leases expressly limited the Routhans to grazing the cows on Farm 258 or other land "owned by the Lessee". Furthermore, on 10 December 2010, Mr Bishop emailed the Routhans saying he looked "forward to working with you both in your new venture". Mr Bishop spent eight to 10 hours preparing the budgets.[51] Mr Savage thought it would take 8-12 hours of a farm advisor's time to undertake work on a farm purchase to bank approval stage. The work Mr Bishop did could not be disregarded as inconsequential in testing the viability of the farm purchase, and any alleged inadequacy of the budgets did not contribute to the Routhans' loss.

[223] I also reject the submission that because the budgets were presented for the purchase of both properties, and were not expressly revised for the purchase of Farm 258 alone, that contributed to their loss. No evidence was adduced as to exactly how this contributed to the failure of the farming enterprise, other than some

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[51] Based on an account of $888 plus disbursements and a charge-out rate of $80-$120 an hour.

generalised statement that cost efficiencies could be achieved in running two farms together (for example, requiring only one tractor). The reality is that the Routhans would have needed to borrow the entire purchase price of Casa Finca, meaning their debt to equity ratio would have been significantly worse if the purchase of both properties had proceeded.

[224] Furthermore, the bank clearly had no difficulty with using the budgets for the combined farm purchase to assess the viability of lending on the purchase of Farm 258 alone. Indeed, in the bank's assessment of the application dated 18 October 2010, it states the initial phase of the purchase is for Farm 258 alone, and says "budgets have been prepared for Dec – June for 1st year" using the "existing level of production of 980 kgMS/ha" (being the production per hectare based on 103,000 kgMS). The bank's assessment then deals separately with the budget for the season 2011/2012 when it would be financing both farms. It was clearly satisfied the purchase of Farm 258 alone was viable based on the information it had been provided. I am satisfied that the Routhans were not contributorily negligent by failing to produce a budget that excluded the proposed Casa Finca purchase.

[225] I also reject the assertion that the Routhans' inexperience contributed materially to the failure of the farming enterprise. The Routhans brought a considerable breadth of relevant experience to the farming operation. They also sought out advice from what appeared to be suitable sources. Ironically, it appears from the evidence that the average efficient production for the farm (that is, the production that an average efficient farmer would be able to produce off that property) was being achieved by the Routhans in the first few years. Mr Lewis's evidence, which I found very balanced and helpful, noted that Westland Milk Products reported regional average milk solids production between 2009 and 2019 of 727 kgMS/ha for the locality, and 796 kgMS/ha in the Kowhitirangi area. That would suggest average production off Farm 258 would be just over 83,000 kgMS. Mr Lewis also calculated that if Farm 258 was run on a grass-based orthodox manner, the maximum figure it could generate would be no more than 91,122 kgMS. To do this would require the farm to grow 14 tonnes of dry matter per hectare (DM/ha) of pasture, being at least one tonne of DM/ha ahead of the regional average.

[226] Furthermore, as the evidence of Mr Savage, the farm consultant called by PGG, demonstrates, in the first four seasons the Routhans actually achieved slightly higher production levels than the average production levels recorded in statistics generated by the Livestock Improvement Corporation (LIC). This is set out in the following table:

Season	kgMS	% of LIC Average
2010/11	85,159	119%
2011/12	80,118	104%
2012/13	79,046	105%
2013/14	88,503	106%

[227] While I heard a number of subjective opinions about the Routhans' farming experience, in fact, the Routhans were achieving, in some years, average or better than average milk solid production levels from the farm.[52] Their difficulties arose because they did not realise this was a reasonable achievement when they were led to believe that for the last four years, on an orthodox farming system, the farm had produced an average of 103,000 kgMS. Furthermore, these creditable production levels were achieved despite losing production because of re-grassing and despite adopting once a day milking at times of stress. It was only once the bank severely constrained their finances that the Routhans' production levels dropped markedly below those of an average dairy farmer. All this points to them having good farming skills and the capacity to achieve at least average, if not better than average results, had they not been aiming to achieve results which, as it transpired, were unrealistically high.

[228] However, there is some merit to the criticism that they unreasonably undertook capital expenditure which had no bearing on production or productivity. While the decision to re-sow pasture was taken on expert advice and appeared to be logically connected to improving production, it is not clear that much of the other capital expenditure was directly linked to improving production or, it if was, that an adequate cost-benefit analysis was undertaken given the Trust's cashflow difficulties because of

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[52] Albeit noting they had the additional support of the run-off block so could be expected to achieve higher than average production.

poor production levels. For example, while the construction of a feed pad and stand-off area would improve utilisation of supplementary feed, it was not clear to me that the Routhans had considered whether that lift in utilisation justified the cost of such a structure when they were cashflow contrained, nor was it clear why it was built to a 600 cow capacity. Similarly, while Mr Routhan has explained why the water system was upgraded (Mr Cook would let the herd into the creek to drink when the troughs could not keep up with what the cows needed), it is not clear why other capital works, such as on the laneways, fencing and farm buildings, were not deferred until the farm was producing at a capacity to meet the cost of this work. In my view these decisions exacerbated the financial decline of the farm and contributed to the losses suffered.

[229] That then leaves the quantification of the plaintiffs' contribution. In my view, having regard to the way losses are calculated by Mr Glennie, at least part of the loss of investment in capital works would not have been suffered if the plaintiffs had not invested in these until the farm was able to afford it. In my view, a fair measure of the plaintiffs' contribution to the losses suffered is set at 20 per cent. That means the amount I am prepared to award them in damages is $1,697,600.

Result

[230] I find that the amount to which the plaintiffs would have been entitled in damages but for their contributory negligence is $2,122,000. That is reduced by 20 per cent on account of contributory negligence. The plaintiffs are awarded the sum of $1,697,600 in damages.

Interest

[231] The Routhans also claimed interest on any damages awarded under the Interest On Money Claims Act 2016, from 3 November 2010 when the sale and purchase agreement became unconditional. However, in my view, interest can only be claimed from the date the loss crystallised, which is when the properties sold. I order interest to run on the judgment debt from the date on which the latest sale of the two properties became unconditional until the judgment debt is paid in full. Interest is to be calculated using the calculator maintained under s 13 Interest on Money Claims Act.

Costs

[232] Costs are reserved although, in the ordinary course, costs would follow the event on a 2B basis. If costs cannot be agreed, memoranda on costs are to be filed as follows:

(a) the plaintiffs' memorandum on costs is to be filed and served no later than 30 working days following receipt of this judgment;

(b) the defendant's memoranda is to be filed and served within 20 working days of receipt of the plaintiffs' memorandum;

(c) any memorandum in reply is to be filed and served within a further 10 working days;

[233] Costs will be determined on the papers unless I need to hear from counsel.

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