IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-88
[2020] NZHC 507

IN THE MATTER	of the sale and purchase of a farm at 910 Morangi Road, Oparau
BETWEEN	SHABOR LIMITED Plaintiff
AND	ROBERT GRAHAM First Defendant
	PINE RIDGE TRUSTEE COMPANY LIMITED Second Defendant
	SUCCESS REALTY LIMITED Third Defendant

Hearing: 9 to 20 September 2019

Counsel: KM Quinn and CB Pearce for plaintiff
DM O'Neill for first and second defendants

Judgment: 13 March 2020

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 13 March 2020 at 2pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Cargill Stent Law, Taupo (S Hickman)
Forgeson Law, Te Kuiti (D Forgeson)
Gilbert/Walker, Auckland (I Rosic)

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Introduction

[1] How many stock can a farm comfortably carry over the winter period? That is the key issue in this case.

[2] In 2014, the plaintiff (Shabor) bought a large sheep and beef farm (the Property) from the first and second defendants (who I will refer to collectively as "Mr Graham"). Shabor wanted to develop it into a deer farm. Shabor's principals, Mr Sharp and Mr Borland,[1] bought the Property after having seen marketing material which said it could "comfortably winter 7,500 plus Stock Units with capacity for more".[2] After inspecting the Property, Shabor submitted an unconditional tender for $5,250,110. Its tender was accepted and Shabor took possession in June 2014.

[3] Shortly after taking possession, however, Shabor formed the view that the Property fell well short of being able to comfortably carry 7,500 Stock Units over winter. Rather, its view was that the Property could only carry around 5,500 (at most) Stock Units. It says that since taking over the Property, it has implemented a professionally recommended fertilizer programme and made a range of other improvements which have gradually lifted the Property's carrying capacity. By the time of the hearing, however, and despite spending many hundreds of thousands of dollars, Shabor says the Property is still not up to a carrying capacity of 7,500 Stock Units.

[4] Shabor commenced these proceedings in 2017. It advances two causes of action against Mr Graham; the first (described by Mr Quinn, senior counsel for Shabor, as the primary claim) is that the Capacity Representation was a misrepresentation which induced Shabor to enter into the agreement for sale and purchase, thus entitling it to damages pursuant to s 35 of the Contract and Commercial Law Act 2017 (CCLA).[3] In its second cause of action, Shabor says that by making the Capacity Representation, Mr Graham engaged in misleading and deceptive conduct in trade and

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1 "Shabor" being a combination of Mr Sharp and Mr Borland's surnames.
2 I will refer to this as the "Capacity Representation".
3 Previously s 6 of the Contractual Remedies Act 1979.

thus acted in breach of the Fair Trading Act 1986. On each cause of action, Shabor seeks damages of around $1 million.

[5] Mr Graham denies Shabor's claims. He stands by his claim that the Property could comfortably winter 7,500 Stock Units. He says the Property traditionally carried that number of stock and in fact in some years, it carried many more. He also says Shabor failed to carry out proper due diligence on the Property, as would be expected of a reasonable purchaser making such a significant investment. Finally, he points to a "no-reliance" clause in the agreement for sale and purchase which he says is a complete answer to the claims in any event. And in relation to the damages claimed, he says that much of the claimed expenditure would have had to have been incurred by Shabor in any event, including in converting the Property to a deer farm.

[6] Finally by way of introduction, the third defendant was Success Realty Limited (trading as Bayleys). Mr Graham had also filed a cross-claim against Bayleys. However, by the time of the hearing before me, all claims against Bayleys had been resolved and it took no active role at the hearing. Some of the witnesses Bayleys had intended to call, however, were called by Shabor and Mr Graham.

Stock Units as a measure of carrying capacity

[7] Before turning to the factual background to the dispute, it is useful to explain what a "Stock Unit" is and how it is relevant to the Property's carrying capacity.

[8] The concept of a Stock Unit was originally developed at Lincoln College in the 1950s or 1960s. The experts called by both parties agreed that the standard accepted measure of a "Stock Unit" is one breeding ewe weighing 55 kilograms with one lamb. I will refer to this as the "base" Stock Unit. The experts also agreed that one base Stock Unit equates to 550 kilograms of dry matter eaten per annum. In other words, one breeding ewe weighing 55 kilograms with one lamb will eat 550 kilograms of dry matter per year. Thus, to carry one Stock Unit, and excluding the use of any supplementary feed, a property would need to grow at least 550 kilograms of dry matter per year.

[9] So far, the propositions are uncontentious. Where the experts disagreed, however, is how the base Stock Unit described in the preceding paragraph is translated, or converted, to apply to other types or weights of animals. For example, a heavier ewe with a higher lambing rate would be expected to eat more than 550 kilograms of dry matter per annum. So too, for example, would a cow. How are animals of that type and/or weight to be expressed in Stock Unit terms?

[10] The Lincoln University Farm Technical Manual was produced in evidence, which includes a Ministry of Agriculture and Fisheries (MAF) table of "Stock Unit Figures" for ewes and cows. The table for ewes centres on the base unit of one Stock Unit equalling a 55 kilogram ewe with one lamb (expressed as a lambing rate of 100 per cent), but also gives conversion rates for lighter and heavier ewes, with higher or lower lambing rates. So, for example, a 65 kilogram ewe with a lambing rate of 130 per cent is described as 1.25 Stock Units. A 400 kilogram cow with a 280 kilogram milk solid yield is described as 6.8 Stock Units. Other (non-MAF) conversion tables for a range of animals (such as deer, goats and horses) are also included in the Manual, some headed "other sources/common usage".

[11] But the fact the experts disagreed on whether there are "standard" Stock Unit rates for anything other than the base unit of a 55 kilogram ewe with one lamb demonstrates that the conversion tables included in the Lincoln Farm Technical Manual are not adopted "industry wide" for all purposes. For example, one expert said the MAF table was really only designed to be used for feed budgeting purposes, not for comparative assessments of carrying capacity. Another expert said there is relatively little variation in the Stock Unit conversion rates used for other animals or different weights of ewes, though some of the other experts disagreed, and said there can be a reasonable degree of variation. Another said that it is quite common to use the "1 ewe = 1 [Stock Unit] conversion for back of the envelope assessment of a property", however, when trying to accurately determine the carrying capacity of a property, "it is best practice to factor in animal live weight and performance". Another expert noted that because, other than the base Stock Unit definition, there is no single New Zealand convention for Stock Unit rates (but rather a number of published conventions with variable usage and adoption), the "limitations of the [Stock Unit]

measure means interpretation should be done cautiously and not in isolation of other data".

[12] It will nevertheless be apparent from the above discussion that there is at least a commonly accepted industry definition of the base Stock Unit, and that it can be converted into an objective measure, namely an amount of dry matter eaten each year. Given the clear purpose of the Capacity Representation was to convey useful and meaningful information to potential purchasers about the Property's carrying capacity, its reference to "Stock Units" must, objectively, be a reference to the base Stock Unit definition. Without being "tied" to this standard definition, the Capacity Representation would have been meaningless.

[13] I therefore proceed on the basis that the Capacity Representation conveyed that the Property could comfortably winter the equivalent of at least 7,500 55 kilogram ewes each with one lamb, or framed by reference to the amount of dry matter eaten, could produce the 4,125,000 kilograms of dry matter per annum needed to sustain that number of animals.[4] Ultimately, all experts agreed on this. They also agreed that across the Property's 810 "useable" or "effective" hectares, this equated to being able to grow 5,092 kilograms of dry matter per hectare per annum of pasture eaten.[5]

[14] Given this, I see the debate between the experts as to the conversion rates used to apply the base Stock Unit to other types of animals (or to lighter or heavier ewes) as somewhat of a distraction. An assessment of whether, at the time of the Capacity Representation, the Property could produce the agreed 4,125,000 kilograms of dry matter per annum turns predominantly on the Property's inherent physical qualities, and importantly, its soil quality and fertility.

[15] The assessment of a property's carrying capacity is also a different exercise to assessing, in Stock Unit terms, the number of *actual* stock on a property at any given time. I mention this now, as a lot of the factual evidence was directed to how many

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4 7,500 x 550 kilograms of dry matter per annum.

5 Expressed as pasture *grown*, Mr Beetham, one of the experts called by Shabor, said the Property would need to grow 6972 kgDM/ha/annum to support 7,500 Stock Units; Mr Thomson, an expert called by Mr Graham, said 6,394 kdDM/ha/annum. Mr Beetham and Mr Thomson agreed that the difference between their "pasture needing to be grown" figures is not material or significant.

stock Mr Graham carried on the Property in the years preceding the sale. Ultimately, however, I did not find this evidence directly relevant to or helpful in determining the Property's carrying capacity.

[16] This is because the actual number of stock on a property at any given time does not say anything, directly at least, about its inherent carrying capacity. For example, a farmer might have 500 stock on his or her property, but could nevertheless accommodate a great many more. The farmer might have simply decided to farm a much smaller number of animals than the property could comfortably accommodate. Conversely, a farm may have more stock on it than its inherent carrying capacity would ordinarily allow, but is "getting by" by using significant amounts of supplementary feed.

[17] I accept that evidence of actual stock numbers on the Property in earlier years, *if* equivalent to 7,500 Stock Units or more, might bolster or support the Capacity Representation.[6] But a number of factors in this case mean that little guidance can be drawn from such evidence:

(a) First, it quickly became clear during the hearing that it was difficult, if not impossible, to accurately calculate how many stock Mr Graham actually carried on the Property from year to year, or to make an accurate assessment of the animals' live weights (for Stock Unit conversion purposes).[7] Indeed, Mr Thomson, an expert called by Mr Graham, disavowed relying on actual stock numbers to assess carrying capacity, given the available information was not of good quality and complicated by Mr Graham's policy of livestock trading (meaning livestock numbers were variable).

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6 See for example, the analysis in *Undrill v Senior* HC Blenheim CP 9/94, 20 August 1997, also a case about an alleged misrepresentation of a farm's carrying capacity.

7 For example, Mr Graham acknowledged that "exact cow numbers are not easy to work out", and that on a farm of this size, "no-one's ever certain of exact stock numbers". He also accepted that there were some mistakes in the actual stock numbers as at 30 June 2013 listed in the Property Information Memorandum for the Property. Mr Graham also noted that he no longer had a number of farm diaries from over the years, which could have enabled a more accurate assessment to be made. And the farm manager, Mr Hughes, quite properly acknowledged that his actual stock number estimates were not accurate in a number of respects.

(b) Second, and as noted, there was genuine debate between the experts on how the base Stock Unit should be converted to different types and weights of animals in any event. That genuine debate confirms there simply isn't an industry accepted set of Stock Unit conversion rates for all purposes. Given this, it would be wrong for the Court to arbitrarily adopt one set of conversion rates over another.

(c) Third, the Property's capacity to carry stock in the past was influenced by the use of supplementary feed, which Mr Graham accepted he used from time to time.

(d) Finally, at the time of sale, the Property had experienced two years of serious drought and was significantly under fertilized. Because of this, even if it had carried higher stock numbers in the past, it was not disputed that its carrying capacity had reduced in more recent years.

[18] I have therefore not sought to determine the actual stock numbers carried on the Property at any given time, or to make an assessment of how those stock numbers would translate into Stock Units. Rather, I have focused on whether at the time of the sale, the Property was capable of producing the agreed 4,125,000 kilograms of dry matter per annum needed to sustain 7,500 Stock Units.

[19] I turn now to the factual background in more detail.

Factual background

Purchase and earlier steps taken to sell

[20] Mr Graham bought the Property (in two blocks) in 2000 and 2001. In October 2007, he entered into a listing agreement with Bayleys, and represented the Property's carrying capacity at that time to be around 8,500 Stock Units.

[21] In June 2008, Mr Graham entered into a conditional agreement for sale and purchase of the Property with Nugen Farms. Mr Allan Crafer represented Nugen Farms at the time, and provided a brief of evidence in these proceedings (which was

taken as read). Mr Crafar explained that Nugen Farms had offered to purchase the Property for $5.8 million. He said that he had over 50 years' experience in farming, and had purchased approximately 35 farms during that time. While Mr Crafar did not give evidence of any representations made about the Property's carrying capacity at that time, he said that adequate due diligence needs to be carried out in farm purchases of this kind.

[22] In the event, the sale to Nugen Farms did not proceed, as the purchaser did not satisfy a finance condition.

[23] Mr Graham again listed the Property for sale with Bayleys in 2012 (though it was not actively marketed at that time). The uncontested evidence was that Mr Graham had told a Mr Dawe of Bayleys that the Property had historically carried around 8,000 Stock Units.

Use of fertilizer and supplementary feed in the years preceding the sale

[24] As will become evident from the discussion of the expert evidence later in this judgment, a property's soil fertility (and therefore pasture production) is a key factor in assessing carrying capacity. In this context, Mr Graham accepted that in the years immediately preceding the sale to Shabor, he had significantly reduced the level of fertilizer put onto the Property, and had in fact put little to no phosphorus (an important nutrient) on the Property in the preceding two years. Indeed, Mr Matheson, an expert called by Mr Graham, confirmed that fertilizer application on the Property had been dropping over a period of five years prior to the sale. Mr Graham also accepted that he used supplementary feed in the years preceding the sale. This was also consistent with the evidence of Mr Hughes, who was the farm manager. For example, he said that over the 2012 and 2013 winters, supplementary feeds of various types were put out "in fairly large quantities". He said that in 2012, silage was fed out fairly steadily from 10 July to 1 November, and that hay was also fed out on a regular basis from June to the end of October 2013. Mr Hughes also said that palm kernel extract (PKE) was fed out in both years.

Steps to sell the Property in 2013/2014

[25] In late 2013, Mr Graham again looked to sell the Property. He met with a representative of Bayleys in December 2013, a Mr Stuart Gudsell. Mr Gudsell said that he had attended the Property for around two hours at that time, and from that meeting, he presented a marketing proposal to Mr Graham. Mr Gudsell said Mr Graham told him that the Property had carried over 8,000 Stock Units in previous years, and that while the exact numbers varied over time, the Property comfortably wintered 7,500 plus Stock Units. Mr Gudsell said this was again conveyed by Mr Graham at a further meeting between the two in January 2014.

[26] Mr Graham also provided Mr Gudsell with actual stock numbers on the Property as at 30 June 2013 (which were later reported in the marketing materials). Mr Gudsell carried out a "conversion" of those stock numbers to Stock Units, using conversion rates he said he had googled on the internet.[8] This produced a total Stock Unit number of 7,839. Being in line with the 7,500 Stock Unit figure given to him, Mr Gudsell said he had no reason to question the stock figures with Mr Graham. The 2013 stock numbers included, however, 650 fallow deer and feral goats. Mr Graham later told Mr Gudsell that he could not be sure about the number of deer and goats on the Property, and so the goat numbers were not included in the later marketing materials.[9]

[27] Mr Graham said that he had told Mr Gudsell on a number of occasions that the Property "traditionally" carried 7,500 Stock Units. He also accepted that, on further analysis in the context of these proceedings, the actual stock numbers for 2013 he gave to Mr Gudsell (and which were included in the marketing materials) were not accurate in all respects.

[28] But irrespective of the precise conversation between Mr Graham and Mr Gudsell about the Property's overall carrying capacity, the point remains that the Capacity Representation was ultimately framed as the Property comfortably wintering 7,500 plus Stock Units, with capacity for more. Mr Graham accepts that he approved

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8 He could not recall the particular table or publisher.

9 Taking *all* the deer and goats out of the equation, Mr Gudsell's conversion to Stock Units drops to 7,327 Stock Units.

the marketing materials in which the Capacity Representation featured. I return later in this judgment to Mr Graham's evidence of how he arrived at his figure of 7,500 Stock Units.[10]

[29] Mr Graham also said that Mr Gudsell asked him at this time if he made supplementary feed on the Property, to which he replied no. This was reflected in Mr Gudsell's notes in the listing agreement, which record "no supplement made". Mr Gudsell said he could not recall if Mr Graham told him whether he *used* supplementary feed on the Property, and accepted in cross examination that he had probably not asked Mr Graham about this. He said, however, that he did not believe Mr Graham told him that he *did* use supplement, as he would have noted that in the marketing materials. Mr Graham said he was not asked by anyone if he fed supplement on the Property, and he would have been quite open about that if he had been.

[30] The issue of whether supplement was used (rather than made) on the Property is relevant as Mr Sharp and Mr Borland said they asked Mr Gudsell if supplementary feed was used on the Property, and he had said no. Mr Sharp and Mr Borland's evidence on this was not seriously challenged. But I do not ascribe anything untoward or sinister in Mr Gudsell's response to Mr Sharp and Mr Borland's inquiry. Rather, it seems likely there had been some miscommunication or misunderstanding as between Mr Graham and Mr Gudsell on whether supplementary feed was *made* on the Property (which it was not), and whether supplementary feed *used* on the Property (which it was). In this context, there was no dispute that Mr Graham's machinery for feeding out was plainly visible during the Property's open homes, and indeed Mr Sharp and Mr Borland said they had seen it when they visited the Property in April 2014.

[31] The marketing materials for the Property included a Property Information Memorandum (PIM). The PIM included a variety of information about the Property, but of key relevance for present purposes, it included the Capacity Representation itself, four soil test results from February 2014, information on fertilizer application in prior years and actual stock numbers (by class) as at 30 June 2013.[11]

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10 See [77]–[82] below.
11 That is, those stock numbers discussed at [26] above.

[32] The Property went onto the market on 11 March 2014. It was advertised for sale by tender, with the tender closing at 4 pm on 10 April 2014. Open homes commenced on 18 March 2014.

Mr Borland and Mr Sharp become interested in the Property

[33] At around this time, Mr Borland and Mr Sharp were looking to purchase a large farm together, to develop as a deer farm. They had met in around 2000 through the deer industry.

[34] Mr Borland explained that he had been involved in deer farming for around 27 years, though for many years during that time, his main job continued to be as an engineer. He became a full time farmer in 2008 (when he purchased a 53 hectare ex-dairy farm which he converted to a deer farm). Prior to Shabor purchasing the Property, Mr Borland explained that he had not been involved in a farm as large as the Property.

[35] Mr Sharp had been farming on his own account since 1976, and until 1989, this mainly involved cattle and sheep. From 1989, Mr Sharp had focused on deer farming. At the time of the hearing before me, he was farming a 195 hectare farm at Whakamaru, comprising mainly deer but also with some cattle. Mr Borland said that he generally deferred to Mr Sharp on matters to do with cattle and sheep, and also in connection with fertilizer.

[36] Mr Borland and Mr Sharp had been looking for suitable properties for a little while, and by the time they looked at the Property, they had already viewed several other properties together. Three farms had been of particular interest. About 18 months prior to purchasing the Property, they had tendered for a property at Galatea, but had not been successful. They had also missed out on a second property, just northeast of Taupō. And shortly before purchasing the Property, they had bid on a property in Taranaki, but that bid had also not been accepted.

[37] Mr Sharp saw an advertisement for the Property on or around 1 April 2014 and was interested, as was Mr Borland. They both said they took note of the Capacity Representation, and the opportunity it presented for development. The Property's

location and contours were also of interest. Mr Sharp telephoned Mr Gudsell on 1 April, and was sent a copy of the PIM. Mr Sharp said he noticed the soil test results disclosed in the PIM, which showed below optimum fertilizer levels. He said that they "looked promising". In cross-examination, he clarified that he considered there was an opportunity to increase carrying capacity beyond 7,500 Stock Units by lifting the soil fertility levels.

[38] Mr Sharp and Mr Borland visited the Property on 7 April 2014. Their banker at ANZ, Mr Murphy, was with them. Their visit (being three days prior to the tender close date) was fairly late in the tender process. Mr Sharp agreed that he and Mr Borland were keen to get a farm, and knew they would have to move quickly if they were interested in the Property.

[39] Both Mr Sharp and Mr Borland said they discussed the Property with Mr Murphy on the drive out to it, and that any price they offered would be on a per Stock Unit basis. Mr Murphy gave them an indication of sale prices for farms in the area on a per Stock Unit basis, ranging from $500 to $1000 per Stock Unit.

[40] After arriving at the Property and exchanging some pleasantries with Mr Graham, Mr Borland and Mr Murphy went outside. Mr Sharp says that he stayed and kept chatting with Mr Graham, and asked him if he fed supplement out on the Property, to which Mr Graham replied no. Mr Graham denied that he had said no, or that Mr Sharp had even asked him the question. Mr Graham was adamant that had he been asked about supplement, he would have been quite open about it.

[41] I prefer Mr Graham's evidence on this point. Ultimately, there was no reason for Mr Graham to, in effect, straight out lie to Mr Sharp in response to a direct question on supplementary feed. This is particularly so given the equipment he used for feeding out was fully visible to potential purchasers (and indeed, as noted, was seen by both Mr Borland and Mr Sharp). Mr Graham was also quite open at the time about some dilapidated fences on the Property, pointing them out to Mr Sharp. In addition, and as discussed further below, Mr Borland and Mr Sharp did ask *Mr Gudsell* whether supplement was fed out on the Property. I consider it a reasonable possibility that

given the discussions took place more than five years ago, Mr Sharp has confused who he asked about supplementary feed.

[42] Mr Sharp, Mr Borland, Mr Gudsell and Mr Murphy then went on a tour of the Property. It took about two hours. Mr Borland and Mr Sharp accept they saw a hay mower and a bale feeder in the implements shed, but formed the view that neither appeared to have been used. They also accept they saw a few dilapidated fences.

[43] Mr Borland said that while on the tour, he asked Mr Gudsell if supplements were fed out on the Property. Mr Gudsell did not have any recollection of that discussion, but accepted that if he had been asked, he would have said no, given he was not aware of supplementary feed use at that time.

[44] Given the tight timeframe before the tender closed, Mr Borland and Mr Sharp said that they tried to get as much information as possible about the Property on their two hour visit. For example, Mr Borland said he made it clear that any tender they put in would be based around a price per Stock Unit, and therefore it was important the Stock Unit figures were accurate. He also said that Mr Gudsell assured them on multiple occasions that the farm "cruised" through winter on 7,500 Stock Units and had room for more. Mr Gudsell did not specifically recall these conversations, but denied he would use a word like "cruise". He accepted however, that if he had been asked about the carrying capacity, he would have reiterated 7,500 Stock Units, given that is the information he had been given by Mr Graham. Mr Murphy, in some notes made by him in early 2016 about the tour of the Property, said Mr Gudsell had reinforced the carrying capacity of 7,500 Stock Units.

[45] Given Mr Borland and Mr Sharp were both giving evidence more than five years after the event, I doubt they can accurately recall the exact words used during their discussions with Mr Gudsell. There is no contemporaneous record. I accept Mr Gudsell's evidence that "cruising" through winter is not a phrase he would ordinarily use. I accept, however, that Mr Borland and Mr Sharp may well have raised the carrying capacity point with Mr Gudsell, which is also consistent with Mr Murphy's notes (albeit written some two years after the event). But given the Capacity Representation itself is very clear on the Property's carrying capacity,

nothing particular turns on the precise content of Mr Borland and Mr Sharp's discussions with Mr Gudsell. As Mr Gudsell said, anything he had said about the Property's carrying capacity would have been consistent with the Capacity Representation.

Events after the visit on 7 April 2014

[46] After the tour, Mr Borland and Mr Sharp, together with Mr Murphy, visited a nearby café to discuss the Property. Mr Sharp and Mr Borland were very interested, and formulated a price based on 7,500 Stock Units multiplied by $700. The $700 figure was derived from the information Mr Murphy had provided on the way out to the Property about other farm sale prices. Mr Sharp and Mr Borland agreed to add a further $110 to their tender price, just in case other tenderers took a similar approach to calculating the price. Mr Sharp, Mr Borland and Mr Murphy then travelled to Bayleys' office in Hamilton to collect the tender documents, and copies were also emailed to them.

[47] Of relevance to issues discussed later in this judgment is that, as would be expected, the tender documents included the tender terms and conditions. These included "further condition" 27. That condition provided as follows:

> **Limitations of Liability**
>
> The Vendor does not warrant:
>
> 27.1 The accuracy of any matter, fact or statement in any report or other information on the property prepared or provided by the Vendor's [sic] or its Managers or Agents (including information contained in Schedules to this Agreement), any advertising of the sale of the property or any statement made except in relation to any specific warranty given in this Agreement or
>
> 27.2 Any other matter relating to the property or its use or nature or the state of the property in any respect other than expressly set out in this Agreement.
>
> 27.3 The Purchaser shall be deemed to have purchased the property acting solely in reliance on the Purchaser's own judgement and upon its own inspection of the property and all other information regarding the property, and not in reliance upon any representative [sic] or warranty made by the Vendor, the Vendor's Agent or Managers other than as expressly set out in this Agreement.

[48] Mr Quinn accepts the reference in cl 27.3 to "representative" is a typographical error and is to be read as "representation". The parties also agree that clause 27.3 ought to be interpreted as a 'stand-alone' clause (that is, it does not follow on from the opening words "The Vendor does not warrant…").

[49] Also forming part of the tender documents was a "memorandum to tenderers", which set out instructions for preparing and submitting a tender. These instructions included that tenderers needed to insert any special conditions or make any desired amendments, and that "tenders may be submitted subject to conditions you, the Tenderer, may wish to include under the Special Conditions of sale".

[50] A few days later, on 10 April 2014, Mr Borland and Mr Sharp visited their lawyer to discuss and finalise their tender. They made a number of handwritten edits to the "further conditions" section of the tender, including that Shabor could access the Property prior to settlement to apply fertilizer before winter. They also added a clause permitting Mr Graham to return to the Property to hunt for deer, as they knew he was a hunter and thought this might act as bit of a "sweetener". They also added some further chattels to the chattels list. Mr Sharp confirmed that their lawyer explained the "further conditions" to them, which included cl 27. Mr Sharp also accepted that before submitting their tender, they had an opportunity to delete cl 27, but chose not to do so. Once the documentation was finalised, they drove to Bayleys' office in Hamilton to submit the tender. Their tender was unconditional.

[51] I interpolate to note that Mr Gudsell, with 25 years' experience in rural real estate, stated that it was rare to receive an unconditional tender for a farm property. He said that in his experience, 90 per cent of tenders would be conditional on completion of due diligence. There was no particular challenge to this evidence (and Mr Gudsell was called by Shabor in any event).

[52] In the event, there were two tenders. Mr Sharp and Mr Borland were notified later on 10 April 2014 that they were the preferred tenderer. They were asked if they would increase their price but they made it clear they would not. After some further negotiations and amendments to the terms which are not relevant for present purposes, the tender agreement was confirmed as agreed and unconditional on 17 April 2014

(the Agreement). Settlement was to take place on 3 June 2014. On 8 May 2014, Mr Sharp and Mr Borland's lawyer notified Mr Graham's lawyer that Shabor had been nominated as purchaser under the Agreement.

[53] Mr Borland and Mr Sharp said they first started having concerns about the Property's true carrying capacity when they attended the Property in late May 2014 to observe the valuation of stock which Shabor had an option to purchase under the Agreement. Mr Sharp said the low number of animals on offer surprised him, as did the poor condition of some of them. He said "alarm bells" started to ring.

[54] The day before the scheduled settlement of 3 June 2014, Shabor's solicitors wrote to Mr Graham's solicitors raising Shabor's concerns about the Property's carrying capacity. The letter stated:

> Notwithstanding the provisions of Clause 27, our client relied on the representation from Bayleys, both in writing and verbally given to them, with regard to the stock carrying capacity of the farm. We attach the Bayleys summary which clearly sets out the farm comfortably winters 7500 plus stock units with capacity for more.
>
> Our client has reason to question that statement and has instructed us to reserve its rights with respect to the potential misrepresentation of the property. You will no doubt be familiar with a number of cases pertaining to misrepresentation around stock carrying capacities in the farming industry.
>
> Suffice to say our client has instructed us to settle in full but reserve its position in this regard and accordingly your client is put on notice of a potential claim.

[55] Mr Graham's solicitor replied later that day, stating that "[o]ur client advises":

> 1. He has in the past carried at least 7,500 stock units on the property.
>
> 2. With the drought conditions, a different fertilizer policy our client has utilized over the last couple of years, this has affected the carrying capacity.
>
> 3. Our client advised the Real Estate Agents the exact numbers of stock he was carrying and they prepared and presented the information in stock units.
>
> 4. Our client understands that there is a very wide variation as to how stock units are calculated.
>
> 5. We understand that your clients are capable experienced farmers and would have known the capabilities of the farm they intended to purchase.

[56] Mr Borland and Mr Sharp said that their concerns about the Property's true carrying capacity were confirmed after settlement, when they questioned Mr Hughes (who had stayed on at the Property) about how many stock had been run on it in the past. Mr Borland and Mr Sharp said Mr Hughes had shown them his diaries which showed lower stock numbers than represented, and also that supplementary feed had been fed out to cattle almost every day during winter.

[57] Mr Borland said that during the first winter (of 2014), they struggled to get through, despite running only about 4,500 to 5000 Stock Units.[12] They did not use any supplementary feed. They did, however, make two drops of fertilizer; one going into the winter (that is, prior to settlement in accordance with the access permitted under the Agreement) and one coming out of winter.

[58] Mr Borland and Mr Sharp also gave evidence about various steps taken in the ensuing years to improve the Property's carrying capacity. I discuss these steps later in this judgment, when addressing Shabor's damages claims.

[59] Shabor commenced these proceedings in March 2017.

The misrepresentation claim – elements

[60] The legal principles applying to a misrepresentation claim pursuant to s 35 of the CCLA are well settled. A plaintiff must demonstrate:[13]

(a) A representation as to a past or present fact that is false or misleading. The meaning of the words used, in their proper context, is the focus of the inquiry.

(b) That the representor intended that the representee would be induced to enter the contract.

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12 This again of course depends on the stock unit conversion rates used for anything other than a 55 kilogram ewe with one lamb.

13 For recent statements of the applicable principles, see *Magee v Mason* [2017] NZCA 502, (2017) NZCPR 902 and *Shen v Ossyanin* [2019] NZHC 135.

(c) That the representee relied on the representation when entering the contract and that such reliance was reasonable (in the sense discussed at [200]–[204] below).

(d) That the representee has suffered loss as a result, recoverable on the basis the representation is a term of the contract.

Is the Capacity Representation a representation as to a present or past fact?

[61] There is no doubt the Capacity Representation is a statement as to present fact. It is expressed in the present tense, and would have been reasonably understood as conveying information on the Property's (then) carrying capacity. The Property's carrying capacity at some undefined point in the past, or at some undefined point in the future, would have been meaningless information to a prospective purchaser. In this context, I also note the observations of Sim J, approved by the Privy Council in *Bisset v Wilkinson* (also a case regarding carrying capacity) that "[i]n ordinary circumstances, any statement made by an owner who has been occupying his own farm as to its carrying capacity would be regarded as a statement of fact."[14]

Was the Capacity Representation misleading?

Introduction

[62] Whether the Capacity Representation was misleading is obviously a key issue in this case. The following discussion of this issue is structured as follows:

(a) I first address two preliminary points concerning the proper interpretation of the Capacity Representation.

(b) I then summarise the evidence about the Property's soil fertility, and why that is relevant to carrying capacity.

(c) I then address Mr Graham's and each expert's evidence about the Property's carrying capacity.

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14 *Bisset v Wilkinson* [1927] AC 177 (PC) at 183–184.

(d) Finally, I set out my findings on the Property's carrying capacity, and whether the Capacity Representation was false or misleading.

Preliminary points on interpretation of Capacity Representation

[63] The first preliminary point is whether the Capacity Representation represents the Property's carrying capacity *without* the use of supplementary feed, or whether it factors in the use of such feed.

[64] In my view, the former must be the correct approach. If it were otherwise, the Capacity Representation would effectively be meaningless. Plainly the use of supplementary feed will affect how many stock a property can comfortably carry. In theory, the more money a farmer is prepared to spend on supplementary feed, the more stock his or her property will be able to carry, particularly through the winter months. What a prospective purchaser is interested in, however, is the inherent carrying capacity of a property, uninfluenced by what decisions any individual farmer might then make as to the use of supplementary feed.

[65] It is helpful to record at this point that in addition to the Capacity Representation, Shabor also pleaded a second alleged misrepresentation, namely that the Property's carrying capacity was achieved without supplementary feed.[15] But as I have found that "no use of supplementary feed" is inherent in the Capacity Representation itself, it is not necessary to address this second alleged misrepresentation separately.

[66] The second preliminary point is that the Capacity Representation was that the Property could comfortably winter 7,500 "plus" Stock Units. It is therefore not a precise number. But the use of the word "plus" conveys that the Property can comfortably winter *at least* 7,500 Stock Units. This is then reinforced by the words which immediately follow, namely "with capacity for more". It is not entirely clear what those additional words mean; for example, whether there is capacity for more with or without the use of supplementary feed, or with or without additional steps being taken and/or funds being expended to improve the Property's carrying capacity.

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15 Statement of Claim at [45(b)].

Nor is it clear how much "more" capacity is being suggested. But I am not required to determine these sorts of issues. This is because the key issue between the parties is whether the Property could comfortably winter even 7,500 Stock Units, that is, rather than some higher, unspecified number.

Importance of soil fertility, and phosphorus in particular

[67] As noted earlier, the experts generally agreed that a property's inherent carrying capacity is closely tied to its soil quality and thus the amount of grass and other dry matter it can grow.

[68] Shabor called Dr Antony Roberts, the Chief Scientific Officer at Ravensdown (an agricultural servicing co-operative). Dr Roberts has, among many other qualifications, a Doctor of Philosophy in Soil Science. There was no dispute that he is a, if not the, pre-eminent soil scientist in New Zealand. His evidence was not seriously challenged.

[69] Dr Roberts confirmed that phosphorus in particular is an essential nutrient for both plant and animal development, and if soil is deficient in this nutrient, plaints will not grow to their maximum capacity. He stated that in New Zealand, "[phosphorous] is the driver to basically build up your soil and nitrogen pool to maximise as much as possible your pasture production". Dr Roberts also explained that phosphorus is the most expensive nutrient per kilogram that farmers generally have to apply.

Fertility levels at the Property up to the time of sale

[70] Dr Roberts stated that for the soil type seen at the Property,[16] the optimum phosphorous levels would have been 20 to 30 micrograms per millilitre.

[71] Soil test results (three samples) for the Property in 2000 were produced in evidence, which recorded phosphorus levels of 3, 4 and 2 micrograms per millilitre respectively.[17] Mr Graham accepted these were "very low" levels, and well below the optimal range. Dr Roberts described them as "extremely low".

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16 Mairoa Ash.

17 This testing is commonly referred to as the "Olsen P" test, or "Olsen P" levels.

[72] Soil test results from the Property taken in February 2014, so reasonably proximate to the sale, were also produced in evidence. These test results were also set out in the PIM. They showed phosphorus levels from four different sites around the Property, with recorded Olsen P levels of 16 (location = Calf); 10 (location = Mid pig); 9 (location = T Flat 2); and 9 (location = Sheep 1), with a resulting average of 11. Mr Borland and Mr Sharp were therefore aware of these results prior to purchasing the Property.

[73] In his written report, Dr Roberts described four soil samples for a Property of this size as "somewhat inadequate," though in his evidence-in-chief, added that "this is putting it mildly". In cross-examination, he also noted that having seen a reference to only four soil samples for a Property of some 810 effective hectares, his first thought would have been that he needed to get more information about fertilizer history.[18] He agreed that "any farmer worth their salt would probably think to himself, [the test results] were low".

[74] Dr Roberts also noted that the samples were taken from a drought year and during the summer period, which is not recommended, as the soil is very dry and can artificially elevate test results, including in relation to Olsen P levels. Dr Roberts considered the Olsen P result for the "Calf" location of 16 to be particularly unreliable, given it was significantly lower in later samples taken (in July 2014 and August 2015). He considered this was likely because the February 2014 sample was taken during a drought, when the later samples were taken at more optimum times.

[75] 12 soil samples were taken from the Property shortly after settlement of the sale, in July 2014. One of these samples recorded an Olsen P level of 6.1. The remainder ranged from 5.2 to 5.9, producing an average of 6. Overall, Dr Roberts agreed with a further expert called by Shabor, Mr McLaughlin, that there was "very low P fertility of the farm". Dr Roberts stated that modelling he had carried out showed that with an Olsen P level of only 6, "the farm would be producing around 71 per cent relative yield".

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[18] He acknowledged, however, that farmers may well think the number of soil samples was adequate.

[76] Later soil samples taken from the Property in August 2015 (11 samples) and August 2016 (11 samples) produced average Olsen P levels of 8 and 11 respectively.[19] Again, therefore, while generally tracking upwards, the Olsen P levels remained well below the optimum range.

Mr Graham's evidence as to carrying capacity

[77] As noted earlier, Mr Graham purchased the Property (then in two blocks) in 2000 and 2001. Accordingly, by the time of the Capacity Representation, he had been farming the Property for some 14 years.

[78] Mr Graham's evidence was that the Capacity Representation was based on his experience of what the Property had been able to and could carry. He emphasised that he had communicated to Mr Gudsell that the Property had "traditionally" carried 7,500 Stock Units. Mr Graham's evidence was also that the actual number of stock on the Property in earlier years had often been materially higher than this.

[79] The crux of Mr Graham's evidence was that he estimated or believed, based on his own assessment of stock numbers, that the Property had carried around 8,000 to 8,500 Stock Units over the time he had farmed it. This assessment included "working backwards" from carcass weights for ewes to live weights, to arrive at an average live weight of 65 kilograms.

[80] On the basis that the Property had in the past carried around 8,000 to 8,500 Stock Units, but taking into account the droughts in the two seasons prior to the sale, coupled with a "new" fertilizer policy,[20] Mr Graham said he knew in early 2014 that the carrying capacity must have dropped back somewhat. He accepted in cross-examination that by 2014, the Property was "materially" short of fertilizer, and that in hindsight, he should have spent "a couple of hundred thousand" on fertilizer in April 2014. When considering the Property's carrying capacity for the purposes of the marketing sales campaign, he accordingly brought the Stock Units down from what

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19 This overall "lift" reflected the steps taken by Shabor after acquiring the Property to apply phosphorous fertilizer in an effort to lift soil fertility.

20 That is, that he had added "hardly any" phosphorus to the Property over the last couple of years, instead experimenting with biological fertilizer.

he thought it had been carrying a few years prior, to the stated number of 7,500. In cross examination, the following exchange took place with him, in which he accepted, given the points just discussed, there may have been some doubt about the figure of 7,500:

> Q. Well why is that relevant? Why are you telling us that?
>
> A. That, that is because…they could look at that and they could see 2013, 11' 12', if they bothered to ask me, in fact even if you go back to 2002, this is how much was carried. They could look at the conditions of the pasture, they could look at the fertiliser use over the previous two years, they could see that no fertiliser had been put on that year, they could see, for some strange reason they never requested that fertiliser was put on by me, which is quite a common practice, they could see that, yes, the fertiliser was going down, **so there was doubt about whether it would carry 7500 in 2014.**
>
> Q. Doubt in whose mind, Mr Graham?
>
> A. As I've said before –
>
> Q. Any doubt in your mind?
>
> …
>
> A. **There would've been a little bit of doubt**, but if I hadn't, hadn't had a farm on the market and was not selling it and carried on, there would've been, there would've been no doubt at all.
>
> [Emphasis added]

[81] Mr Graham also accepted in response to a question from me that he had included the 7,500 figure in the sales materials without specifically working out the Stock Unit carrying capacity, but simply knowing it was something less than he had traditionally carried.

[82] Mr Dawe, a manager at Bayleys, gave evidence that when the dispute first arose, Mr Graham had discussed it with him and said words to the effect that the carrying capacity of the Property at the time of sale was 6,500 Stock Units. But Mr Graham's evidence, which I accept, was that this was a reference to the *actual* number of Stock Units he thought he had on the farm at the time of sale, not its inherent carrying capacity. Mr Graham's evidence is consistent with a contemporaneous email sent by Mr Dawe to others within Bayleys at the time, which recorded that:

> When talking with [Mr Graham] before he said that **based on the stock figures on the farm when the property was sold** it was approximately 6500

> stock units at that time in a drought but he had farmed the property with higher stock numbers to be around or above 7500.
>
> [Emphasis added]

Experts' evidence on carrying capacity – introduction

[83] Before addressing each of the experts called to give evidence about the Property's carrying capacity, it is appropriate to comment on their qualifications and expertise.

[84] In short, there was no challenge to any of the experts' qualifications. All are highly qualified in their respective fields, and most have had lengthy careers related to farming and rural business. I found all the experts to be credible and reliable. The overall content of their evidence was helpful.

[85] In addition, there was ultimately a fair degree of agreement between them. For example, most (if not all) agreed that matters such as a property's contour and pasture production will be very important to its carrying capacity. All agreed with the base Stock Unit definition, discussed at [8] above. And all agreed that the Property's carrying capacity had been declining in the period immediately prior to sale. Finally, those experts who were willing to put a number on the Property's carrying capacity in June 2014 all assessed it as something *less* than 7,500 Stock Units.

[86] It was also very apparent from the experts' collective evidence that assessment of a property's carrying capacity, particularly when carried out a number of years after the event, is quite an imprecise exercise – whether based on soil fertility and pasture production, or drawn from evidence of actual stock numbers historically carried on a property.

Mr McLaughlin's evidence as to carrying capacity

[87] Shabor called Mr Avon McLaughlin, a valuer and farm management consultant with Veitch Morrison. Mr McLaughlin has had a long career in the rural sector, ranging from working as a farm appraiser for the Rural Bank, a share-milker, a self-employed farm consultant, a rural real estate agent and farm valuer. While Mr McLaughlin's evidence focused to a significant extent on valuation of the Property

(relevant to Shabor's damages claim), he also expressed his opinion as to the Property's carrying capacity.

[88] Mr McLaughlin first converted the known *actual* stock on the Property at settlement (that is, the stock Shabor bought from Mr Graham pursuant to the option to purchase in the Agreement) to Stock Units, as well as the actual stock numbers listed the PIM as at 30 June 2013. The former produced a total of 5,528 Stock Units, or 6.82 Stock Units per effective hectare. The latter produced a total of 6,839 Stock Units, or 8.44 Stock Units per effective hectare.[21]

[89] Mr McLaughlin did not arrive at these Stock Unit numbers by using the conversion ratios contained in the Lincoln Farm Manual discussed earlier.[22] In particular, he considered the MAF table for ewes and cows[23] was designed for feed budgeting purposes only. His conversion rates were drawn from what he referred to as "industry publications" (such as the "farm budget manuals" from Lincoln), though he was not particularly clear on the actual publication he had used.

[90] Mr McLaughlin also considered soil fertility and pasture production, noting that on the basis of the soil samples he reviewed, the Property's pasture production was restricted. He said that even with an Olsen P level of 10, pasture productivity would only be at around 67 per cent of relative yield (in other words, expected pasture production was only two thirds of the potential).[24]

[91] Mr McLaughlin gave his opinion that the Capacity Representation equated to a carrying capacity of 9.26 Stock Units per effective hectare,[25] and that he had seen "no evidence to support [this] claim". Mr McLaughlin said that "I don't believe the fertility levels (Olsen P) have ever been in the medium range in the past that would be a prerequisite to achieve the above stocking rate of 9.26 SU/eff ha." Based on his review of the Property and its soil condition, his view in July 2016 was that its carrying capacity at the time of sale was between 5,265 and 5,670 Stock Units.

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21 As discussed below, this figure was then used by Dr Roberts in his report in relation to the Property's soil fertility and carrying capacity.
22 See [10] above.
23 Discussed at [11] above.
24 Compared to Dr Roberts' estimate of 71 per cent when Olsen P was at 6.
25 7,500 Stock Units divided by 810 effective hectares.

[92] Mr McLaughlin said the following in relation to the above conclusions:

> In reaching the above conclusions, I took into consideration the information I had been given about the actual stock numbers that had been farmed on the Property in the past. However, **I considered that it is important to assess a farm's carrying capacity on a more objective basis that primarily reflects the physical resources of a farm,** rather than the skill or farming policies of the individual farmer.
>
> …
>
> In assessing the average efficient carrying capacity of the Property, I have considered not only the stock numbers that had previously been farmed, but also the February 2014 soil test results, the history of fertilizer application, comparison to the Beef and Lamb New Zealand economic survey data from comparable farms in the region, and my general knowledge of the district from having worked there (albeit in the 1970s).
>
> [Emphasis added]

[93] Mr McLaughlin also said that in his opinion, the maximum inherent carrying capacity of the Property was capped at 7,290 Stock Units.

Dr Roberts' evidence as to carrying capacity

[94] Dr Roberts agreed with Mr McLaughlin that the represented carrying capacity of 7,500 Stock Units, relative to the size of the Property and its "usable" areas, equated to 9.26 Stock Units per effective hectare. Dr Roberts also agreed with Mr McLaughlin that given the low levels of phosphorus shown in the various test results discussed above, it was simply not possible for the Property to carry 7,500 Stock Units at the time of sale. The following exchange took place between the Court and Dr Roberts:

> Q. And you say, and so that is ignoring the numbers that we have got in the Veitch report and you say that a stocking rate of 9.6, 9.26 stock units per hectare could not be carried at this level of P fertility. What level of P fertility are you referring to, is that the middle column, am I right, the Olsen P?
>
> A. Yes, the July 2014, sorry the Olsen P levels, yes, but the ones taken from July 2014.
>
> Q. And so, putting aside what actual stock numbers might have been on this farm at any one time, am I right, are you saying there that with that Olsen P level, you could not support 7500?
>
> A. Can't possibly grow enough pasture, you can't possibly grow, I don't believe, in my opinion and my experience on those sort of classes of farms and soils, that you could support that stocking rate.
>
> Q. On grass alone?

A. Yes, absolutely, on pasture.

Q. And so that is assuming there is no supplementary feed or anything?

A. So the modelling that I did contains nothing about supplementary.

[95] Dr Roberts also estimated that to support the number of stock purchased by Shabor at settlement (equating to 5,528 Stock Units, or 6.8 Stock Units per effective hectare)[26], the Property would have needed to grow around 5330 kilograms of dry matter per effective hectare per year (kgDM/ha/annum).

[96] On the basis of the actual Stock Units represented in the PIM as at 30 June 2013 (namely around 6,839,[27] which Dr Roberts agreed equates to 8.44 Stock Units per effective hectare), Dr Roberts said there would have needed to be a significant lift in pasture growth to accommodate even those numbers. Based on model analysis carried out by him, he estimated that a 22 per cent increase in pasture grown (and eaten) would have been needed to sustain this level of Stock Units.

[97] Dr Roberts then used the "econometric nutrient recommendation model" developed by AgResearch to estimate the phosphorus input required to raise Olsen P levels high enough to sustain a 22 per cent increase in pasture production. That model demonstrated that raising Olsen P levels to 18 would sustain a 23 per cent increase in pasture growth, and that to achieve that, a capital application of 178 kilograms of phosphorus per hectare would have been needed in 2014 and 2015 (together with 38 kilograms per hectare of maintenance fertiliser each year). Dr Roberts estimated the cost of lifting the Olsen P levels to 18 to be $638,958.[28]

[98] That assessment was based on lifting pasture production to accommodate 8.44 Stock Units per effective hectare, rather than 9.26 Stock Units per effective hectare (based on the total 7,500 Stock Units as per the Capacity Representation). Dr Roberts made the obvious point that an even greater lift in pasture production would have been required to support that higher number of Stock Units, though did not specify what this might be (or what it would cost).

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26 Drawn from Mr McLaughlin's evidence and adopted conversion ratios (see [88] above).

27 Again, drawn from Mr McLaughlin's evidence.

28 It will be recalled that even Mr Graham accepted that, in hindsight, he should have spent "a couple of hundred thousand" on fertilizer in April 2014; see [80] above.

Mr Beetham's evidence as to carrying capacity

[99] Shabor also called Mr Richmond Beetham, an agribusiness consultant. Mr Beetham grew up on a sheep and beef farm, and currently owns a 410 hectare sheep and beef farm. Mr Beetham has worked for Balance Agri-Nutrients as a technical field representative, as an extension manager and then economic service manager at Beef + Lamb New Zealand, and more recently, as an agribusiness consultant with BakerAg.

[100] Mr Beetham generally explained the Stock Unit system and carrying capacity, the relevance of the soil fertility reports in relation to the Property and his view that it was unable to carry 7,500 Stock Units at the time of sale. Mr Beetham also addressed the steps needed (and associated costs) to bring the Property up to a carrying capacity of 7,500.

[101] Mr Beetham produced a schedule of conversion rates to apply the base Stock Unit to other animals and types of sheep. This schedule was taken from the Beef + Lamb New Zealand sheep and beef farm survey, which Mr Beetham described as "one of the leading and largest standardised data set that allows farmers and industry to compare financial and physical performance across similar farms across the country." Nevertheless, given the genuine debate between the experts as to whether there is a "standard" schedule of Stock Unit rates for different animals and weights, it is evident that the Beef + Lamb schedule is not such an industry standard. Mr Beetham also produced a table of conversion rates used in a BakerAg database called "Financial Analysis Benchmarking", contributed to by 160 farmers. Some of those conversion rates are different to the Beef + Lamb conversion rates, again reinforcing there is no settled "industry standard".[29]

[102] Mr Beetham noted that after acquiring the Property, Shabor carried the equivalent (using his adopted stock conversion rates) of 4771 Stock Units on the

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[29] The experts met prior to the hearing and produced a (helpful) joint report. Seeing that there was disagreement on the Stock Unit conversion rates, Mr Beetham contacted rural professionals across a range of disciplines and asked for the Stock Unit conversion rates they used. He then appended a resulting table to the joint report, which showed a maximum variance of four per cent across the rates adopted. I have declined to take this table into account. Mr O'Neill, counsel for Mr Graham, objected to it on the basis of hearsay, and I agree with that characterisation. It was advanced for the truth of its contents, yet none of the other rural professionals were called to give evidence.

Property over the winter of 2014, with no supplementary feed. He noted that over the successive years, the number of Stock Units carried by Shabor gradually increased to 5,841 (2015); 5,418 (2016); 6,068 (2017); and 6448 Stock Units (2018). To carry these numbers, Mr Beetham noted that four tonnes of PKE had been used to finish animals, and hay was also fed out in the winter of 2015. Silage and hay have also been made on the Property and fed out since 2015.

[103] Mr Beetham then turned to the soil fertility and pasture yield. He stated that "ultimately the carrying capacity of a farm is largely determined by the expected pasture production". He noted the "very low" Olsen P test results from February and July 2014, observing that "phosphorous is one of the main nutrients that when deficient will impact the quantity and quality of pasture grown and the resulting amount of stock that can be carried". These comments are consistent with Dr Roberts' and Mr McLaughlin's evidence. Mr Beetham agreed with Mr McLaughlin and Dr Roberts that at the time of sale, the Property would have been producing around 67 to 71 per cent of total potential yield.

[104] Mr Beetham them assessed the carrying capacity of the Property using a computer-based modelling programme called "Farmax". Mr Beetham said that with good subdivision and soil fertility at the Property at economic optimum levels, its *potential* pasture production was estimated at between 6800 to 7500 kgDM/ha/annum.[30]

[105] Relying on Dr Roberts' assessment that with an average Olsen P of 6, the Property would have been producing only around 71% relative yield at takeover, Mr Beetham estimated a range of predicted pasture production in June 2014 of 4828 to 5325 kgDM/ha/annum. Adopting the higher figure, and applying the Farmax modelling to it, Mr Beetham concluded that 5325 kgDM/ha/annum would only support around 5,500 Stock Units (or 6.8 Stock Units per hectare). He noted that this was comparable to the outcome of Dr Roberts' modelling on "Overseer", namely that the Property would have to grow 5330 kgDM/ha/annum to support 5,528 Stock

[30] Mr Beetham said this was comparable to Mr Thompson's estimate of 7422 kgDM/ha/annum, based on what Mr Thompson considered to be a comparable property (Whatawhata), which had an average Olsen P level of 15.8.

Units.[31] Mr Beetham stated that the figure of 5,500 Stock Units broadly lined up with the stock numbers Shabor was actually able to winter in the first three years after purchase. He therefore gave an overall view that the Property's carrying capacity at sale was somewhere between 5,300 and 5,500 Stock Units.

[106] By comparison with Beef + Lamb data, Mr Beetham said that his estimated carrying capacity meant that the Property's actual gross revenue per Stock Unit was consistent with similar data reported by Beef + Lamb New Zealand for comparable farms, whereas the higher Stock Unit numbers represented would mean the Property was performing with much lower than average gross farm revenue per Stock Unit. Mr Beetham said this ought not to be the case, given the Property operated at better levels of production per head than an average comparable farm (the Property having a five-year average lambing rate of 131 per cent versus 124.6 per cent on comparable farms). Mr Beetham said this further supported a carrying capacity nearer his assessment, rather than 7,500 Stock Units.

[107] Finally, Mr Beetham estimated that there would have needed to be about a 30 per cent increase in annual pasture production (to 6972 kgDM/ha/annum, being pasture grown, not eaten) to support 7,500 Stock Units on the Property in 2014.[32] He concluded that as of June 2019, the Property's carrying capacity had been lifted to between 6,000 and 6,500 Stock Units.

Mr Thomson's evidence as to carrying capacity

[108] Mr Thomson was called by Mr Graham. Mr Thomson has been a farm management consultant in various roles for 25 years. He has worked in research and monitoring of sheep and beef for MAF, as a self-employed farm consultant (specialising in beef and sheep breeding and management), as the General Manager and Director of the NZ Beef Improvement Group Ltd, as a project manager for a large beef processor and exporter, and is currently an agricultural consultant with AgFirst in Waikato.

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31 See [95] above for Dr Roberts' evidence.
32 See fn 31 above, where this figure is comparable to Mr Thomson's.

[109] Mr Thomson's evidence relied very heavily on his assessment of what he considered to be a comparable property some 40 kilometres from the Property named "Whatawhata". He considered it had comparable contour, aspect and soil fertility to the Property. In relation to the latter, Whatawhata had an average Olsen P level of 15.8, which he viewed as comparable to the reading of 16 for "calf paddock" from the February 2014 soil samples. Based on the contour of the Property, Mr Thomson assessed the result for the "calf paddock" was representative of around one third of the Property, and thus one third of the Property had good soil fertility.

[110] On this basis, Mr Thomson assessed that, in June 2014:

(a) The weighted average pasture *production* at the Property in a normal rainfall year would be around 7,400 kgDM per annum.

(b) When adjusted for pasture *utilisation* at 80 per cent of the total amount available, this would lead to around 6,000 kgDM per annum available for feed.

(c) Based on that level of available feed, and one Stock Unit requiring 550 kgDM per annum, the Property could potentially support up to 8,700 Stock Units.

[111] In his report, Mr Thomson accordingly stated that the Capacity Representation was "conservative based on the assumptions made around pasture utilisation, soil fertility and rainfall."

[112] In cross-examination, however, Mr Thomson accepted that the July 2014 soil samples provided a "better and much more useful data set" for assessing the Property's soil fertility. It became apparent that Mr Thomson had not taken those results into account, given he was seeking to assess the Property's carrying potential capacity at the time of sale, and those results were shortly after the sale. There is, however, a distinction between information *a purchaser* could take into account when assessing the purchase, and what an expert can legitimately take into account when assessing *actual* carrying capacity in June 2014 (an objective exercise). It would not have been

objectionable for Mr Thomson to have taken these results into account when carrying out his assessment.

[113] Mr Matheson (another expert called by Mr Graham), agreed that Whatawhata would be a useful comparator, *assuming* the soil fertility results of February 2014 were an accurate representation of the Property's overall fertility at the time. Given the later test results showed, however, that the result of 16 for "calf paddock" was not accurate, Mr Matheson said Whatawhata would only be a useful comparator "once the Property's soil fertility was improved to similar levels as at Whatawhata". Similarly, Dr Roberts did not consider the Whatawhata property (on which he had carried out research) to be comparable to the Property. Dr Roberts' evidence was not challenged on this point.

[114] Given Mr Thomson had not had regard to the post-sale soil fertility results, he agreed that "hindsight is a great thing, and if you had the information at the outset, you would've come to a much different conclusion." He accepted that in light of the later soil test results, the February 2014 result for "calf paddock" (of 16) was almost certainly an erroneous result.

[115] It also became apparent that Mr Thomson had not in fact assessed the Property's carrying capacity in 2014, but rather had approached the issue of what the Property's carrying capacity *could potentially* be in the future; in other words, whether it could ultimately "get there". The following related exchange took place between Mr Quinn and Mr Thomson:

> Q. Right, thank you. If you had a client come to you now, knowing all that you know, let me put this question in exactly the right way, assume we're back in the middle of 2014, but you know now, well you know at that point what we now know with all the benefit of the hindsight that we have, and a client comes to you and says "I'm looking at buying this farm at Moerangi Road", would you be advising that client, with the benefit of all of this knowledge you have about soil fertility, would you be advising that client to run 7500 stock units on that property in 2014?
>
> A. Probably not.
>
> Q. And why not?
>
> A. Well because I know that to raise your fertility levels to optimum levels as Mr Beetham has pointed out in his evidence, it costs a lot of money, and so in

> the due diligence process, one would've calculated that, but one would've also taken a conservative view to stocking, and when one's purchasing property, that I am satisfied the position which you come. You don't take an inflated view of ideas, **I mean we're asked about what the potential was, not what it was going to carry and I think we need to come back to that point, we're talking about what in your opinion is the potential stocking rate for this farm, and on the basis of the information I had at the time, I came to the conclusion that the farm could carry 7500 stock units as a potential.**
>
> Q. It could get there?
>
> A. Yes.
>
> Q. That's the exercise that the plaintiffs are engaged in at the moment isn't it?
>
> A. Yes.
>
> Q. They're trying to lift the fertility up to a level where it would support 7500 stock units?
>
> A. Correct.
>
> [Emphasis added]

[116] Mr Thomson's evidence was accordingly consistent with the Property's carrying capacity at June 2014 being something *less* than 7,500 Stock Units.

Mr Miller's evidence as to carrying capacity

[117] Mr Graham also called David Miller to provide an opinion on the Property's carrying capacity at June 2014. Mr Miller had spent several years with the Livestock Improvement Corporation, as a consulting officer and then senior consulting officer. He was also employed by Genetic Technologies providing management input to farmers and consultants across the North Island. In more recent years, he has been employed as General Manager of Extension at DairyNZ and from 2009, contracted to AgFirst Waikato as a senior farm management consultant.

[118] Mr Miller said that he had been engaged by Mr Graham to "calculate the stock units he carried on the property based on stock numbers that were supplied and verified by him". Mr Miller's assessment was accordingly dependant on the accuracy of the underlying stock numbers supplied by Mr Graham.

[119] Mr Miller agreed with the "base" Stock Unit described earlier in this judgment. For more accurate assessments, however, he used the Lincoln Farm Manual tables,

which are dependant on an assessment of stock live weight. Mr Miller had assessed live weight of stock on Mr Graham's farm by "reverse engineering" from carcass weights, using a percentage of 40 per cent. He accepted in cross-examination, however, that an MPI research paper on assessing live weights noted the percentage then used was 43 per cent but the research paper was advocating for a percentage of 40 per cent, and stated the conversion factor could range from 36 per cent to 47 per cent. Mr Miller agreed that it would make an "enormous difference" to the live weight assessment which end of that scale was used.

[120] Mr Miller stated that based on information provided by Mr Graham, he had been able to assess that in excess of 7,500 Stock Units were run on the Property through the 2006, 2007, 2008, 2010, 2011 and 2013 years. He said that Stock Units were at or below 7,500 in the 2009, 2012 and 2014 years. Mr Miller said the lower stock numbers in the latter years reflected a change in farming practice (the cattle to sheep ratio changing) and the impact of the 2013 and 2014 droughts.

[121] Based on these Stock Unit numbers, Mr Miller initially stated that they placed Mr Graham's gross farm revenue per Stock Unit in line with Beef + Lamb data for the comparable farm class. However, after discussing this topic with Mr Beetham, Mr Miller agreed Mr Beetham's approach to the Beef + Lamb data was more accurate, and that Mr Graham's gross farm revenue was below the Beef + Lamb average. Mr Miller said this was consistent with Mr Graham running higher stock numbers with lower performance. He also noted that the assessment based on Mr Beetham's numbers indicated a per stock unit performance well above the top quintile in the Beef + Lamb survey.

[122] In the joint experts' report, Mr Miller stated:

> [The figures are] symptomatic of a farm operating at the higher end of an appropriate stocking rate. Describing a farm as carrying 7,500 SU makes no comment about how well or otherwise those stock are being farmed.

[123] In this context, however, it is important to recall that the Capacity Representation was that 7,500 Stock Units could be "comfortably" wintered, which would not convey that capacity was at the higher end of an appropriate rate, or perhaps more colloquially, "stretched".

[124] Like a number of the other experts, Mr Miller considered Shabor should have carried out further due diligence before purchasing the Property. This in part stemmed from his view that the Stock Unit system is a "relatively weak methodology for calculating farm performance". Mr Miller stated:

> In Mr Graham's situation **with the stock number provided** there could be a difference of 1500 in the stock unit calculations derived by different people based on the assumptions they had to make.
>
> [Emphasis added]

[125] Mr Miller also addressed the 2013 and 2014 droughts, and agreed that they would have led to lower stock numbers being carried and higher use of supplementary feed.

[126] Mr Miller agreed with Mr Beetham's methodology for assessing the cost of additional fertilizer to lift Olsen P levels to an average of 18. Mr Miller also commented on the Farmax model used by Mr Beetham, noting that he (that is, Mr Miller) also used it "extensively" in his farm consulting business.

[127] In his initial report, Mr Miller did not provide an assessment of what he considered to be the Property's carrying capacity as at June 2014. In the joint experts' report, however, he stated:

> [G]iven the historic numbers of animals carried on the property and considering the less than maintenance fertilizer applied in the two years prior to sale, under Mr Graham's farming style the property would have carried 6,500 – 7,000 stock units through the 2014 winter, assuming the property had recovered from the drought during the autumn. Applying less than maintenance fertilizer does not have an immediate impact on pasture production. Impacts become more pronounced 3 to 4 years post the reduced fertilizer application. This case is confounded by a significant difference in farming philosophy. Mr Graham ran a high stocking rate/lower animal performance regime. It appears Shabor favour a lower stocking rate/higher level of animal performance.

[128] The following observation may be made about this evidence:

(a) First as noted, the assessment is dependant on an accurate assessment of stock carried in prior years, which was accepted at the hearing not to be possible.

(b) Second, even Mr Miller's evidence was that the actual carrying capacity at June 2014 was lower than represented.

(c) Third, the assessment is based on an assumption that the Property had recovered from the drought. There was no particular evidence directed to this, but I note Mr Graham's acceptance that "in hindsight", he should have spent "a couple of hundred thousand" on fertilizer in April 2014.

(d) Finally, Mr Graham's "farming policy" of high stock numbers with lower animal performance is, in my view, inconsistent with the notion of the Property "comfortably" wintering 7,500 plus Stock Units.

Mr Matheson's evidence as to carrying capacity

[129] Mr Matheson was also called by Mr Graham. He was originally employed by ANZ and the National Bank of New Zealand as an interest rate trader. He later obtained a Bachelor of Applied Science (Rural Valuation and Management), and an Advanced Certificate in Sustainable Nutrient Management in New Zealand Agriculture from Massey University. Since 2006, he has been an employee of Perrin Ag Consultants Ltd, and since 2008, has also been a director. His area of expertise is agricultural investment, financial analysis and modelling, profitable nutrient management and farm business management.

[130] Mr Matheson stated that carrying capacity is essentially determined by two main factors, being the amount of pasture inherently able to be grown on a property (primarily between March and October), and the capacity/capability of the farmer to utilise pasture growth. The first factor is clearly an objective matter; the second subjective and dependant on steps taken by an individual farmer.

[131] As to the first factor, Mr Matheson's view was that because of the variables that go into pasture growth, it is difficult to accurately measure that growth. Accordingly, while he accepted that assessing carrying capacity by estimating pasture growth rates and subsequent pasture utilisation at a property is a "valid methodology", he stated that "it can be difficult to accurately assess when considered in isolation of a

farm's historic livestock performance and adequate local knowledge". Mr Matheson accordingly stated that carrying capacity is "ideally" assessed by considering:

(a) Numbers of livestock currently and historically farmed (including levels of performance – growth rates, lambing percentages and so on).

(b) Inter-seasonal variation within livestock numbers.

(c) An estimate of underlying pasture growth.

(d) Opportunities to improve feed utilisation/pasture management.

[132] Given the variables involved, Mr Matheson was of the view that a carrying capacity expressed in Stock Unit terms should be considered as indicative only. For these reasons, his view was that relying on estimates of carrying capacity defined in Stock Units ought to be done with some caution, and particularly when the assessment is given in advertising material with no visibility of how the Stock Unit numbers have been calculated.[33] Mr Matheson also noted that a number of the experts had used different Stock Unit conversion rates, and that Mr Gudsell used a different set of rates again when he undertook his own conversion of the stock numbers reported to him for 30 June 2013. Mr Matheson accordingly considered that given the limited information in the PIM and the difficulties in interpreting carrying capacity based on reported livestock numbers, Mr Sharp and Mr Borland should have sought more information from Mr Graham at the time of purchase, so as to enable them to "interrogate the underlying drivers of carrying capacity – pasture growth potential and pasture utilisation".

[133] On these factors, Mr Matheson noted that soil fertility is a "key driver" of pasture growth potential, and agreed with Mr Beetham, Mr McLaughlin and Dr Roberts that the relationship between Olsen P levels and pasture growth is "well accepted". Based on the (limited) soil samples reported in the PIM, Mr Matheson

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[33] For example, Mr Matheson noted that if it was right to assume that all of the ewes on the Property had an average live weight of 65 kilograms and lambing at 120 per cent, they would be appropriately classed as 1.2 stock units, and thus add a further 557 Stock Units to a total calculated on the basis of the basic Stock Unit definition.

noted that those results "might be expected to limited the number of stock that could be successfully farmed". He also noted that the data included in the PIM for Olsen P levels and fertilizer application over the preceding few years suggested that "soil P levels were being depleted". On pasture utilization, Mr Matheson said that his inspection of the Property in 2019 indicated a number of fences that would have been in poor condition in 2014, which would have been evident on inspection, and which would have also limited carrying capacity. Mr Matheson also noted that Shabor's concern at the condition of some stock purchased prior to settlement should have alerted it as purchaser to potential overstocking, which would have raised concerns about a suggested stocking rate not supported by other evidence.

[134] Mr Matheson accordingly stated:

> Therefore, in my opinion there were a number of indicators that should have alerted a potential purchaser that the carrying capacity of the [Property] warranted further investigation in a more extensive due diligence process. These were: the soil fertility text information in the PIM (or lack thereof), the farm's recent fertilizer history (also referenced in the PIM), the likely condition of some of the fences and the reported condition of the cattle on the farm. … Any further information into these matters could have been completed either prior to an offer being made or with the offer being made conditional on the outcome of a due diligence process.

[135] Mr Matheson said that, particularly in the context of the indicators referenced in the above extract from his evidence, Shabor should have carried out more in-depth due diligence prior to purchasing the Property. Mr Matheson said that he has seen completion of due diligence as a condition in over half of the farm purchases he has been involved with clients.

[136] Mr Matheson did not express a view in his evidence-in-chief or the joint experts' report on the actual carrying capacity of the Property at June 2014. This was largely on the basis of what he perceived to be the difficulty in carrying out such a calculation. But he said that "it seems clear that the Property's carrying capacity in 2014 was lower than it had been historically". In his underlying report, he said that based on an average Olsen P level of 11 (being the average of the four February 2014 test results), an average stocking rate of equal to or less than eight or nine Stock Units per hectare could be inferred, "which would potentially imply a carrying capacity for the farm of less than 7,290 SU". In cross-examination, he described that as his

"starting point", and agreed that with an even lower average Olsen P level, the inferred stocking rates would also be lower. He also confirmed his opinion that the Property in June 2014 would *not* have been able to carry the actual stock numbers as at 30 June 2013 as disclosed in the PIM.

Overall conclusions regarding the Capacity Representation

[137] Taking into account all of the above, I conclude as follows:

(a) At least in this case, estimated pasture production and utilisation are better indicators of carrying capacity than reference to historic numbers of stock carried on the Property.

(b) Soil quality, and in particular, Olsen P levels, are a key driver of pasture production.

(c) In the past, the Property may have, and indeed at times was likely to have, carried around 7,500 Stock Units and possibly more. But the Property's carrying capacity had declined in the period leading up to June 2014, given the successive droughts and importantly, the lack of fertilizer application.

(d) As at June 2014, the Property was not able to carry 7,500 Stock Units, or in other words, it was not able to grow the necessary 4,125,000 kilograms of dry matter to support that number of Stock Units.

(e) It is now, many years after the event, difficult assess with any degree of accuracy what the Property's carrying capacity was at June 2014.

(f) I conclude that the carrying capacity was nearer Mr Beetham's assessment than Mr Miller's assessment. As the Property's actual carrying capacity in June 2014 was materially lower than 7,500 Stock Units, the Capacity Representation was a misrepresentation (for the purposes of the CCLA) and misleading for the purposes of the FTA.

(g) I have adopted a carrying capacity of around 5,500 Stock Units at June 2014, possibly up to around 6,000 Stock Units. This is broadly consistent with (though a little higher than) Mr Beetham's and Mr McLaughlin's assessment. I accept it is considerably lower than Mr Miller's assessment of 6,500 to 7,000 Stock Units. But Mr Miller's assessment was heavily dependent on the historic stock numbers as reported by Mr Graham being correct. In addition, Mr Miller's assessment was qualified by the assumption that the Property had recovered from the drought, when it was clear no further fertilizer had been applied after the 2013/2014 summer, and Mr Matheson's view was that the fertilizer levels would have continued to drop by that point. Mr Miller's assessment also took the Property's gross farm revenue per Stock Unit well below Beef + Lamb averages, when his original position had been that performance consistent with those averages was an indicator of carrying capacity.[34]

(h) Determining the *actual* carrying capacity at June 2014 is not, however, necessary in this case (as opposed to determining, for liability purposes, that it was something materially lower than 7,500). This is because, as discussed further below in relation to the calculation of damages, the "costs to cure" incurred by Shabor (which I accept as the correct measure of damages in this case) are tied to steps taken to *lift* the Property's carrying capacity to the represented 7,500 Stock Units. The expert evidence was consistent that a significant lift in the average Olsen P levels would be needed to support 7,500 Stock Units. The costs associated with that are not dependant on identifying the "floor" from which that lift occurs.

(i) Mr Graham did not try to "hide" the fact he used supplement on the farm. As noted earlier, the implements used to feed out were in full view and indeed seen by Mr Borland and Mr Sharp.

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[34] I also note that Mr Beetham's estimate of 5,500 Stock Units put Mr Graham's gross farm revenue per stock unit above Beef + Lamb averages, further demonstrating the difficulty in arriving at an accurate carrying capacity assessment.

(j) Finally, Mr Graham was somewhat casual in his estimate of the Property's carrying capacity for the purposes of the 2014 advertising materials. As noted, I accept the Property might have carried more than 7,500 Stock Units in the past, particularly in non-drought times and with appropriate fertilisation. But Mr Graham did not check or verify his own assessment of around 7,500 Stock Units, and in fact accepted there might have been "some doubt" about that in hindsight. But while Mr Graham was perhaps casual in his assessment of the Property's carrying capacity in 2014, there was nothing deliberate or sinister in this context; in other words, Mr Graham did not *knowingly* under-estimate the advertised carrying capacity.

Effect of the non-reliance clause

Introduction

[138] Having found that the Capacity Representation was false or misleading, the next steps would ordinarily be to examine inducement and reliance. There was no real suggestion in this case that the Capacity Representation was not intended to induce entry into the Agreement. Indeed, it was a reasonably prominent aspect of the various marketing materials for the Property, and it is self-evident that those materials sought to encourage parties to view the Property and ultimately purchase it. I accordingly proceed on the basis that the intention to induce element is made out.

[139] But cl 27.3 of the Agreement is what is often referred to as a "no-reliance" clause, commonly framed as an agreement by the contracting parties that they have entered into the contract on the basis of their own judgement and *not* in reliance on any prior representations made by the other party. Such clauses accordingly purport to preclude the Court from inquiring as to whether there *was* reliance on any pre-contractual representations.[35] This type of clause is captured by s 50(1)(c) of the CCLA. It will therefore only be enforced as between the parties if the Court considers it is "fair and reasonable" to do so.[36] In carrying out an assessment of whether it would

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35 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd* [2019] NZCA 245, [2019] 3 NZLR 455 at [248(c)].

36 Contract and Commercial Law Act 2017 (CCLA 2017), s 50(2).

be fair and reasonable, the Court must have regard to all the circumstances of the case, including:[37]

(a) the subject matter and value of the transaction; and

(b) the respective bargaining strengths of the parties; and

(c) whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

[140] The approach to the assessment to be carried out under s 50(2) of the CCLA is reasonably well settled. A leading decision is *PAE (New Zealand) Ltd v Brosnahan.*[38] In that case, Harrison J, delivering the judgment of the Court of Appeal, said the following (in respect of s 50's predecessor, s 4 of the Contractual Remedies Act):[39]

> An entire agreement clause, however, is not absolute or conclusive. Section 4(1) recognises a wide judicial discretion to determine whether it is "fair and reasonable that the provision should be conclusive". While the issue is to be determined "having regard to all the circumstances of the case", the specified criteria focus the inquiry on an assessment of the relative positions of the parties and their access to independent legal advice. Its apparent purpose is to protect one party's relative vulnerability from another party's power to impose an exemption from liability which is contrary to the factual reality or an existing legal obligation and is thus unreasonable and unfair. Section 4(1) is a mechanism for striking balances, both individually between parties and conceptually between freedom of contract and unfair or unreasonable commercial conduct.

[141] It will be obvious that what is "fair and reasonable" will differ according to the particular facts in any given case. But in assessing whether it is fair and reasonable that cl 27.3 is conclusive between the parties in this case, I have found it helpful to consider other decisions which have carried out such an assessment, including those involving the sale of a property or business.

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37 CCLA 2017, s 50(3).
38 *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2009) 10 TCLR 626.
39 At [15].

"Fair and reasonable" assessments in leading and other relevant decisions

[142] Imbalance in bargaining strength and power was considered crucial to thwarting the operation of non-reliance clauses in the Court of Appeal's recent decision in *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd*.[40] In that case, the Coomeys were dairy farmers. Through Bushline Trustees Ltd, they entered into finance arrangements with ANZ involving complex interest rate swap products. The High Court and Court of Appeal found that ANZ misrepresented the effect of these swaps.

[143] The High Court had found that disclaimer/no-reliance clauses in the transaction documents precluded Bushline from relying on the representations made by ANZ, and confirmed that Bushline understood the nature of the transactions. In finding it fair and reasonable to enforce the provisions between the parties, the High Court had placed reliance on the fact Bushline had been legally advised in relation to the transactions. But the Court of Appeal held that the disclaimer clauses were not conclusive as between the parties. The following factors were relevant to the Court's reasoning:

(a) ANZ had made an undertaking to monitor the swaps on an ongoing basis and manage the Coomeys' risk. This was necessary because of the nature of the product: "difficult and complex transactions, requiring expertise to assess prior to entry and to manage once entered which rural consumers like the Coomeys were unlikely to have".[41]

(b) Rural banking staff within ANZ did not themselves properly understand the swaps.[42]

(c) There was an imbalance of bargaining power – the swap terms were standard, treated by ANZ as non-negotiable, and intended for less sophisticated customers who lacked the capacity to negotiate.[43]

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40 *Bushline Trustees Ltd v ANZ Bank New Zealand Ltd*, above n 35.
41 At [258].
42 At [259].
43 At [265(a)].

(d) The fact the Coomeys were legally represented carried less weight than it might otherwise have, because the subject matter was "entirely within the representor's knowledge" and any expert advice was based on the information ANZ had itself provided.[44]

(e) The Court also made findings as to the nature of the advice in question (though privilege had not been waived in relation to it).[45] Given what ANZ itself required of customers' solicitors entering into the swap transactions, the Court held that the advice was of a "mechanical, formal, nature" and thus did not materially impact the fair and reasonable assessment.[46]

[144] An exclusion clause was similarly held to be unenforceable in *Steel v Spence Consultants Ltd*.[47] In that case, the plaintiffs were the purchasers of a house which leaked. The defendant was an expert commissioned by the vendor who had produced a "moisture assessment" report found by the Judge to be misleading. The offending report included a disclaimer clause purporting to limit liability. One of the factors considered relevant to the decision not to enforce the clause was that the parties were not negotiating from an equal position; rather, "the defendants held themselves out to have expertise in this field, and to provide services of this type to lay persons".[48]

[145] Again, information asymmetry was a key factor in refusing to enforce an exclusion clause in *Pegasus Town Ltd v Draper*.[49] The Drapers, based in Hong Kong, purchased a lot in a development near Christchurch. They were not told by Pegasus that a bypass would be built close to the development, increasing traffic noise and decreasing the value of their land. They were granted summary judgment for misrepresentation under the Contractual Remedies Act on the grounds Pegasus had misrepresented to the Drapers the development would have a restful, natural environment, and that there were no proposals which might affect this.

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44 At [265(b)].
45 At [251].
46 At [271].
47 *Steel v Spence Consultants Ltd* [2017] NZHC 398, (2017) 14 TCLR 624.
48 At [52].
49 *Pegasus Town Ltd v Draper* [2011] NZCA 140, (2011) 13 TCLR 144.

[146] The agreement contained a clause stipulating the purchaser had purchased based on their own judgement and not any representation or warranty made by the vendor, as well as an 'entire agreement' clause. Pegasus argued on appeal it was inappropriate to determine s 4 issues at the summary judgment stage.[50] The Court of Appeal rejected that submission, ruling it was so clearly not fair and reasonable to uphold the clauses in that case, that it could be determined on a summary judgment application. Two key factors were emphasised. First, information asymmetry; the Drapers were residents of Hong Kong, unfamiliar with New Zealand, and heavily dependent upon Pegasus for information concerning the nature of the development.[51] Second, the conduct of the appellant was considered significant.[52] Given Pegasus knew about the bypass, it either did not inform its agents about it, or did so and its agents did not pass that along. Either way, the Court considered, it "must accept responsibility".[53]

[147] In *Bushline*, *Steel* and *Draper*, the Courts were reticent to uphold liability clauses as between comparatively less knowledgeable parties and commercial entities. A different approach has been taken where both parties are commercial.

[148] *PAE (New Zealand) Ltd v Brosnahan* concerned the purchase of a maintenance business, CPS, by a facilities management company, PAE.[54] The directors of CPS misrepresented its profitability to PAE during the sale process. The directors sought to rely on an 'entire agreement' clause which provided negotiations or representations would not be contractually binding.

[149] The Court of Appeal found it was fair and reasonable for the entire agreement clause to apply. There was no inconsistency between the clause and the way the parties had conducted themselves throughout the negotiation period. There was a further clause in the agreement which listed nine specific warranties the directors made. The Court stated:

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50 At [37].
51 At [41].
52 At [41].
53 At [41].
54 *PAE (New Zealand) Ltd v Brosnahan*, above n 38.

> [22] PAE had every opportunity to require warranties relating to accounts receivable, the principal source of the error, and profitability, if it regarded either as sufficiently important to justify a right of recourse in the event of a material error. To deny cl 19 its natural meaning would have two contrary effects. First, it would resurrect or reinstate a representation which the parties had agreed was inoperative or of historical importance. Second, it would convert the alleged representations about profitability into an implied warrant when they were expressly excluded.

[150] The Court also emphasised the equality of bargaining position:

> [23] Moreover, as Mallon J found, there was no imbalance in the respective bargaining strengths of the parties; if anything, PAE's position was stronger. It is, as Mr Butler points out, a subsidiary of a multinational, experienced in takeovers and acquisitions and familiar with the due diligence process. The company had access to and obtained independent financial and legal advice. It had ample opportunity to safeguard itself against the adverse consequences of any pre-contractual misrepresentations other than those specified if that was its objective. It would not be fair and reasonable, we think, to allow PAE to invoke the statutory protection to circumvent the effect of provisions which it had deliberately structured for its own benefit.

[151] Whereas the Court of Appeal in *Bushline* was concerned with the respondent's conduct (see [143(b)] above), this was far less of a concern for the Court in *PAE (New Zealand) Ltd*. The Court endorsed the trial Judge's finding it was "irrelevant" that errors in CPS's accounts were the result of negligence or recklessness, or that one of the directors tried to conceal the errors after the agreement between the parties had been signed. That did not, the Court held, affect how "the plain words" of the exclusion clause should be treated for the purposes of the "fair and reasonable" analysis.[55]

[152] In *David v TFAC Ltd*, the Grisdales incorporated TFAC and through it purchased a home services franchise from Mrs David and her company.[56] The promotional booklet the Grisdales were provided described the franchise as "proven in the marketplace". The Grisdales also said they were misled to believe they were suited to run the company, when Mr Grisdale's personality test results in fact showed the opposite. The agreement told prospective buyers to seek specialist legal advice (as well as advising they seek independent accounting advice).

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55 At [21].

56 *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239.

[153] The Court rejected that the Grisdales had been misled. They knew the franchise was in fact new to New Zealand and had discussed Mr Grisdale's poor test scores with the appellants.[57]

[154] The Court nonetheless went on to consider the effect of the disclaimer clauses.[58] On that issue, the Court would have differed from the trial Judge's ruling there was information asymmetry which meant the exclusion clause should not stand. The Court accepted the failure to take independent advice did not excuse misleading or deceptive conduct, but considered that here, "the purpose of emphasising the need for advice from experienced independent advisors was so that those advisors could assist potential franchisees, particularly those without experience, by advising on the legal, financial and business aspects of the proposed franchise arrangement."[59] In this context, the relevant clauses were held to be clear and consistent in recommending independent advice, and were not downplayed or "buried".[60]

[155] A no-reliance clause was also upheld under the Contractual Remedies Act in *WaikatoLink Ltd v Comvita New Zealand Ltd*.[61] The parties had enjoyed a commercial association lasting over 20 years. They then decided to enter into an agreement where Comvita could use certain patents and intellectual property owned by WaikatoLink. Comvita claimed WaikatoLink had misrepresented to it that WaikatoLink was on the cusp of a significant scientific discovery of great commercial value to Comvita, inducing it to enter into the agreement. The agreement contained a no-reliance clause which acknowledged the parties were not relying on any representation not recorded in the agreement.[62]

[156] The Court accepted WaikatoLink had misrepresented the scientific discovery, and failed to disclose to Comvita when it realised no such discovery had been made. Harrison J also held Comvita had relied on the misrepresentation to enter the contract.

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57 At [49] and [56].

58 While this was analysed in the context of the Fair Trading Act claim, the claim had also been advanced under the Contractual Remedies Act, and there is no suggestion the same points on enforceability of the clause would not have been relevant to a "fair and reasonable" analysis.

59 At [66].

60 At [65].

61 *WaikatoLink Ltd v Comvita New Zealand Ltd* (2010) 12 TCLR 808 (HC).

62 At [107].

The representations were "the culmination of a sales pitch designed unequivocally to persuade Comvita that WaikatoLink now had a much more valuable asset to sell".[63]

[157] Harrison J was nonetheless satisfied under s 4 of the Contractual Remedies Act that it was fair and reasonable to uphold the no-reliance clause. He emphasised the weight the Courts generally have placed on upholding contractual certainty between commercial parties.[64] Here, there were lengthy and detailed negotiations between commercial and legally represented parties.[65] Comvita itself had drafted the entire agreement clause, which was significantly more onerous than that proposed by WaikatoLink.[66] Nor did the Judge consider WaikatoLink's representations were deliberate or analogous to fraud.[67] The Judge also placed weight on the fact that Comvita could have taken steps to negotiate the agreement provisions to protect itself against the contingency which arose in that case, but did not do so.[68]

[158] In *Overton Holdings Ltd v APN New Zealand Ltd*, APN sold a property to Overton for $4 million, which was to be subject to a lease back to APN.[69] The agreement included a clause stating Overton relied only on its own judgement in purchasing the property, and not in reliance on any representations made by the vendor. It was discovered several years later some buildings on the property were earthquake prone, and APN vacated the premises. Overton sought to cancel the sale and lease, claiming APN had misrepresented the premises were fit for its business use.

[159] The Court rejected that a misrepresentation had been made at all, noting a disclaimer in the property information confirming no undertaking was given as to structural integrity.[70] The Court nonetheless went on to consider whether, in the alternative, the non-reliance clause was susceptible to s 4 of the Contractual Remedies Act. The Court concluded it was fair and reasonable under s 4 for APN to rely on the clause:[71]

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63 At [106].
64 At [117].
65 At [118]–[120].
66 At [127]–[129].
67 At [121]–[124].
68 At [127]–[128].
69 *Overton Holdings Ltd v APN New Zealand Ltd* [2015] NZCA 526, (2015) 17 NZCPR 251.
70 At [27].
71 At [41]–[42].

> Here the Agreement concerned the purchase of a commercial property for $4 million. There was no inequality in the respective bargaining strength of Overton and APN. Mr Rockefeller [Overton's principal] was a well-known, experienced investor in commercial property and while Overton was not represented by an external lawyer at the time of entering into the Agreement, Mr Rockefeller was legally qualified.
>
> … Reliance (or inducement) is an element of an actionable misrepresentation. We agree and accept that cl 18.1 is a "non-reliance clause". The clause was not in standard form. It was contained in the Further Terms of Sale and was readily visible. It was set out following the clause establishing the obligation for the lease back. Moreover, the misrepresentation (if accepted) was innocent and not fraudulent.

[160] The reference at the conclusion of the above extract to the misrepresentation being innocent rather than fraudulent is a reference to the Court of Appeal's observations in *Brownlie v Shotover Mining Ltd* as to policy grounds for a judicial reluctance to go behind disclaimer or entire agreement clauses in commercial transactions, at least without a finding of fraud.[72] In that case, McKay J, delivering the judgment of the Court, stated:[73]

> There can be nothing inherently unfair in such an exclusionary clause. It is highly desirable that written contracts should be so drawn as to state all the terms of the intended contract, and so avoid the uncertainties which can arise from allegations of verbal representations or collateral warranties. If parties have not agreed to include express warranties in their written contract, then it is reasonable for them to state expressly that verbal warranties are excluded. Other matters relevant under [s 4] to determining whether it is fair and reasonable to enforce the clause include "all the circumstances of the case". This was a commercial contract between commercial parties each with separate legal advice. The subject matter and value of the transaction were sufficient substantial to justify the expectation that each party would be familiar with its terms and intended to be bound by them. The respective bargaining strengths of the parties would not justify any special indulgence to either. Both parties were represented and advised by solicitors at the relevant time.
>
> …
>
> We have no hesitation in upholding the conclusiveness of the provision in the absence of fraud. It would be a matter of concern if commercial people acting in good faith could not, in entering into a transaction such as this, achieve certainty by a written contract excluding liability for prior statements by one of them if that is what they wished to do.

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72 *Brownlie v Shotover Mining Ltd* CA 181/87, 21 February 1992.
73 At 31–33.

[161] This "judicial reluctance" in commercial cases was reiterated more recently by the Court of Appeal in *PAE (New Zealand) Ltd v Brosnahan.*[74]

Should cl 27.3 be enforced in this case?

[162] I turn first to the interpretation of cl 27. It is convenient to repeat its terms:

> **Limitations of Liability**
>
> The Vendor does not warrant:
>
> 27.1 The accuracy of any matter, fact or statement in any report or other information on the property prepared or provided by the Vendor's [sic] or its Managers or Agents (including information contained in Schedules to this Agreement), any advertising of the sale of the property or any statement made except in relation to any specific warranty given in this Agreement or
>
> 27.2 Any other matter relating to the property or its use or nature or the state of the property in any respect other than expressly set out in this Agreement.
>
> 27.3 The Purchaser shall be deemed to have purchased the property acting solely in reliance on the Purchaser's own judgement and upon its own inspection of the property and all other information regarding the property, and not in reliance upon any representative [sic] or warranty made by the Vendor, the Vendor's Agent or Managers other than as expressly set out in this Agreement.

[163] By operation of the opening words of the clause together with cl 27.1, Mr Graham did not warrant the accuracy of any advertising of the sale of the Property, or any statement made in relation to it, except in relation to any specific warranty given in the Agreement. Mr Quinn submitted that this is effectively a "no implied warranty clause", meaning that any purchaser could not imply a warranty into the Agreement. He submitted that it had nothing to do with pre-contractual representations made outside of the Agreement and thus was quite different to cl 27.3.

[164] I accept Mr Quinn's submission. The opening words of cl 27 combined with cl 27.1 make it clear that there is no *contractual warranty* being given by Mr Graham in relation to any of those matters set out in cl 27.1 of the Agreement. That does not, directly at least, address or preclude reliance by Shabor on pre-contractual representations which induce entry into the Agreement.

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74 *PAE (New Zealand) Ltd v Brosnahan*, above n 38, at [16].

[165] Clause 27.2 is not relevant for present purposes.

[166] As noted at [48] above, all parties agreed that cl 27.3 should have been a stand-alone clause, given it does not naturally flow on from the opening words "the Vendor does not warrant…". As also noted earlier, it is accepted by Shabor that the reference in cl 27.3 to "representative" is a typographical error and should be read as "representation".

[167] Mr Quinn accepts that on its face, cl 27.3 is a no-reliance clause and is thus subject to s 50 of the CCLA. But he says that the sub-clause is incoherent and/or ambiguous. This is said to be because it states that the purchaser has relied on *"[its] own judgment and upon its own inspection of the property and all other information regarding the property*", but that the purchaser has also not relied on "*any representation or warranty made by the Vendor… other than as expressly set out in this Agreement*." Mr Quinn says these two parts of the clause are incompatible, given "all other information regarding the property" must include any information supplied by the vendors. Thus, in the first part of the clause, the purchaser is said to have relied on that information, but is then said not to have relied on it in entering into the Agreement. Mr Quinn says that the ambiguity must be resolved *contra proferentum*, and should be interpreted as a purchaser being entitled to rely on any information about the Property that it actually received, but consistent with the two previous sub-clauses, not any implied representations. Alternatively, Mr Quinn says that it would not be fair and reasonable to treat one interpretation of the clause (that is, that favouring the vendors) as conclusive between the parties.

[168] I am not persuaded there is the incoherence or ambiguity in the clause as Mr Quinn suggests. While it is perhaps not the most elegantly of drafted clauses, its overall objective intent is clear, namely that the purchaser is deemed to have purchased the Property acting "*solely in reliance on its own judgement"*, together with its "*own inspection of the Property and [its own inspection of] all other information regarding the Property*, and importantly, that it "*has not relied on any representation or warranty by the Vendor…."* The concept of relying on the purchaser's own inspection of the Property and its own inspection of "*all other information regarding the Property*" must be something different to not relying on "*any representation by the Vendor*". The

former is no doubt directed to other objective information concerning the Property itself, such as the the soil test results and the fertilizer application records and so on, rather than the vendor's own statements or representations about the Property.

[169] I therefore do not consider there is a need to "read down" or interpret cl 27.3 *contra proferentum*.

[170] Turning to the assessment of whether it would be fair and reasonable for cl 27.3 to be conclusive between the parties,[75] I take into account that the Capacity Representation was in written form, rather than verbal, and thus its terms were clear. It also appears to have been verbally reiterated by Mr Gudsell (as Mr Graham's agent) during the 7 April 2014 tour of the Property. Mr Sharp and Mr Borland took it into account when formulating their tender price. It could also be argued that there is an "information asymmetry" between the parties, given Mr Graham, having owned the Property for some 14 years, would have been intimately familiar with it, compared to Mr Sharp and Mr Borland's relative lack of knowledge from their single two hour visit.

[171] Despite the factors weighing against conclusiveness, I am nevertheless satisfied it is fair and reasonable for cl 27.3 to be conclusive as between Mr Graham and Shabor. I say this for the following nine reasons.

[172] First, this was a reasonably significant commercial transaction (involving a purchase price of over $5.2 million), not one involving consumers or the purchase of a residential property for personal use. On the contrary, Mr Sharp and Mr Borland had joined together to form the Shabor business, in order to purchase a farm together to run as a business and for profit.

[173] Second, while I accept there was an information imbalance in the strict sense outlined at [170] above, Mr Sharp and Mr Borland are clearly experienced farmers in their own right, with deep farming knowledge (and Mr Sharp in particular in relation to sheep and beef). They are therefore not naïve contracting parties, wholly dependent

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[75] *Herbison v Papakura Video Ltd* [1987] 2 NZLR 527 (HC) at 540–541 contains a useful "list" of factors for and against conclusiveness, many of which are relevant in this case.

on information from their contracting counter-party. I further observe that if an information imbalance of the type which exists in the sale of a property or business were determinative, a clause such as 27.3 could almost never be conclusive in such cases, given the vendor will inevitably have considerably more knowledge about the property or business than the purchaser.

[174] Third, cl 27.3 was a "further term" of the Agreement, and not a standard term "buried" in the detailed fine print of the standard ADLS form. There is no suggestion Mr Sharp and Mr Borland were not aware of and cognisant of the clause's terms (on the contrary, they received legal advice on it – discussed below at [178]). That the clause was included in the "further terms of sale" and readily visible was a point of some relevance to the Court of Appeal's decision in *Overton.*[76]

[175] Fourth, the context of cl 27.1. As noted, it is a "no implied warranty" clause. It was expressly directed to advertising materials. Yet as the Court of Appeal observed in *PAE (New Zealand) Ltd v Brosnahan*, the effect of cl 27.3 not being conclusive between the parties would be to "convert the [earlier] representations about [carrying capacity] into an implied warranty when they were expressly excluded".[77]

[176] Fifth, Mr Sharp and Mr Borland were in possession of the tender terms and conditions, including cl 27.3, *prior to* completing and submitting their tender. They were therefore on notice that Mr Graham did not accept responsibility for representations made in advertising materials and that purchasers should make their own inquiries.

[177] Sixth, Mr Sharp and Mr Borland were clearly willing and able to make various amendments to the further terms of the Agreement, and indeed made a number of handwritten amendments on the very same page on which cl 27.3 featured. This was not a "take it or leave it" set of terms and conditions (applicable in many consumer contexts, and of concern in *Bushline*). They accordingly had the opportunity to make amendments to cl 27.3 but did not do so. Importantly in my view, Mr Sharp and

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[76] *Overton Holdings Ltd v APN New Zealand Ltd,* above n 69, at [42.] See also *Hall v Warwick Todd Ltd* (2000) 9 TCLR 448 (HC) at [78].

[77] *PAE (New Zealand) Ltd v Brosnahan*, above n 38, at [22].

Mr Borland also had the opportunity to make their tender conditional on completing due diligence (which might have been considered prudent given the late point at which they entered the sale process), but again they chose not to do so. In this context, I note Mr Gudsell's (uncontested) evidence that it is rare to receive unconditional farm tenders, and that in his experience, 90 per cent of farm purchases are conditional on due diligence being completed. That evidence is also consistent with Mr Matheson's observations (see [135] above). The ability to protect oneself on matters considered material (through negotiation of suitable clauses) was of some relevance in enforcing a disclaimer clause in both *PAE (New Zealand) Ltd* and *Waikatolink Ltd v Comvita.*

[178] Seventh, and also importantly, Mr Sharp and Mr Borland received legal advice on the Agreement, including on the further conditions of which cl 27.3 formed a part.[78] That advice was bespoke, and was not, for example, part of a certification process required by a bank, as was the case in *Bushline.*[79] While not a material factor, but also of some relevance in this context, the PIM itself (being a key document about the Property and which Mr Sharp and Mr Borland had as of 1 April 2014) noted that Bayleys had not checked, reviewed or audited any of the information contained in it, and advised all purchasers "to conduct their own due diligence investigation into the same".

[179] Eighth, to the extent Mr Graham's conduct is relevant, there was no fraud, wilful concealment or misstatement of the true position. I accept that when he spoke with Mr Gudsell in early 2014, Mr Graham genuinely believed the Property's carrying capacity to be around 7,500 Stock Units.

[180] Finally, and as part of "all the circumstances of the case," I take into account that Mr Sharp and Mr Borland were obviously very keen to purchase a property and came into the tender process at a very late stage, and yet on the basis of one two hour visit, submitted an unconditional tender for more than $5 million. A point made by a number of the experts (including Mr Beetham and Mr Gudsell, both called by Shabor) was that Mr Sharp and Mr Borland did not undertake sufficient due diligence in the context of a transaction of this significance. I emphasis, however, that this factor is

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78 See [50] above.
79 See [143(e)] above.

not determinative or of very significant weight in the "fair and reasonable" assessment, given a lack of due diligence, even when contractually available, does not mean reliance on an express representation will be unreasonable.[80] In the overall context of this commercial transaction, however, it is a further factor to "add to the mix".

[181] Standing back, a key purpose of a contractual agreement is to record agreed risk allocation between the parties. Given the matters set out at [172]–[180] above, and undertaking the balancing exercise required, I consider there is no good reason why the (freely) agreed risk allocation in this case should not be enforced.

[182] I accordingly conclude that cl 27.3 is a complete answer to Shabor's cause of action pursuant to s 35 of the CCLA.

Fair Trading Act cause of action

Introduction

[183] As is orthodox, Shabor's pre-contractual misrepresentation claim has also been advanced under s 9 of the Fair Trading Act. This was also the case in most if not all of the authorities discussed in the preceding section of this judgment. That is not surprising, given the similarity between the two causes of action – at least in terms of liability. As the Court of Appeal in *PAE (New Zealand) Ltd v Brosnahan* explained, the two species of claims are similar, diverging primarily in the relief they offer:[81]

> … This judgment is restricted to the CRA and FTA causes of action. The essential elements are the same or similar. Each is based upon the existence of a misstatement or misstatements, whether categorised as a misrepresentation under the CRA or misleading and deceptive conduct under the FTA. Each requires proof of reliance, which must be reasonable, and thus causation of loss.
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> The two causes of action diverge on relief. The CRA compensates for expectation damages to reflect loss of a bargain. By contrast, a FTA claimant is restricted to reliance damages, similar to the tort, and subject to the Court's wide discretionary powers: see s 43. Differences between the two measures can be substantial, as illustrated by this case…

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80 See, for example, *Best of Luck Ltd v Diamond Bay Investments Ltd* HC Auckland CIV-2007-404-2043, 11 October 2007 at [121]–[128] and [132].

81 *PAE (New Zealand) Ltd v Brosnahan*, above n 38, at [29]–[30].

[184] Shabor's Fair Trading Act claim was described as its "secondary" claim, perhaps reflecting the different assessment of damages under that statute, and the Court's discretion under s 43 to reduce damages, including to reflect a plaintiff's own conduct which has partly contributed to its loss.

[185] Given the similarities between the two causes of action, in all of the authorities discussed earlier (save for *Waikatolink v Comvita*), the Contractual Remedies Act and Fair Trading Act claims have been treated relatively interchangeably, with no difference in outcome, including on the effect of a no-reliance clause. Again, this is not surprising, given the undoubted consumer focus of the Fair Trading Act. As I have recorded above, neither Mr Sharp or Mr Borland, or as a result, Shabor, purchased the Property as a consumer. It would therefore be somewhat surprising if Shabor was in a *better* position vis-a-vis its contracting counter-party under consumer-focused legislation, than it is under contract-focused legislation.

Approach

[186] The Supreme Court in *Red Eagle* cautioned against a prescriptive methodology for claims under s 9 of the Fair Trading Act, noting the circumstances in which they arise are highly variable.[82] Nonetheless, it endorsed a two stage approach in most cases: the first being an inquiry as to whether there has been a breach of s 9 (which requires the conduct to be objectively misleading); and second, for that conduct to be the (or an) effective cause of the plaintiff's loss.[83] As noted earlier, I have already determined that the Capacity Representation was misleading for the purposes of s 9.[84]

[187] What then is the effect, if any, of cl 27.3 on the Fair Trading Act claim? The Court of Appeal in *David v TFAC Ltd* noted that the courts have long held that it is not possible to contract out of the Fair Trading Act.[85] That of course has now been overtaken by amendments to the Act which permit contracting out in certain circumstances.[86] But as the present transaction occurred prior to these amendments

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82 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [26].
83 At [26]–[29].
84 See [137(f)] above.
85 *David v TFAC Ltd,* above n 56, at [60].
86 Section 5D of the Fair Trading Act (which allows for exceptions to the general "no contracting out" rule) was inserted on 17 June 2014 by s 8 of the Fair Trading Amendment Act 2013.

coming into effect, the parties are agreed that the prior "no contracting out" regime applies.

[188] The justification for the (earlier) inability to contract out was that the Fair Trading Act is consumer protection legislation, and it would be contrary to its protective policy to allow contracting out.[87] But importantly, the Court in *David v TFAC Ltd* went on to state:[88]

> While that justification has force in relation to consumer transactions, it has less force in the context of commercial transactions involving substantial independently advised parties negotiating from positions of equality. In the latter case, any resulting contract can be expected to reflect the parties' wishes as to the allocation of risk and it is difficult to see why they should not be permitted to allocate risks between them by contracting out of the FTA.

[189] The Court confirmed that despite the inability to contract out, exclusion or disclaimer clauses can impact on both the requirements of the conduct being objectively misleading and causing the plaintiff loss:

> [63] While such mechanisms are not determinative, it has been accepted that they are relevant to the s 9 analysis. For example, in *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059, French J said (at 53,222):
>
> > A disclaimer or exclusion clause will affect liability for misleading or deceptive conduct only if it deprives the conduct of that quality or breaks the causal connection between conduct and loss. Whether it has that effect in a given case is a question of evidence and not a question of law.
>
> See also *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [50]-[51] (HCA). But a disclaimer or similar clause may be overwhelmed by oral assurances or other conduct (see *Phyllis Gale Ltd v Ellicott* (1997) 8 TCLR 57 at 65–66 (HC) and *Cornfields* at para [41]).

[190] The Court of Appeal in *David v TFAC Ltd* disagreed with the emphasis the High Court Judge had placed on a suggested information asymmetry, and the lack of emphasis on clauses in the underlying materials encouraging the appellant to seek independent advice.[89] Given this, the Court of Appeal held the disclaimer clause was

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87 *David v TFAC Ltd,* above n 56, at [60].
88 At [61].
89 At [64]–[65].

effective in rendering any reliance placed on assurances given by the other party unreasonable.[90]

[191] In *Pegasus v Draper* (in which the Court found it was *not* fair and reasonable for the clause to be conclusive under the Contractual Remedies Act), the Court reemphasised the points relied on under the Contractual Remedies Act analysis, namely the "significant information asymmetry" and that it was a case of deliberate or negligent misrepresentation.[91] Stevens J added it was relevant the misleading and deceptive conduct took place prior to signing the sale and purchase agreement, and considered the disclaimers and exclusion clauses were overcome by oral assurances and silence.[92]

[192] In *Overton*, the Court of Appeal dealt briefly with the parallel claim under the Fair Trading Act. It was satisfied that the appellant in that case had not been misled, or that the breach of the Act had been an effective cause of the appellant's loss, said to be for the same reasons discussed under the Contractual Remedies Act cause of action, including the effect of the no-reliance clause.[93]

[193] Finally, in *PAE (New Zealand) Ltd v Brosnahan,* the Court considered it was not strictly necessary to even consider the effect of the exclusion clause in the Fair Trading Act claim. The lack of due diligence undertaken by PAE made it unreasonable to rely on the directors' representations, noting Elias J's comments in *Des Forges v Wright* that the Fair Trading Act:[94]

> …is not designed to provide a guarantee to purchasers who fail to look after their own interests in a manner which is reasonable in the circumstances.

[194] Given the unreasonable conduct on the part of the purchaser in that case, the Court of Appeal agreed with the High Court's conclusion that the misleading conduct in that case was not causative of PAE's loss.[95]

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90 At [67].
91 *Pegasus Town Ltd v Draper,* above n 49, at [48].
92 At [48].
93 *Overton Holdings Ltd v APN New Zealand Ltd,* above n 69, at [45]–[48]. See also [158]–[159] above.
94 *PAE (New Zealand) Ltd v Brosnahan*, above n 38, at [40], citing *Des Forges v Wright* [1996] 2 NZLR 758 (HC) at 765.
95 At [40].

[195] But in any event, the Court stated that the exclusion clause would have broken the chain of causation as far as reliance was concerned. Referring to what it considered to be the clear terms of the disclaimer clauses in that case, the Court considered that:[96]

> The parties were agreeing in unequivocal terms at PAE's instigation, that what the directors had said and done before the agreement no longer mattered. Effectively, they drew down the curtain of liability, excluding from it all preceding conduct. By this means, they also broke the chain of causation: s 43 FTA; *David* at para [63]. There is nothing in this agreement and in its particular commercial context which was contrary to public policy, or to the underlying purpose of the FTA, as Mallon J found.

Discussion

[196] Like the position under the Contractual Remedies Act cause of action, I conclude that the no-reliance clause in this case is effective in defeating the claim under the Fair Trading Act also.

[197] In particular, I adopt the approach taken by the Court of Appeal in *PAE (New Zealand) Ltd v Brosnahan* and set out at [195] above. In this case, cl 27.3 was clear in stating that Mr Sharp and Mr Borland, when submitting their tender and entering into the Agreement, relied on their own judgement, and *not* on any representations or warranties given by Mr Graham. Mr Sharp and Mr Borland were aware of the tender terms as of 7 April 2014, and importantly, prior to formulating and submitting their tender. Rather than the effect of the clause being "overwhelmed" by earlier representations, the content of cl 27.3 itself, that it was clearly visible to Mr Sharp and Mr Borland and that they received advice on it, "drew down the curtain of liability". They, as purchasers, were on notice and represented in clear terms to Mr Graham, that they were not relying on any representations made by him. There is no reason why this statement should not bind them in the circumstances of this case.

[198] I therefore conclude that cl 27.3 was effective in breaking the chain of causation between the Capacity Representation and Shabor's loss. For the reasons briefly set out at [233]–[236] below in relation to damages, had I not found cl. 27.3 broke the chain of causation in this case, in the second step of the analysis endorsed in *Red Eagle*, I would have reduced Shabor's damages claim to take into account what

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[96] At [46].

I consider to have been its haste in entering into this significant transaction, and consequent failure to conduct appropriate due diligence (which as noted, was a theme of a number of the experts' evidence).[97]

Observations on reasonable reliance and damages

[199] Given my findings as to the effect of cl 27.3 under both the CCLA and Fair Trading Act claims, it is not necessary to go further and assess whether any reliance by Mr Sharp and Mr Borland on the Capacity Representation was unreasonable, or what damages might flow under each cause of action. But given these matters were argued before me, and in the event I am wrong in my conclusion on the effect of cl 27.3, it is appropriate to make some observations on these topics.

Reasonable reliance

[200] It has been said in a number of decisions, including of the Court of Appeal, that under a CCLA (or Contractual Remedies Act) claim for pre-contractual misrepresentation, there must be actual reliance on the representation, *and* that reliance must be reasonable.[98]

[201] As the Court of Appeal noted in *Vining Realty Group Ltd v Moorehouse*:[99]

> …there is no explicit requirement in s 6 for reliance by a representee to be "reasonable" **in the sense that the misrepresentation would have induced a reasonable person to enter the contract**. On the other hand, the cases suggest that there is such a general reasonableness requirement.
>
> [Emphasis added]

[202] As will be appreciated, there is a difference (albeit subtle) about what meaning is conveyed by a representation to a reasonable person, and whether a person's reliance on a representation was reasonable.

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97 *Red Eagle Corporation Ltd v Ellis*, above n 82, at [29]–[30].

98 See, for example, *Ridgway Empire Ltd v Grant* [2019] NZCA 134, (2019) 20 NZCPR 236 at [21]–[23]; *Magee v Mason,* above n 13, at [51]; and *Shen v Ossyanin,* above n 13, at [16].

99 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879 at [46]. Appealed in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726, but on quantum issues and Council liability.

[203] In support of the proposition set out in the above extract from *Vining Realty Group Ltd v Moorehouse*, the Court referred to *Savill v NZI Finance Ltd*[100] and *Harrison v Amcor Trading (NZ) Ltd*.[101] In *Savill,* the only point made about reasonableness was that the representation must "have induced a "reasonable person" to enter into the contract", or that the representor must have "wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did".[102] The same points were adopted and applied by Fisher J in *Harrison.*[103] A similar approach was taken in *Best of Luck Ltd v Diamond*, where Heath J stated "if a representation were of a kind that no reasonable person in the position of the purchaser would have relied upon it, [it] is not actionable if false".[104] Thus, it is uncontroversial that there will be no actionable misrepresentation if the plaintiff has taken literally something that a reasonable person would interpret as hyperbole or puffery.[105]

[204] On the basis of *Savill* therefore, there is no additional requirement of reasonable reliance, that is, *in addition* to the representation inducing a reasonable person to enter the contract.[106] But at least in the context of a CCLA claim, any potential difference between these two approaches may be somewhat illusory in practice. That is because even in *Magee,* the Court of Appeal said that the reasonable reliance element is "easily satisfied once it is shown that the representor intended that [the representation] induce entry."[107] And in *Vining Realty Group*, the presence of a due diligence clause in the contract did not make it unreasonable to rely on the representations, the Court stating that:[108]

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100 *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA).

101 *Harrison v Amcor Trading (NZ) Ltd* HC Auckland HC167/97, 13 May 1999.

102 *Savill,* at 145, per Henry J, with whom Casey J agreed.

103 *Harrison,* at 6 ("the focus is essentially the objective one of interpreting the SBS as a reasonable person placed in the circumstances of [the plaintiffs]").

104 *Best of Luck Ltd v Diamond Bay Investments Ltd,* above n 81, at [119]. See also the Court of Appeal's decision in *West v Quayside Trustee Ltd* [2012] NZCA 232, [2012] NZCCLR 16 where at [30] the Court cited with approval a passage from the High Court judgment that "the meaning [of the representation] relied upon by the representee must be reasonable in all the circumstances".

105 RJ Hollyman *Falsehood and Breach of Contract in New Zealand: Misrepresentations, Contractual Remedies, and the Fair Trading Act* (Thomson Reuters, Wellington, 2017) at [5.3.2].

106 As might be suggested by those cases referred to at fn 100 above.

107 *Magee v Mason,* above n 13, at [51].

108 *Vining Realty Group Ltd v Moorhouse*, above n 99, at [53(a) and (c)].

(a) where a clear and unequivocal representation is made, the representee should be able to take it at face value; someone guilty of misrepresentation cannot blame the other person for believing them; and

(b) it was more reasonable for the representees to rely on the representations because they were so significant and explicit that the representees could assume they would not have been made without checking.

[205] On this basis, and even if it were concluded that Shabor (through its principals) was careless in not carrying out further due diligence on the Property's carrying capacity, I would not have found reliance on the Capacity Representation to have been unreasonable, in the sense discussed in the above authorities. As noted, it was clearly intended that the Capacity Representation be relied on, given it featured across the marketing material for the Property. Further, it was in clear terms, and was not couched in a manner a reasonable person would have taken as hyperbole or puffery.

[206] For completeness, I note that any failure to conduct proper due diligence is not a "defence" to a misrepresentation claim. The relevance of a suggested lack of due diligence to a misrepresentation claim was examined by Heath J in *Best of Luck Ltd*. The Judge stated:[109]

> A due diligence exercise may not be undertaken carefully because, instead, the purchaser chooses to rely on a representation that turns out to be false. If a purchaser were to make that choice it does not disentitle him or her from seeking a s 6 remedy. Nor does it operate to immunise a vendor against liability for a s 6 misrepresentation.

[207] Heath J also said:[110]

> The mere fact that a party has been afforded an opportunity to investigate and verify a representation does not deprive him or her from seeking damages when that representation turns out to be false. As Lord Dunedin stated in *Nocton v Lord Ashburton* [1914] AC 932 at 962:

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109 *Best of Luck Ltd v Diamond Bay Investments Ltd,* above n 80, at [132].
110 At [125].

> No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction.

[208] Mr Quinn referred to similar statements made by Sir George Jessel MR and Baggallay LJ in the leading decision of *Redgrave v Hurd*.[111] In *New Zealand Motor Bodies v Emslie*, and referring to *Redgrave v Hurd*, Barker J accepted "[i]t is no defence to an action for misrepresentation that the representeee had the means of discovering that it was untrue, or that with reasonable diligence, he could have discovered it to be untrue".[112] Barker J also stated that the Contractual Remedies Act had not changed the common law in this area.[113]

[209] Accordingly, had it been necessary to determine this aspect of the claim, I would have found that given the nature and circumstances of the Capacity Representation, it was not unreasonable for Mr Sharp and Mr Borland to have relied on it. Nor was any suggested lack of due diligence a "defence".

[210] For completeness, and as noted earlier, a plaintiff's lack of care may be relevant at the second stage of a claim brought under the Fair Trading Act, namely the discretion afforded to the Court under s 43 of the Act to grant relief. I return to this topic later, when considering damages under the Fair Trading Act claim.[114]

Damages

[211] Mr Quinn submitted that the appropriate measure of damages under the CCLA cause of action in this case is the "costs to cure", that is, the costs incurred (and to be incurred) by Shabor in developing the Property into a farm that can comfortably winter at least 7,500 Stock Units.[115] As noted by Mr O'Neill in his closing submissions, the costs to cure will be the appropriate measure of damages when the purpose of the

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111 *Redgrave v Hurd* (1881) 20 ChD 1 (CA).

112 *New Zealand Motor Bodies v Emslie* [1985] 2 NZLR 569 (HC) at 595.

113 At 595. See also Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [11.2.4(c)].

114 At [233]–[236] below.

115 Relying on *Vining Realty Group Ltd v Moorhouse*, above n 101, at [60]. On appeal to the Supreme Court, reported as *Marlborough District Council v Altimarloch Joint Venture Ltd,* above n 99, the majority (Elias CJ and Anderson J dissenting) held that the purchasers were entitled to the costs of building a dam to enable them to acquire the level of water for irrigation which had been represented by the vendor able to be lawfully taken from a stream, which was not in fact true.

contract is to provide an item with a particular feature and substitution is not reasonably possible; otherwise, diminution in value will be the appropriate measure.[116] Ultimately, Mr O'Neill accepted that given the nature of the Capacity Representation, the cost to cure measure of damages would be appropriate in this case.

[212] I agree that costs to cure would have been an appropriate measure of damages in this case, for the following reasons:

(a) There was no suggestion in the evidence, nor was it put to either Mr Borland or Mr Sharp, that it would have been reasonable for them to sell the Property, purchase a new property and claim damages on the diminution of value measure.

(b) Indeed, there was no evidence that similar suitable properties were readily available, and on the contrary, the evidence suggested properties this large do not "come up" very often. As such, this is not a case where the evidence suggests a readily substitutable item where diminution in value is the more orthodox measure of damages.[117]

(c) Further, it was not unreasonable for Shabor to take the steps it did to "cure" the breach and lift the carrying capacity. That this approach was reasonable is reflected in Mr Graham's own evidence that "in hindsight", he ought to have spent "a couple of hundred thousand" on fertilizer in April 2014. Had Mr Graham continued to own the Property and wanted to comfortably run 7,500 Stock Units, it is therefore likely he would have had to incur additional significant costs to bring the soil fertility levels back to what they ought to have been.

(d) The "costs to cure" approach also reflects the stipulated performance of the Agreement, given the representation as to 7,500 Stock Units becomes a term of the Agreement itself. The costs to lift capacity to that level brings the Property back where it had likely been some years

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116 *Altimarloch,* at [24] per Elias CJ; [62] per Blanchard J; and [158] per Tipping J.
117 *Altimarloch*, at [157] and [167] per Tipping J.

earlier, rather than creating something new or different from as stipulated in the Agreement. For these reasons, the concerns expressed by Elias CJ (and Anderson J) in *Altimarloch* as to the presence of the dam not being stipulated performance do not arise here.[118] In addition, Elias CJ noted in *Altimarloch* that "[i]f sufficient water rights had been available for purchase, this could well have been a case where, depending on the reasonableness of price, cost of cure in such purchase could be an appropriate way to value the loss in the bargain".[119] By analogy, the shortfall in Stock Units was "available" to acquire in this case, by making various improvements to the Property.

(e) There was nothing in the valuation evidence presented that would indicate, like in the swimming pool case of *Ruxley Electronics*,[120] that the costs to cure are wholly disproportionate to Shabor's loss on a diminution in value measure. Mr McLaughlin's valuation evidence on behalf of Shabor was that the value of the Property if it could only carry 5,500 Stock Units would have been some $530,000 less than the price paid by Shabor. I do not accept the valuation evidence for Mr Graham that even if the Property's carrying capacity was materially less than represented, it would not make a difference to its price. Given Mr Matheson, called by Mr Graham, described carrying capacity as a proxy for the revenue generating potential of a property, it would not make sense for a *materially lower* carrying capacity to have no impact on value.

(f) I am conscious that Mr Sharp in particular had some concern about the Property's carrying capacity shortly prior to settlement, which led to the "reservation of rights" letter of 2 June 2014.[121] In *Altimarloch*, Tipping J said the facts in that case were "not as if the purchaser elected to settle with knowledge of the shortfall. If that had been so the position

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118 At [37] per Elias CJ and [236] per Anderson J.
119 At [38].
120 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).
121 See [54] above.

as regards the proper measure of loss may well have been different".[122] But in this case, while *some* suspicions were raised, there was no *actual* knowledge of the shortfall in carrying capacity or how significant (or not) it might be. The reservation of rights letter referred only to "potential" issues. The actual position only became clear after Shabor took possession, passed through its first winter on the Property and took expert advice. And again, it was not put to Mr Sharp or Mr Borland that it would have been more reasonable for them not to settle, *even if* another suitable property had been available.

[213] For these reasons, I consider the costs to cure approach to damages in this case most closely reflects the costs "actually and reasonably suffered" by Shabor as a result of the Capacity Representation being false.[123] In assessing the quantum of the costs to cure, however, care needs to be taken to ensure that no elements which might properly be considered betterment are included in the analysis.

[214] Turning to the make-up of Shabor's damages claim, key costs incurred to improve the Property's carrying capacity are additional fertilizer (capital application, rather than maintenance) and fencing. In the event, there was a degree of agreement between the respective experts who considered these costs (Mr Beetham for Shabor and Mr Matheson for Mr Graham) – at least in relation to the underlying calculations.

[215] On the cost of capital fertilizer, Mr Beetham noted that to date, Shabor has spent $370,401 in applying 110 kilograms/ha of phosphorus.[124] This has already led to some improvement in carrying capacity. Mr Matheson did not take issue with this figure, though in his damages analysis, had only catered for lifting Olsen P levels to an average of 11, being the average of four February 2014 test results included in the PIM. I do not agree, however, that that is the correct approach. First, there was no serious challenge to Dr Roberts' evidence that a lift to an average Olsen P level of 18 was required to support even just under 7000 Stock Units. In addition, while the lower fertility levels were recorded in the PIM, that was in conjunction with a stated

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122 *Marlborough District Council v Altimarloch Joint Venture Ltd,* above n 99, at [168] per Tipping J.
123 At [156] per Tipping J.
124 This excludes maintenance levels of fertilizer, which would be incurred in any event.

carrying capacity of 7,500 Stock Units. I accordingly adopt Mr Beetham's $370,401 figure.

[216] Mr Beetham estimated a further $232,348 is needed in capital fertilizer to lift the overall Olsen P levels to 18 (being Dr Roberts' estimate of what would be required to lift carrying capacity to 6839 Stock Units).[125] Again, Mr Matheson did not take issue with Mr Beetham's calculation, though notes that "few hill country properties would operate with average soil Olsen P levels at or near 'optimum' over all of their country, but might maintain higher soil fertility levels over the better contoured or subdivided areas". Mr Beetham also estimated that a further $51,217 would be required to lift Olsen P levels further on the cropable contour parts of the Property to comfortably support pasture growth to sustain 7,500 Stock Units. Again, Mr Matheson did not specifically comment on this aspect of Mr Beetham's evidence.

[217] I accordingly adopt those further figures from Mr Beetham's evidence, giving a total capital fertilizer (phosphorus) spend (to date and expected) of $653,966.

[218] While lifting the Olsen P levels was identified by all relevant experts as the priority and giving the "best return", Mr Beetham also recommended additional lime on the Property to reduce the impact of aluminium toxicity. While Mr Beetham said that quantifying how much lime is needed would require more detailed soil testing or paddock by paddock texting, as a "basic estimate", a further $52,560 needs to be spent on lime to help lift pasture production and thus carrying capacity. Mr Matheson did not comment on this aspect of Mr Beetham's evidence. While the focus of the evidence on fertilizer was lifting the Olsen P levels, lime also formed part of the recommended capital fertilizer application, including by Dr Roberts. Mr Sharp noted that the access obtained to the Property shortly prior to settlement to apply fertilizer before winter included the application of lime. Accordingly, it is reasonable to conclude that there is a "genuine intention to expend"[126] these further sums on additional lime application.

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125 See [96]–[97] above. As noted, Dr Roberts did not say what Olsen P level would be required to achieve pasture growth to support 7,500 Stock Units. But an average of 18 is approaching the optimum levels of Olsen P for the type of soil on the Property.

126 *Marlborough District Council v Altimarloch Joint Venture Ltd,* above n 99, at [161] per Tipping J.

[219] Mr Beetham also estimates costs of $82,201 to create further subdivision on the Property and water reticulation. This was assessed by use of the Farmax model as to the average paddock sizes needed to run 7,500 Stock Units. Mr Beetham acknowledged, however, that approaches and polices to the level of subdivision required to support carrying capacity is variable.

[220] Mr Sharp's evidence was that, prior to purchase, he and Mr Borland did see an opportunity to lift carrying capacity to even more than 7,500 Stock Units through further subdivision. Mr Matheson did not address Mr Beetham's calculation. But I have found that it is likely the Property could carry around 7,500 Stock Units in the past, which was obviously possible without the further subdivision envisaged. Shabor has also undertaken a process of converting the Property to a deer farm, being a quite different use to that when Mr Graham owned it.

[221] I am accordingly not satisfied that Shabor, bearing the onus of proof on its damages claim, has made out this aspect of its claim. The evidence of Mr Beetham was at a very high level only. Shabor's closing submissions did not address this aspect of its damages calculation. And there is no clear evidence that further subdivision costs of this nature or quantum are likely to be incurred by Shabor in any event. I would not, therefore, have included this element of the claim in any damages award.

[222] As to fencing, Mr Beetham's damages claim included a sum of $212,245 for fencing work carried out by Shabor since settlement and which has improved carrying capacity, as well as estimated costs to complete. The total is made up of new sheep fences to replace all dilapidated fences at settlement ($68,651) (category 1); total new deer fencing, 70 per cent of which was replacing dilapidated fences at settlement, but priced on the basis of "conventional fence" ($117,075) (category 2); and rewiring sheep fencing ($26,520) (category 3). These totals excluded the cost to "top up" existing fences to make them deer proof and other costs associated with new deer facilities.

[223] In terms of the calculation of these costs, Mr Matheson took no issue. However, Mr Borland confirmed in cross-examination that other than in the first three months of owning the Property, the fencing work has in fact been carried out by Shabor

itself; that is, not a third party to whom a fee has been paid. It was agreed that the conventional fencing costs adopted by Mr Beetham ($15 per metre) were split about 50:50 between labour and materials. Mr Graham's position was, therefore, that any damages award in respect of fencing should "back out" of it the labour component, given no actual dollar cost was incurred by Shabor for this.

[224] Mr Matheson also removed from his analysis the total category 2 fencing cost (being $117,075), on the basis this remedied dilapidated fencing which would have been evident on inspection on 7 April 2014. However, he accepted in cross-examination that if the Property's carrying capacity was materially lower than 7,500 Stock Units, then fixing dilapidated fences in order to lift carrying capacity was valid expenditure, regardless of whether a purchaser knew the fences were dilapidated at purchase. Or to put the matter another way, had the Property in fact already comfortably carried 7,500 Stock Units in its existing condition (including the dilapidated fences), that expenditure would either not have been needed, or if it had been incurred, it would have lifted carrying capacity *beyond* 7,500 Stock Units, and thus lifted the Property's economic return to an even higher level.

[225] I would therefore have included the three cost categories for fencing identified by Mr Beetham. But I consider it appropriate to remove from them the labour element, which was agreed at around half the $15 per metre. Mr Quinn submitted that to do so ignores the fact that damages are being assessed on the contractual measure, to compensate for loss of expectations. Thus, "if all the fencing work remained to be undertaken, instead of just part of it, it seems the Defendants would take no issue with Mr Beetham's calculation of fencing costs."

[226] While in theory that might be correct, the evidence nevertheless confirms that the majority of the fencing work has been carried out by Shabor itself. Accordingly, in terms of fencing costs to date, it has *not* incurred a labour element of approximately 50 per cent of $15 per metre. Its only actual costs have been materials. As Tipping J observed in *Altimarloch,* "the key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff."[127] And in terms

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127 *Marlborough District Council v Altimarloch Joint Venture Ltd,* above n 99, at [156].

of fencing work yet to be done, there was no suggestion this would be completed by third parties. It is thus reasonable to assume that work to complete dilapidated fencing will also be carried out by Shabor itself, and labour costs not paid to an external party. Again, as Tipping J noted in *Altimarloch* in relation to future costs to cure:[128]

> Of course the plaintiff must have a genuine intention to expend the damages to protect the performance interest. If that is not so, it would hardly be reasonable to award damages according to the performance measure.

[227] Had I awarded damages in Shabor's favour, I would have therefore reduced the fencing element of the damages calculation by 50 per cent to remove the estimated external labour cost.

[228] On this basis, therefore, Shabor's damages award on the CCLA cause of action would have been $812,648 ($653,966 to lift Olsen P levels, plus $52,560 lime application, plus $106,122 fencing costs). I do not consider this to be disproportionate compared to the diminution in value of around $530,000.

[229] I will now briefly address the damages claim under the Fair Trading Act cause of action.

[230] Damages under s 43 of the Act are calculated on the tort measure of damages.[129] Thus, rather than compensation to secure performance of 7,500 Stock Units, damages are (generally) calculated as if the misrepresentation had not been made.[130] In those circumstances, "[t]he normal measure of damages is the value transferred, generally represented by the contract price, less the value received, whether of property or of services or of money."[131]

[231] Mr McLaughlin assess the difference in value of the Property on the basis it carried 7,500 Stock Units and 5,500 Stock Units to be approximately $530,000. As noted at [212(e)] above, I do not accept Mr Coakley's evidence that with this level of difference in carrying capacity, there would have been no material difference in value.

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128 At [161], citing *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 332 per Megarry V-C.
129 *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA).
130 At 25 per Henry J.
131 James Edelman *McGregor on Damages* (20th ed, Sweet & Maxwell, London, 2018) at [49–028] and [49-058].

[232] Shabor also claimed operating losses of approximately $450,000 attributable to the lower carrying capacity of the Property. This figure was based on Shabor's accountant's evidence, Mr Gray. He said that Shabor suffered a net loss of $472,209 in the 2014 financial year, and that almost all of that was attributable to the operations at the Property.[132]

[233] Mr Matheson did not comment on Mr Gray's evidence. But even accepting for present purposes the total of Mr McLaughlin's diminution in value and Mr Gray's operating loss (given a total of $980,000), I would have reduced the Fair Trading Act damages award to reflect what I consider to be Shabor's own conduct contributing significantly to that loss. As discussed earlier, despite the significance of the transaction, its entry into the Agreement was hasty; I accept the experts' evidence that more due diligence ought to have been carried out; Mr Sharp and Mr Borland placed wholesale reliance on a carrying capacity set out in advertising materials expressed in Stock Unit terms, without ascertaining the basis upon which that had been calculated; and failed to take steps available to it to protect its position, such as negotiating appropriate clauses in the Agreement or making its tender conditional on due diligence.

[234] The author of "Entire Agreement (And Acknowledgement) Clauses, Misrepresentation and the Fair Trading Act" states:[133]

> The plaintiff's conduct, then, remains relevant under the *Red Eagle* approach. But, rather than barring recovery altogether, it means that the courts will apportion damages according to the contribution of the defendant and plaintiff to the damage suffered by the latter. It is theoretically possible that the courts might reduce the entirety of the damages by reason of the plaintiff's conduct. However, if it is shown that the defendant's conduct was misleading, that it actually misled the plaintiff and that it caused him or her significant loss, it is unlikely that this will be entirely negated by the plaintiff's unreasonableness. A much more likely result is for the courts, upon finding that both parties contributed significantly to the loss, to award a proportion (usually half) of the damages. This was the outcome in *Red Eagle*.

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132 Shabor having other business interests at that time.

133 Matthew Barber "Entire Agreement (And Acknowledgement) Clauses, Misrepresentation and the Fair Trading Act*"* (2011) 17 NZBLQ 393 at 403–404 (footnotes omitted).

[235] In *Red Eagle*, the Supreme Court stated that any reduction to reflect the plaintiff's own conduct was "necessarily a broad-brush assessment".[134] Having found that the plaintiff was very neglectful of his own interests, the Supreme Court stated that it had been open to the High Court Judge to make a 50:50 apportionment of blame. In *Poplawski v Pryde*, a misleading communication from the defendant was an "effective cause" of the plaintiff's decision to invest, though the High Court Judge had found that the plaintiffs ought to have pursued the transaction with more care.[135] The Judge's finding that he would have reduced the damages award by 50 per cent was upheld on appeal.[136] In *WaikatoLink v Comvita*, Harrison J reduced the damages award under the Fair Trading Act by 50 per cent for a "hasty and ill-conceived commercial decision".[137]

[236] Taking the broad brush assessment outlined above, I would have reduced the Fair Trading Act damages award by 40 per cent to reflect Shabor's own conduct. On any view, therefore, and even adopting the highpoint of Shabor's damages claim under the Fair Trading Act, any damages award under this Act would have been significantly less than the damages awarded under the CCLA.

Result and costs

Result

[237] I have made the following findings:

(a) The Capacity Representation was false and misleading. As at June 2014, the Property could not comfortably winter at least 7,500 Stock Units.

(b) The Property's actual carrying capacity at June 2014 was likely to be around 5,500 to 6,000 Stock Units.

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134 *Red Eagle Corporation Ltd v Ellis*, above n 82, at [39].
135 *Poplawski v Pryde* [2012] NZHC 2011 at [64].
136 *Poplawski v Pryde* [2013] NZCA 229, (2013) 13 TCLR 565 at [72].
137 *WaikatoLink Ltd v Comvita New Zealand Ltd*, above n 61, at [169].

(c) It is fair and reasonable for cl 27.3 of the Agreement to be conclusive between the parties for the purposes of s 50 of the CCLA. It similarly broke the chain of causation for the purposes of Shabor's claim under s 43 of the Fair Trading Act.

(d) Shabor's causes of action are accordingly dismissed.

(e) Had it been necessary to determine, I would not have found Shabor's reliance on the Capacity Representation unreasonable (for the purposes of the CCLA claim).

(f) Had I awarded damages to Shabor under the CCLA, I would have awarded a sum of $812,648 (on a costs to cure basis).

(g) Any damages award under the Fair Trading Act would have been reduced by 40 per cent, to reflect that Shabor's own actions contributed significantly to its loss.

Costs

[238] I invite the parties to seek to agree costs. At least on the basis of the materials presently before the Court, I cannot see any reason for increased or indemnity costs.

[239] If the parties cannot agree costs, Mr Graham is to file and serve a costs memorandum within **15 working days** of the date of this judgment. Shabor may then file a memorandum in response within **a further 5 working days**. No memorandum is to be longer than five pages in length. I will thereafter determine costs on the papers.

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Fitzgerald J

Solicitors: