IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA53/2022
[2023] NZCA 123

BETWEEN	PGG WRIGHTSON REAL ESTATE LIMITED Appellant
AND	PHILIP WILLIAM ROUTHAN AND JULIE VERONICA ROUTHAN AS TRUSTES OF THE KANIERE FAMILY TRUST Respondents

Hearing:	25 August 2022 (further submissions received 6 September 2022)
Court:	Gilbert, Mallon and Wylie JJ
Counsel:	L J Taylor KC, M E Parker and J E Eckford for Appellant D R Kalderimis, O T H Neas and T Nelson for Respondents
Judgment:	24 April 2023 at 2 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court judgment is set aside. Judgment is entered for the respondents in the sum of $300,000 plus interest under the Interest On Money Claims Act 2016 from the date of settlement of the purchase on 20 December 2010 until the judgment debt is paid in full.

C The cross-appeal is dismissed.

D The respondents must pay costs to the appellant for a complex appeal on a band C basis and usual disbursements. We certify for second counsel.

E The respondents' entitlement to costs in the High Court is undisturbed.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] The primary question on this appeal concerns the proper measure of damages in a claim against a real estate agent for a misrepresentation about production levels relied on by a purchaser in deciding to purchase a dairy farm.

[2] The purchaser claims it would not have purchased the farm had it known the correct position. It invested substantial sums in an effort to improve the production of the farm over the 10-year period of its operation but was unable to achieve the represented level. The purchaser's already high level of gearing at the time of purchase increased substantially to fund this further investment. The purchaser was ultimately unable to service its borrowings, in part because of a dramatic decline in the milk price. The mortgagee forced the sale of the farm and an associated farm property. The purchaser lost its equity in these properties and claims the real estate agent is liable for all its losses associated with the farming venture.

[3] The real estate agent says that the farm was worth more than the purchaser paid at the date of sale, even taking account of its actual production level. Therefore, it says the purchaser suffered no loss as a result of entering into the purchase agreement in reliance on the misrepresentation. It contends that the purchaser's losses were the result of business decisions it made over the 10-year period. The real estate agent had no involvement in these decisions and says it is not liable for the consequences of them.

Overview

[4] In October 2010, Mr Routhan, as one of the trustees of the Kaniere Family Trust (the Trust), entered into an agreement with Cooks Stud Farms Ltd (Cooks Farms) to purchase for $2.8 million a 105 hectare dairy farm in Hokitika (the Farm). PGG Wrightson Real Estate Ltd (PGG) acted as Cooks Farms' agent on the sale. The Trust's purchase was said to be induced by a misrepresentation made by PGG as to the average production from the Farm over the preceding three years — 103,000 kg of milk solids (kgMS) per season from 260 cows, whereas the correct figure was 98,729. The former figure reflected the average production in the three-year period ended 31 May 2009. PGG represented prior to the purchase in 2010 that the production level was unchanged. That was incorrect; production had dropped to 90,337 in the 2010 year, reducing the rolling three-year average to 98,729.

[5] Despite sustained effort and significant investment, the Trust did not manage to achieve the represented production level at any time in the 10-year period of its

ownership following settlement in December 2010. As can be seen from the table below, production fluctuated between a high of 88,503 and a low of 60,597. The production figures achieved by Cooks Farms in the four years prior to the purchase are also shown for comparison purposes:

Year	kgMS
2006/07	106,280
2007/08	107,921
2008/09	97,930 (three-year average = 104,043)
2009/10	90,337 (three-year average = 98,729)
2010/11	85,159
2011/12	80,118
2012/13	79,046
2013/14	88,503
2014/15	64,674
2015/16	78,992
2016/17	69,001
2017/18	87,486
2018/19	66,950
2019/20	60,597

[6] The Trust was eventually forced by its mortgagee, Rabobank, to sell the Farm in December 2020 at a price of $1.5 million. The Trust was also forced to sell a separate run-off property, a nearby 73-hectare property in Hokitika it had purchased in 2000 and which it ran in conjunction with the Farm (the run-off property). This property was also secured by the mortgage and was sold for $761,000. By the time of these sales, the farm-gate milk price had plummeted and farm values in the district had fallen dramatically. The Trust, which was highly geared, lost all its equity.

[7] The Trust contends that it would not have agreed to purchase the Farm had it known the correct position as to past production. Instead, it claims it would have purchased some other dairy farm that would have consistently produced approximately 103,000 kgMS on a comparable grass-based system. The Trust also

claims it would have sold the run-off property in 2010 for $1.6 million to reduce debt and provide working capital. The Trust claimed at trial it had lost a total of $3,184,000 as a result of PGG's misrepresentation, which it calculated as follows:[1]

(a) Loss of $1,442,000 on the sale of the Farm and the run-off property over and above the expected decline in value for comparable properties:

Farm	
Purchase price in 2010	$2,800,000
Less sale price in December 2020	$1,500,000
Less expected market decline of a comparable property over that period	$697,000
	$603,000

Run-off property	
Expected sale price if sold in 2010	$1,600,000
Less sale price in December 2020	$761,000
	$839,000
Total ($603,000 + $839,000)	$1,442,000

(b) Loss of $680,000 invested in capital improvements:

Sheds, concrete pad, herd house and feed pad at the run-off	$467,000
Fencing	$114,000
Re-grassing	$100,000
Total (rounded)	$680,000

(c) Interest costs of $1,062,000 which it says could have been saved if an alternative farm had been purchased:

Interest that would have been saved if the

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1 Based on the evidence of an independent expert engaged by the Trust, Mr Simon Glennie.

run-off property had been sold for $1.6 million in 2010 and the proceeds applied in reduction of bank debt and assuming an annual compounding interest rate of 8 per cent	$2,062,000
Less value of the run-off to the business calculated at $100,000 per annum	$1,000,000
Total	$1,062,000

[8] PGG contends that the Trust was no worse off as a result of entering into the agreement to purchase the Farm because it says it was worth more at the date of purchase than the Trust paid for it, even taking account of the reduced production level. PGG therefore contends that no loss was suffered by the Trust as a result of its claimed reliance on the misrepresentation.

The Trust's claims

[9] The Trust issued proceedings against PGG in the High Court in February 2018. In its fourth amended statement of claim, it advanced five alternative causes of action, each seeking damages of "not less than $3,000,000" and all based on the misrepresentation as to the historical production level:

(a) Misleading conduct in breach of s 9 of the Fair Trading Act 1986.

(b) Negligence (vicarious liability).

(c) Negligence (direct liability).

(d) Negligent misrepresentation (vicarious liability).

(e) Deceit (vicarious liability).

PGG's defences

[10] In its statement of defence, PGG denied that the Trust would not have purchased the Farm had it known the correct production level. It also claimed that a reasonable purchaser in its position would not have been misled by

the misrepresentation. It disputed the calculation of loss. In addition, PGG pleaded three affirmative defences (ignoring those no longer relied on):

(a) Liability was excluded by a disclaimer in the PGG proposal that contained the misrepresentation.

(b) The claim under the Fair Trading Act was time-barred.

(c) The Trust was contributorily negligent.

High Court judgment

Assessment of liability

[11] Dunningham J found that the misleading statement as to production levels was not the only statement in the PGG proposal which misled the Trust, but it was the most potent. The Judge was satisfied it was material to the purchase decision and that it was objectively reasonable for the Trust to have been misled in all the circumstances.[2] The Fair Trading Act claim was therefore proved subject to the questions of loss and the affirmative defences.[3]

[12] The Judge considered that the three negligence causes of action all rested on the same factual matrix and overlapped to such an extent that they could be considered together.[4] PGG was found to have owed the Trust a duty of care and to have breached that duty in providing inaccurate or misleading information.[5]

[13] The Judge was not satisfied that the high threshold required to sustain the claim in deceit had been proved.[6] That claim was accordingly dismissed.

The effect of the disclaimer

[14] The PGG proposal contained the following standard form disclaimer:

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2 *Routhan v PGG Wrightson Real Estate Ltd* [2021] NZHC 3585 [High Court judgment] at [140] and [141].
3 At [141].
4 At [79].
5 At [117].
6 At [130].

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

[15] The Judge found that this disclaimer only applied to information obtained from a vendor and passed on to a purchaser in circumstances where there was no reason to doubt the accuracy of the information. That was not the case here and the disclaimer therefore did not protect PGG from liability for the misrepresentation.[7]

Limitation defence

[16] PGG contended that the claim under the Fair Trading Act was time-barred in terms of s 43A because it was brought more than three years after the date on which the loss was discovered or ought reasonably to have been discovered. The Judge rejected that contention, being satisfied that the Trust did not, and could not reasonably have been expected to, discover the correct production levels until late 2014 during an arbitration with Cooks Farms.[8] The present claim, originally filed in February 2018, was therefore brought within time taking into account the effect of a standstill agreement the parties entered into in October 2016.[9]

Assessment of loss

[17] Leaving aside the question of contributory negligence, the Judge found that the recoverable losses suffered by committing to the purchase of the Farm in reliance on the misrepresentation were those set out at [7(a) and (b)] above, but not [7(c)], being the loss of equity in the Farm and the run-off property through the forced sale in 2020 ($1,442,000) and the loss of investment in capital improvements on the Farm ($680,000):

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7 At [115].
8 At [75].
9 At [76].

> [195] … I consider the losses which are proved as a consequence of the representations are the losses suffered by committing to this farm purchase, being the loss of equity in the farm and run-off through the forced sale in 2020 and the loss of investment in capital developments on the farm. However, the suggestion that the Routhans would have, but for the representations, saved $1,062,000 in interest is simply too speculative to be taken into account. I consider they were likely to have borrowed an equally large amount for a different farm purchase.
>
> [196] It follows, therefore, that because of the representations which induced the Routhans into this property purchase, the Trust has suffered a loss being the difference between the additional loss of value on the farm properties suffered as a consequence of the forced sale, being $1,442,000, as well as the $680,000 of investment in infrastructure and improvements on that property which was not reflected in the sale price. Those losses total $2,122,000, and represents their losses under the negligence and [Fair Trading Act] causes of action.

Contributory negligence

[18] The Judge accepted there was merit in PGG's criticism that the Trust incurred capital expenditure which had no bearing on production and other capital expenditure without an adequate cost-benefit analysis. For example, the Judge found that while the construction of the feed pad and stand-off area would improve utilisation of supplementary feed, it was unclear whether that lift in utilisation justified the cost, particularly given the Trust was cashflow constrained. It was also not clear why the facility was built with a 600-cow capacity. The Judge also considered that other capital expenditure, such as on laneways, fencing and farm buildings should have been deferred until the Farm was producing at a level that could sustain that expense. The Judge found that these decisions exacerbated the financial decline of the Farm and contributed to the Trust's losses.[10]

[19] Taking these matters into account, the Judge considered that a fair measure of the Trust's contribution to its own losses would be 20 per cent. That reduced the damages to $1,697,600.[11] The Judge awarded interest on the damages under the Interest On Money Claims Act 2016 from the date the sale of the last of the two properties became unconditional until the judgment was paid in full.[12]

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[10] At [228].
[11] At [229].
[12] At [231].

PGG's appeal

[20] PGG contends on appeal that the Judge erred in the following respects:

(a) In finding that the disclaimer did not exclude liability for the Trust's claim.

(b) In finding that the actual average production level was not reasonably discoverable prior to 2014 and that the Fair Trading Act claim was therefore not time barred.

(c) In finding that the Trust would not have purchased the Farm had it known the correct production figures for the preceding three years.

(d) In assessing the loss contrary to established principles as to scope of duty, causation, remoteness of damage and the date for assessment of loss.

(e) In finding that the Trust's negligent contribution to its loss was only 20 per cent as a result of its imprudent expenditure.

[21] PGG seeks an order setting aside the High Court judgment and/or reducing the damages award to no more than $50,000, being the difference in value of the Farm as a result of the representation being wrong.

The Trust's cross-appeal

[22] The Trust cross-appeals against the High Court's finding that the claim in deceit was not proved. It seeks judgment on the deceit claim assessed on a "total loss of capital" basis which it now calculates to be $3,875,496 as follows:

Ingoing net equity	$1,575,496
Funding provided by Mr Tony Timpson, a close personal friend and benefactor, which the Trust claims would likely have been forgiven	$1,800,000

Notional capital gain and/or trading profit from an alternative venture	$500,000
Total	$3,875,496

[23] Alternatively, if the deceit claim is rejected, the Trust contends that the discount applied for contributory negligence of 20 per cent was either unjustified or disproportionately large.

[24] The Trust does not challenge the other aspects of the Judge's assessment of the damages payable under the Fair Trading Act and negligence causes of action.

The issues

[25] It will be convenient to address the issues in the following order:

(a) Was the Judge correct to dismiss the deceit claim?

(b) Was liability excluded by the disclaimer?

(c) Was the Fair Trading Act claim time-barred?

(d) Was the Trust was induced by the misrepresentation to enter into the agreement?

(e) Was the recoverable loss assessed correctly?

The factual narrative

[26] Before addressing these issues, we set out the facts in some detail, including the circumstances leading to the purchase of the Farm and the steps taken by the Trust in the 10-year period after it took possession.

Pre-purchase

[27] Mr Nelson Cook, the sole director of Cooks Farms, is a highly experienced and well-respected farmer who has received many dairy farming awards. He bought his

first farm in 1960 and had owned the Farm through Cooks Farms, since 1984. He decided to sell the Farm in 2009 because he had several farms and he thought it was a good time to sell. In mid-2009, he listed the Farm for sale through CRT Real Estate Ltd (CRT) for $2.9 million (plus GST).

[28] Ms Shari McLaughlin of CRT prepared a brochure (the CRT brochure) setting out the following information about the Farm on the face page:[13]

> **Heartland Dairying - Hokitika**
>
> **Kaniere-kowhitirangi Road, Hokitika**
>
> This quality unit in an excellent location 10 minutes inland from Hokitika has all you could want. *Averaging 103,000 kgms for the last 3 seasons from approx 260 cows on a grass based system with half the herd wintered off each year*. A large 4 bedroom family home with double garage and conservatory surrounded by landscaped gardens. Tidy 12 aside double up herringbone dairy shed, large wintering barn and numerous other farm buildings. Don't let the opportunity to make this unit your own pass you by.

[29] The property details on the next page referred to 95,000 dairy shares. This roughly correlates to the actual production achieved in the prior year, the 2008/2009 year, of 97,930 kgMS.

[30] The Farm did not sell at that time and Mr Cook withdrew it from the market.

[31] Mr and Mrs Routhan were then living in Wellington but were planning to fulfil a long-held dream of buying a dairy farm and relocating their family to Hokitika. They had both grown up there (Mrs Routhan on her family's dairy farm) and they already owned property in the area (a house on a lifestyle block which had been in Mr Routhan's family for three generations and the run-off property).

[32] Mr Routhan's background is in the plumbing, drainlaying and gasfitting industry where he achieved considerable success. He purchased the plumbing company he was working for in 1981 and developed it to the point where it operated in 14 locations around New Zealand. Mr Routhan received various awards for his achievements in this industry. He also served on the Plumbers, Gasfitters and Drainlayers Board as chairman and later as chief executive.

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13 Emphasis in italics added.

[33] In September or October 2009, Mr Routhan contacted Mr Greg Daly of PGG, a well-known and experienced real estate agent on the West Coast, to seek his assistance in securing a farm with a capacity of around 500 to 600 cows in the Kokatahi/Kowhitirangi Valley, preferably close to their run-off property.

[34] Mrs Routhan's uncle had listed his 105-hectare dairy farm with Mr Daly. It was located across the road from the run-off property and was being sold as a going concern with 285 cows producing 102,000 kgMS per annum. The Routhans offered $4 million for this property but their offer was declined after Ms McLaughlin convinced the owner she could sell it for more (although this did not prove to be the case and the property did not sell until some years later).

[35] In early 2010, Ms McLaughlin gave the Routhans a number of brochures, including the CRT brochure, advertising various farms for sale in the Hokitika region. Although CRT did not hold a current agency listing for the Farm, Ms McLaughlin thought it may suit the Routhans' requirements and she understood that Mr Cook would now be open to an offer of $2.8 million.

[36] Mr Routhan advised Mr Daly that Ms McLaughlin had approached them about various properties in the area, including the Farm. Mr Routhan gave Mr Daly the CRT brochure and asked him to obtain production details and pricing for the Farm and a neighbouring farm (Casa Finca). Mr Routhan asked for this to be done without disclosing his identity because he did not want it known that he was looking to purchase farms located close to their run-off property.

[37] Mr Daly met with Mr Cook on 7 September 2010. Unsurprisingly, given the long passage of time, neither could recall the precise details of this meeting by the time their briefs of evidence were completed more than 10 years later.[14] It is common ground that Mr Cook confirmed at this meeting that he was still interested in selling the Farm. Mr Daly wrote some notes on the inside cover of the CRT brochure while he was talking to Mr Cook. Mr Daly's recollection was that he asked Mr Cook about the Farm's milk production and was told that the average was still the same,

[14] As noted, the proceedings were not filed until February 2018. The briefs of evidence of Mr Daly and Mr Cook were completed in June 2021.

from which Mr Daly inferred that it remained 103,000 kgMS. For his part, Mr Cook's recollection was that production had been "pretty consistent for the last couple of years", following a peak when he had an outstanding farm manager. However, Mr Cook said it was not his practice to give out production figures and he would have referred Mr Daly to the dairy company.

[38] The Judge found that Mr Cook did not state that the milk production for the most recent season was 103,000 kgMS.[15] However, the Judge considered it was likely Mr Cook said something to Mr Daly about production levels having been pretty consistent for the last couple of years following a peak when he had an outstanding farm manager.[16]

[39] Mr Routhan recalls that Mr Daly visited them on his way home from this meeting and told them that Mr Cook would sell the Farm for $2.8 million and that production for the 2009/10 season was "steady on 103,000 [kgMS]". Mr Daly did not recall this specifically but accepted he probably would have told Mr Routhan that the average production was at that level or something to that effect because that is what he understood from his discussions with Mr Cook.

[40] Mr Routhan instructed Mr Ross Bishop to prepare financial forecasts on the assumption that Casa Finca and the Farm would both be acquired and operated together in conjunction with the run-off property. Mr Bishop was a consultant who provided financial advice to farmers in the West Coast region. He had been assisting the Trust over the past two to three years in connection with its development of the run-off property which had been a swamp. Mr Bishop said he was asked to prepare indicative reports only. He said Mr Routhan wanted to understand the sensitivities around forecast payouts to decide whether the proposed purchase was worth pursuing. Mr Bishop said that the three draft budgets he prepared for the year ended 30 June 2011 were all based on the long-run district average production figures produced by the dairy company. The combined base production level assumed in the draft forecasts was 245,000 kgMS. The modelling showed indicative gross profit

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15 High Court judgment, above n 2, at [31].
16 At [32].

outcomes depending on various assumptions, including production levels ranging from plus or minus 10 per cent from the assumed base.

[41] Mr Routhan asked Mr Daly to prepare a proposal document for the Farm and Casa Finca for submission to the bank. Mr Daly prepared this document (the PGG proposal) using the CRT brochure as a base and updating it with information obtained from Mr Cook. The same supporting documentation contained in the CRT brochure relating to the 2009/10 period was included — the Ravensdown recommended fertiliser plan for the Farm dated 24 August 2009, Analytical Research Laboratories Ltd soil analysis dated 30 June 2009, and the rates assessment for the period 1 July 2009 to 30 June 2010 — together with an updated title search. The only material changes from the CRT brochure were to the information on the first page:

> SUPPLEMENTS Approx half herd wintered off and 115 bales baleage made on. [No mention of baleage in CRT brochure]
>
> SHARES Approx 103,000 shares included in sale [Compared to 95,000 in CRT brochure]

[42] Mr Routhan provided a copy of the PGG proposal and Mr Bishop's forecasts to Rabobank. On 15 September 2010, Mr Routhan signed on behalf of the Trust a Rabobank loan application for $8,150,000 to fund:

(a) the purchase of Casa Finca for $4.2 million;

(b) the purchase of the Farm for $2.8 million;

(c) working capital of $150,000; and

(d) the refinancing of existing debt of $1 million (ASB loan of $780,000 secured over the run-off property having an estimated value $1.6 million and a National Bank loan of $230,000 secured over the lifestyle block having an estimated value of $770,000).

[43] In a section of the loan application headed "Property details", Mr Routhan recorded alongside "Carrying capacity" the figure "123 000 m/s" for Casa Finca and "103 000 m/s" for the Farm.

[44] Mr Daly prepared a rural agency agreement which he and Mr Cook signed on 11 October 2010. This document incorrectly recorded on the face page that the Farm was listed with PGG for the period from 1 September 2010 to 21 December 2010, but the body of the agreement stated that the appointment commenced on 11 October 2010 and was to expire on 21 December 2010. On the foot of the face page of the agreement, Mr Daly ticked the "yes" box next to "Rural Information Sheet Completed". However, it is common ground that Mr Cook did not complete this sheet at the time. Mr Daly recalled that Mr Cook told him he wanted to check the production figures and would get back to him. That was not Mr Cook's recollection. He believed he would have referred Mr Daly to the dairy company. However, he did amend the document at some stage to change the average production figure for the last three years from 103,000 to 97,000. He could not recall when this was done. There is no record of when the document was received by PGG, but it was not until after the purchase agreement was entered into and quite possibly not until after settlement had occurred. The document did not come to light until many years later when discovery was undertaken in the arbitration. It seems that Mr Daly had no knowledge of the document with the amended production figure until then.

Agreement for sale and purchase of the Farm

[45] The agreement for sale and purchase was completed on 19 October 2010. The agreement was conditional on:

(a) the purchaser carrying out satisfactory due diligence on the property within a period of 15 working days from the date of the agreement;

(b) solicitor's approval of title and the form and content of the agreement within 10 working days; and

(c) obtaining a satisfactory supply contract for a volume of milk solids acceptable to the Trust within 10 working days.

[46] Another special term dealt with the dairy company shares:

> **24.0 Dairy Company Shares**
>
> (a) The purchase price is inclusive of the 103,000 Westland Milk Products Dairy Company Shares owned by the Vendor (s) at the value of $1.50 each.
>
> (b) On settlement the Vendor (s) shall deliver to the Purchaser (s) a duly executed form of transfer of the shares in favour of the Purchaser (s).
>
> (c) The Vendor (s) warrant that the above shares have been paid up in full.

[47] Sometime after the agreement was signed, the Trust received an internal PGG form headed "Particulars of Real Estate Sale" which was signed by Mr Michael Curragh, the manager of PGG in Greymouth. This document recorded milk production at 103,000 kgMS.

[48] The trustees of the Trust carried out only limited due diligence, although the Judge found this was consistent with common practice at the time.[17] They did not obtain any breakdown of the actual production from the Farm over the preceding years. More significantly, they did not ask any questions of Mr Cook about how the Farm had been run in order to achieve the production levels represented, which were well above the industry average in the district. Nor did the Trust obtain any valuation or other independent advice about the quality of the farm and its pastures, which were assessed in the months following settlement as being in a "dire" state.

[49] The joint expert report presented to the High Court listed the following issues that a purchaser could have identified for clarification as part of due diligence:[18]

(a) Reflect on performance on a season-by-season basis.

(b) Grazing arrangement — where, what and when.

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17 At [221].

18 The experts were not agreed as to whether a reasonable, non-expert, purchaser should have been expected to have clarified these points as a matter of due diligence in 2010.

(c) Supplements used (quantity and timing) on the dairy farm.

(d) Pasture renewal and cropping programme.

(e) Labour and management structure.

[50] No budgets were prepared other than the gross profit forecasts prepared by Mr Bishop which incorporated Casa Finca and the run-off property and took no account of the costs associated with the proposed high level of borrowing.

[51] The agreement was declared unconditional by the Trust's solicitors on 10 November 2010. Rabobank approved a loan of $4.8 million on 24 November 2010 as follows:

(a)	Refinance loan from ASB Bank Ltd	$780,000
(b)	Purchase of the Farm ($2.8m – $1.5m from Mr Timpson)	$1,300,000
(c)	Purchase of Casa Finca	$2,720,000

[52] In the meantime, on 8 November 2010, the Trust entered into an agreement to purchase Casa Finca for $4.2 million. However, the purchase of Casa Finca did not ultimately proceed. This meant that the borrowing from Rabobank reduced to $2,080,000.

[53] In anticipation of settlement, Mr Cook's solicitors sent the Trust's solicitors various documents including a desktop valuation certificate prepared by QV Valuations apportioning the sale price between land and improvements. Section 1 of this report was headed "PROPERTY SUMMARY" and included a "[p]roduction estimate" of "90,000 kilograms of milk solids".

[54] The agreement for sale and purchase of the Farm settled on 20 December 2010. The purchase price of $2.8 million was entirely funded by debt, being the loan from Rabobank of $2,080,000 ($1.3 million towards the purchase price with the balance of

$780,000 being used to refinance ASB Bank) and a loan of $1.5 million at bank deposit interest rates from Mr Timpson.

Post-settlement

[55] Rabobank ultimately forced the sale of both the run-off property and the Farm. Both were sold by tender on 1 December 2020, 10 years after the Trust purchased the Farm. During this 10-year period, the Trust made a number of significant investment and management decisions affecting the farming operation. These decisions necessitated a substantial increase in the level of the Trust's borrowing from $3.58 million at the time of the settlement of the purchase in December 2010 to $4.8 million by July 2013. The increase in the already high level of borrowing left the Trust further exposed to the dramatic fall in the dairy price which commenced in the 2014/15 year and continued for several years after that.

[56] Before summarising these decisions and their associated costs, we mention three other significant matters that emerged following settlement. First, contrary to the information in the PGG proposal, the high level of production achieved by Cooks Farms was partly attributable to the extremely high level of nitrogen it applied to the pasture — 350–400 kg per hectare as compared with the Ravensdown recommendation of 147 kg.[19] Secondly, in addition to half the herd being wintered off, all the heifers were also kept off the Farm, usually on one of Mr Cook's run-off blocks.[20] Thirdly, the actual stocking rate over the relevant period was 233 cows, not 260 as stated in the proposal.[21] These other misrepresentations were not pleaded.[22] The Trust sought to introduce them in closing.[23] We understand this is what the Judge was referring to when she stated that the representation as to the historical production level was not the only misrepresentation that induced the purchase, but it was the most potent.[24]

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19 High Court judgment, above n 2, at [58(a)].
20 At [58(b)].
21 At [58(c)].
22 At [140].
23 At [132].
24 At [140].

Farm manager

[57] In the initial period after the Trust took possession, Mr Chris Lord, who had managed the Farm for Mr Cook, continued in this role. However, he left suddenly, in February 2011. It appears that he and Mr Routhan were unable to work well together. The Trust then engaged Mr Robert Bradley, a semi-retired dairy farmer, as a farm adviser. He worked on the Farm once a week until he ceased advising the Trust in late 2013.

Herd replacement and increased stocking rate

[58] Mr Cook had run Friesian cows on the Farm, but Mr Routhan wanted cross-breeds, which are smaller. To that end, the Trust entered into two lease agreements with Cooks Farms, the first for 270 cows for the period from 20 December 2010 until 31 May 2011 and the second for 300 cows and 75 heifer calves for the two-year period commencing 1 June 2011.

Termination of cow lease and subsequent arbitration

[59] It became obvious almost immediately after taking possession of the Farm that milk production achieved by the Trust was well below that represented. Following inspection of the cows, Mr Bradley concluded that they were poor milk producers, and this was thought to be the main cause of the low production levels. The Trust accordingly wrote to Mr Cook on 25 November 2011 advising that it intended to terminate the second lease from its commencement date of 31 May 2012. Mr Cook responded claiming that the Trust had no right to cancel and that the low production was due to Mr Routhan's inexperience as a dairy farmer. The Trust maintained its position and wrote to Mr Cook on 22 May 2012 purporting to cancel the second lease.

[60] Following the purported cancellation of the lease, the Trust borrowed a further $620,000 from Rabobank in June 2012 for the purchase of a replacement herd. Mr Routhan said the replacement herd cost $700,000.

[61] The cow lease dispute was referred to arbitration and was ultimately resolved in Mr Cook's favour in August 2015. The direct cost to the Trust (not including the cost of the replacement herd) was $269,165.98 as follows:

(a)	Damages award	$44,779.71
(b)	Interest	$15,233.37
(c)	Legal fees	$129,027.90
(d)	Arbitrator's award of costs	$80,125.00

[62] We note here that in the course of preparing for the arbitration, the Trust's solicitors asked Mr Cook for disclosure of certified production certificates. These were eventually received from the dairy company with Mr Cook's permission in November 2014. Mr Routhan said this was the first he knew that the actual average production level was below that stated in the brochure.

Re-grassing of pasture

[63] Another early step taken by the Trust to address the production shortfall was to completely renew the pasture on the Farm on the advice of a specialist agronomist. As a stop-gap measure, grass seed was direct-drilled into the existing pasture in late 2011. This was followed by a full-scale re-pasture of the entire farm carried out over a three-year period commencing in 2012. Mr Routhan estimated that this work cost approximately $150,000.

[64] Mr Bradley explained that normally only one-tenth of a farm would be out of action for pasture renewal each season. However, because of what he described as the "dire" state of the paddocks, it was considered necessary to re-grass them in a shorter period. The consequence was that one-third of the Farm was not able to be used to provide grass to feed the cows for two to three months in each of these three seasons necessitating the purchase of supplementary feed. Mr Routhan stated that approximately $47,000 was spent on extra feed in the 2010/11 year alone.

A further $42,000 was spent on fertiliser in the first half of the 2011/12 year, over and above that budgeted for.

[65] In an attempt to increase production, a decision was made to continue milking the cows during the winter of 2013. However, the consequent lack of grass in the spring ultimately led to the decision to change from twice daily milking to milking only once a day in the spring of 2014. Milk production was compromised in the three seasons affected by the re-grassing programme and this was a significant contributor to the low production achieved, particularly in the 2014/15 season of only 64,674 kgMS.

Capital expenditure

[66] The Trust embarked on an extensive capital improvement programme. Works carried out (or at least in progress) by the end of the 2013 calendar year included the following:

(a) New concrete feed pad and stand-off area at the run-off — $440,000.

(b) Full re-fence of the Farm — $250,000.

(c) Replace the water supply system — $116,000.

(d) Laneway improvement — $150,000.

Decline in dairy prices

[67] Unfortunately, the viability of the farming operation was significantly impacted by the dramatic decline in the West Coast farm-gate milk price commencing in the 2014/15 year. The Westland dairy price dropped from $7.70 per kgMS in the year prior to the purchase (2010/2011), to a low of $3.62 in the 2015/16 year:

Year	Price per kgMS
2010/11	$7.70
2011/12	$6.04

2012/13	$6.34
2013/14	$7.57
2014/15	$4.95
2015/16	$3.62
2016/17	$5.18

Increase in borrowing costs

[68] Following settlement of the purchase, the Trust increased its borrowings from $3.58 million to $4.8 million to meet the capital and operational expenditure summarised above (but not the costs of the later adverse arbitration award):

(a) June 2012, Rabobank advanced $620,000 for the purchase of the replacement herd, increasing the facility from $2.080 million at the time of purchase to $2.7 million.

(b) September 2012, Rabobank increased the facility by a further $130,000 to $2.83 million for capital and operating expenditure.

(c) April 2013, Mr Timpson advanced a further $300,000 to the Trust bringing total borrowings from him to $1.8 million. Unfortunately, he passed away in June 2013, before an expected additional advance of $120,000 was to be made.

(d) July 2013, Rabobank advanced a further $170,000 to fund capital expenditure and working capital. This brought the total facility to $3 million. At the same time the interest rates were increased to reflect the increased risk.

[69] In April 2015, Rabobank downgraded the account and placed it under the oversight of its special asset management division. It insisted that no unbudgeted capital expenditure was to be incurred without its prior written consent. Rabobank subsequently granted further extensions to the credit limit — to $3.25 million in July 2015, $3.35 million in October 2015 and $3.5 million in

April 2016. This took the Trust's total borrowings to $5.3 million taking account of Mr Timpson's loans.[25]

Standstill agreement

[70] On 20 October 2016, the Trust reached a limitation standstill agreement with PGG. This was renewed from time to time to cover the period until proceedings were issued in February 2018.

Forced sale of the properties

[71] In September 2017, Rabobank required the Trust to put one of its properties on the market by 30 September 2017 and the other by 30 November 2017. On 5 October 2017, the Trust entered into an agency agreement with Greg Daly Real Estate Ltd in respect of the run-off property. Mr Daly said that a price between $1.4 and $1.65 million was negotiated with the neighbours but they were unable to secure funding.

[72] The Trust engaged Mr Daly to conduct a deadline sale process for the Farm by private treaty in March and April 2019. No written offers were received. Although two local parties showed some interest, it was difficult to secure bank funding at that time.

[73] On 28 February 2019, Rabobank served a Property Law Act notice on the Trust. In May 2019, at Rabobank's insistence, the Trust engaged Ernst & Young to help prepare the Farm for sale and to oversee the sale process.

[74] Mr Daly was re-engaged in March 2020 to attempt a sale of the Farm and the run-off property. The marketing campaign produced only limited enquiries and Covid-19 travel restrictions limited property inspections.

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25 The Trust's financial statements for the year ended 30 June 2020 record that the total amount due to Rabobank at that date with accrued interest was over $4 million.

[75] In December 2020, the Trust sold the run-off property for $761,000 and the Farm for $1.5 million. Settlement of these sales, both of which were by tender, occurred in February and June 2021 respectively.

Was the Judge correct to dismiss the deceit claim?

[76] The deceit pleading was founded on the following allegations:

> 81. With reckless disregard for their truth or otherwise, and with intent to induce the Trust to purchase the Farm, and as employees and/or agents of [PGG]:
>
> 81.1 [Mr] Daly made the average production statement and the continuing production statement;
>
> 81.2 [Mr] Daly committed the Non-Disclosure; and
>
> 81.3 [Mr] Curragh made the production confirmation statement.
>
> 82. The matters pleaded in paragraph 81 constituted deceitful conduct.

[77] The "average production statement" was defined in the pleading as the statement in the PGG proposal that the average production from the Farm over the last three years was 103,000 kgMS from 260 cows.

[78] The "continuing production statement" was defined as Mr Daly's oral advice to Mr Routhan following his meeting with Mr Cook on 7 September 2010 that the Farm's production for the 2009/10 season remained at the same level as stated in the CRT brochure.

[79] The "Non-Disclosure" was defined in the following way:

> 38. [Mr] Daly did not disclose to [Mr] Routhan, prior to the sale, that:
>
> 38.1 upon request at or around the time of the Agency Agreement, [Mr Cook] had refused to confirm and certify information about the Farm, including in relation to production levels (as contained in the draft West Coast Information Sheet);
>
> 38.2 [Mr] Daly left the draft West Coast Information Sheet with [Mr Cook] to confirm and certify;
>
> 38.3 [Mr] Daly did not request from [Mr Cook], or otherwise obtain, information about the Farm's projected production level for the 2010/20111 season to date;

> 38.4 [Mr] Daly did not request from [Mr Cook], or otherwise obtain, information about the Farm's projected production level; and
>
> 38.5 [Mr Cook] had not confirmed and certified the information about production levels contained in the draft West Coast Information Sheet (through returning the completed West Coast Information Sheet).
>
> ("**the Non-Disclosure**")

[80] The "production confirmation statement" was a reference to the "[P]articulars of [R]eal [E]state [S]ale" form which stated that milk production was 103,000 kgMS.

[81] Despite the breadth of this pleading, the Judge recorded her understanding that there was no allegation of deceit prior to the signing of the agency agreement on 11 October 2010 when Mr Cook declined to approve the listing information, particularly the production figure.[26] Mr Kalderimis, for the Trust, confirmed this on appeal. He submits that Mr Daly was grossly negligent, but not dishonest, in the period up to 11 October 2010. It is therefore conceded, contrary to the pleading, that Mr Daly was not deceitful at the time he made the continuing production statement and the average production statement. The focus is on the non-disclosure after Mr Cook declined to affirm the production details at the time the agency agreement was signed on 11 October 2010 and the so-called production confirmation statement in the Particulars of Real Estate Sale form signed by Mr Curragh referred to at [47] above.

[82] The Judge considered that Mr Daly's failure to check with Mr Cook to confirm the listing information was correct prior to the agreement for sale and purchase being entered into was negligent but did not constitute deceit. The Judge's reasoning is captured in the following paragraphs of her judgment:

> [129] … [T]his is not a case where, on 11 October 2011, information came to light which showed Mr Daly's earlier representations to be false. Rather, it was information which meant they may or may not be true. But Mr Daly's evidence demonstrates he had a reasonable expectation that Mr Cook would have got back to him if there was any change. He held Mr Cook in high regard, noting he was one of the most respected farmers in the valley and believed "if he was doubting something I am sure you know he would have got back to me". He also assumed that the office processes would follow up on

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26 High Court judgment, above n 2, at [128].

> "the missing page" of the agency agreement. In other words, while Mr Daly knew there was some uncertainty over the production figures, he expressed confidence that if they were wrong, this would be advised in a timely way and certainly before settlement.
>
> [130] In my view, that expression of belief falls short of the threshold for deceit. It was clearly negligent for him to have failed to contact Mr Cook himself to confirm [that] the listing information was correct before the contract was entered into. He should not have assumed that either administrative staff or Mr Cook would make sure that happened. However, his actions fall short of the threshold to establish deceit and this cause of action fails.

[83] Mr Kalderimis submits that, even on the basis of the Judge's findings, Mr Daly lacked a positive belief in the truth and had a conscious awareness of the risk the information might not be true. He contends that this is sufficient to establish deceit. He says the High Court failed to consider the continuing nature of Mr Daly's statements, arguing that he had a duty to correct the information once he became aware that the production figure might not be correct. Mr Kalderimis relies particularly on the decision of the New South Wales Supreme Court in *McBride v Christie's Australia Pty Ltd* where it was held that Christie's was liable in deceit for failing to correct a representation that "there was no doubt that the Painting had been signed by Albert Tucker" when it later discovered this was false and that it was doubtful the painting had in fact been signed by him.[27]

[84] We see that case as being distinguishable. Mr Daly honestly, albeit mistakenly, believed the statement about farm production was correct at the time he made it. Unlike the position in *McBride*, Mr Daly did not become aware at any stage prior to settlement of the agreement for sale and purchase that the statement was false. He understood that Mr Cook was to check the position and would let him know if a correction was required. He respected Mr Cook and reasonably believed he would do this. We agree with the Judge that Mr Daly was negligent but not deceitful.

[85] Mr Kalderimis says that the deceit cause of action was not solely based on the representation as to historical average production, it extended to an alleged representation by Mr Daly that Mr Cook had confirmed the production. He says that even if Mr Daly had a misguided but honest belief that the production figure remained

[27] *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729 at [341], [344] and [346].

accurate unless Mr Cook corrected it, he could have had no such belief in respect of "Mr Cook's confirmation". This is a reference to a pleading in the fourth amended statement of claim which builds on the pleaded non-disclosure set out at [79] above:

> 39. The Non-Disclosure represented to [Mr] Routhan that:
>
> 39.1 [Mr Cook] had confirmed and certified the average production level at 103,000 KG/MS across the previous three years (inclusive of 2009/2010);
>
> 39.2 [PGG] (through [Mr] Daly and others) had no reason to question the accuracy of the average production at 103,000 KG/MS across the previous three years (inclusive of 2009/2010);
>
> 39.3 [PGG] (through [Mr] Daly and others) had no reason to question that the Farm's production level remained steady following the 2009/2010 season; and
>
> 39.4 [PGG] (through [Mr] Daly and others) had no reason to question whether the Farm would continue to produce at or around a rate of 103,000 KG/MS.

[86] Mr Kalderimis says the Judge failed to address this aspect of the claim. However, we do not consider it advances the Trust's position. Mr Daly did not tell Mr Routhan following his meeting with Mr Cook on 11 October 2010 that Mr Cook had confirmed or certified the production level. The non-disclosure did not amount to a statement to this effect. Mr Daly reasonably expected that Mr Cook would promptly notify him or PGG if his understanding turned out to be incorrect.

[87] We are not persuaded the Judge erred in rejecting the deceit claim. We agree with her reasoning and conclusion in respect of this cause of action.

Was liability excluded by the disclaimer?

[88] We set out the disclaimer at [14] above. It had the effect of excluding liability for information supplied by the vendor and relayed by the agent, effectively as a conduit. We are satisfied the Judge was right to conclude that the disclaimer did not protect PGG from liability for misrepresenting the historical production achieved on the Farm.[28] In short, as the Judge found, Mr Cook did not supply the figure. He did

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[28] High Court judgment, above n 2, at [115].

not state that the average production over the past three years was 103,000 kgMS. Nor did he state that this was the production for the 2009/10 season. PGG was not a mere conduit, passing on information it obtained from Mr Cook. Mr Daly obtained the production figure from the CRT brochure for the three-year period ending 31 May 2009 and wrongly drew the inference that this was also the production achieved in the 2009/10 season based on Mr Cook's generalised statement that the production level was "pretty consistent for the last couple of years".

Was the Fair Trading Act claim time-barred?

[89] PGG alleged that the Trust was, or ought to have been, aware prior to settlement on 20 December 2010 that the representation as to the three-year average production was incorrect. On that basis, it asserted that the claim was time-barred by virtue of s 43A of the Fair Trading Act.

[90] It appears that in the High Court PGG placed particular reliance on the QV Valuations desktop certificate dated 15 December 2010 and provided for the purposes of settlement (referred to at [53] above). This contained a production estimate of 90,000 kgMS. The Judge rejected PGG's submission that this document should have brought to the Trust's attention that the represented production figure was wrong.[29] There was no evidence the Routhans saw this document, nor would it have alerted them to the fact that the representation was incorrect. This was simply a desktop production estimate for the current season. There was no suggestion it was verified from actual data and it was included for the limited purpose of apportioning the sale price as between land and improvements for tax purposes. Even if the Routhans had seen this certificate, it would not have overridden the information they had expressly sought from Mr Cook through his agent, Mr Daly, about the actual production levels.[30]

[29] At [73].
[30] At [74].

[91] The Judge found that the Trust did not discover the true production levels until late 2014 in the context of the cow lease arbitration.[31] The Judge considered the Routhans had no reason to undertake any other enquiry before that date.[32]

[92] Mr Taylor KC, for PGG, argues that the Trust was put on enquiry soon after settlement and, if enquiry had been made, it would have led to the discovery that the represented production figure was wrong. He points to Mr Routhan's evidence that they "knew very quickly or early on [that] something was horribly wrong". Mr Routhan confirmed that this was in February 2011. He could not recall specifically but thought he "probably did" ask Mr Cook at that time why they were not achieving the represented production level. Mr Cook's evidence was that, if requested, he would have given authority for the actual figures to be provided by the dairy company to the Trust. In summary, Mr Taylor submits that the correct annual and average production figures were reasonably discoverable, and ought to have been discovered, through due diligence prior to settlement, or upon enquiry as soon as the Trust was on notice that production was well below the represented level.

[93] Mr Kalderimis counters that the Trust could not reasonably be expected to question historical production given PGG's clear representations. Instead, they reasonably explored other explanations for the poor production and, in accordance with professional advice, they applied extra fertiliser, brought in supplementary feed, fed calves with a milk powder-based substitute, and over-sowed the farm pasture with new seed. They also undertook substantial operating and capital expenditure. He submits that it was not until they made enquiries in the course of the arbitration that they discovered the true position about historical production levels. In summary, Mr Kalderimis submits that the Judge was correct to find that the Fair Trading Act claim was therefore brought within time, taking account of the limitation standstill agreement reached two years later, in October 2016.

[94] We accept Mr Kalderimis' submission on this issue. We have not been persuaded the Judge was wrong to reject the limitation defence. The Trust was entitled to rely, and did rely, on the correctness of the information it was given by PGG.

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31 At [75].
32 At [75] and [105].

Its focus post-settlement was on the causes of the evident underperformance, not realising that the represented historical production was false.

Was the Trust induced by the misrepresentation to enter into the agreement?

[95] PGG argued at trial that the Trust would have proceeded with the purchase of the Farm even if the correct three-year average production figure had been given, namely 98,729 kgMS instead of 103,000 kgMS. It emphasised that this was a difference of only 4,271 kgMS (approximately four per cent lower) and was well within normal seasonal variations. PGG argued that this would not have prompted the Trust to make further enquiries or dissuaded it from proceeding with the purchase.

[96] The Judge rejected this submission. She considered it was clearly important to the Trust that there was a stable high level of production. That is why Mr Routhan expressly asked Mr Daly to confirm this. A drop of four per cent in the rolling three-year average would have indicated a significant drop in the most recent year, as was indeed the case (90,337 kgMS).[33] The Judge accepted Mr Routhan's evidence that production capacity was especially important to him and the Trust would not have purchased the Farm if it had known the correct historical production. Mr Routhan also thought it was doubtful the Trust would have been able to secure lending from Rabobank had the correct historical production figures been supplied.[34]

[97] Mr Taylor argues that the Judge was wrong to find that the Trust would not have gone ahead with the purchase if the correct figure had been supplied. He makes the following points. The four per cent difference in the three-year average production was insignificant, particularly in circumstances where there was a wide fluctuation in production figures on the West Coast. Profitability was not at the forefront of the Trust's decision-making; rather, this was a long-held dream that was being brought to fruition. Mr Routhan's evidence that Rabobank would not have lent the money was an unsubstantiated opinion that should not have been taken into account. In any event, a reduction of four per cent to the three-year average is unlikely to have made any difference. The Court wrongly relied on other misrepresentations that were not

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33 At [174].
34 At [176].

pleaded or attributed to PGG — the Farm had not been run on a stand-alone basis, but in conjunction with Mr Cook's other farm properties; the stocking rate was lower than the 260 cows represented; half the herd was not wintered off early in that younger and low producing cows were also kept off the farm; more dry feed was used than the 115 bales made on the Farm as represented; and significantly more nitrogen was applied to the Farm than was represented.[35] Mr Routhan stated in open correspondence with PGG in June 2016 that a lower offer would have been made had it been aware of the accurate position. He did not say they would not have purchased it. Mr Taylor further argues that there is no relevant distinction between a "transaction" and a "no transaction" case and he says the Judge's focus on this issue led her into error when assessing damages.

[98] Mr Kalderimis submits that this is a no transaction case — the Trust would not have purchased the Farm if it had known the true position. The damages enquiry is necessarily focused on the extent to which the Trust was worse off as a result of entering into the transaction. He contends there was ample evidence to support the Judge's findings that the Trust would not have purchased the Farm and would instead have bought an alternative farm.[36]

[99] PGG is liable in both negligence and for breach of the Fair Trading Act. It was not suggested before us, nor does it appear to have been in the High Court,[37] that this would make any difference to the damages outcome in the circumstances of this case. The Trust sought the same damages under each of its cause of action. The nature and content of the duty in this instance is effectively the same — a duty not to mislead by providing incorrect information in breach of s 9 of the Fair Trading Act and a duty not to negligently provide incorrect information. The principles guiding the extent of liability to pay damages to a claimant who has relied on a negligent misstatement can provide assistance by way of analogy when assessing damages under the Fair Trading Act to a claimant who has been similarly misled by the same misstatement.[38]

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35 At [132].
36 At [192].
37 At [196].
38 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 5.8.09(4); and *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388 at [44] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. See also *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25, (1999) 199 CLR 413 at [129] and [131].

[100] However, the leading authorities express the approach to the assessment of the recoverable damages somewhat differently. Under the Fair Trading Act, the inquiry has been cast in broad terms as being "a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the [Fair Trading] Act".[39] The focus is nevertheless on whether there is a "clear nexus" between the impugned conduct and the claimed loss in the sense that it is an effective cause of that loss.[40] The discretion conferred under s 43 of the Fair Trading Act enables a court to award only part of the loss where the claimant should bear some of the responsibility.[41] By comparison, the assessment of recoverable loss in negligence cases (including for negligent misstatement) generally requires a more sophisticated analysis focusing on issues such as the scope of the duty and whether there is a sufficient nexus between the specific harm and the particular duty owed.

[101] Given these potential differences in the proper approach and notwithstanding Mr Taylor's submission that this is not a "no transaction" case, we consider it will be helpful to address at the outset the threshold factual question of whether the Trust would have proceeded with the purchase at the same price even if PGG had supplied the correct production information. If it would have made no difference as Mr Taylor contends and the Trust would have proceeded with the purchase in any event, no loss would be recoverable on either approach. The Trust would fail to satisfy even the "but for" causation test, a necessary but not sufficient prerequisite to establish legal causation for a breach of the Fair Trading Act or a tortious breach.[42]

[102] As Mr Taylor points out, there was no evidence from Rabobank that it would not have provided the $1.3 million loan towards the purchase price if the correct production figure had been supplied. However, there was sufficient evidence to support the Judge's finding that the Trust would not have purchased the Farm if PGG had accurately stated the production figures. Mr Routhan specifically asked Mr Daly to obtain updated production figures from Mr Cook. As we have seen, the figure of

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39 *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 404; approved in *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [31].

40 *Red Eagle Corp Ltd v Ellis*, above n 39, at [29], quoting *Goldsbro v Walker*, above n 39, at 401.

41 *Red Eagle Corp Ltd v Ellis*, above n 39, at [30].

42 *Red Eagle Corp Ltd v Ellis*, above n 39, at [29]; *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 403 per Henry J and 408 per Thomas J; and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 681.

103,000 kgMS was a key metric referred to in contemporaneous documents leading to the purchase being declared unconditional and it was inferentially confirmed by the number of shares included in the sale.

[103] We agree with the Judge that PGG's focus on the four per cent reduction obscures the more significant point that the actual production for the year immediately preceding the sale had to be considerably lower than this average — by 12 per cent — in order to lower the rolling three-year average by four per cent. The Routhans may have been fulfilling a long-held dream in purchasing the Farm but that does not mean they were not concerned about whether the purchase was prudent, and the proposed venture would be viable.

[104] It does not appear to us that the Judge was distracted by misrepresentations not forming part of the claim or attributed to PPG. The section of the judgment which Mr Taylor relies on merely records the Trust's submissions, specifically representations it sought to introduce in closing submissions.[43] It appears to us that the Judge's focus was appropriately confined to whether the purchase would have proceeded had the Trust been given correct information about the historical production.

[105] Mr Routhan's correspondence with PGG in June 2016 suggesting the Trust would have offered no more than $2.5 million for the Farm if it had known the correct position does not materially assist PGG on this issue. Mr Routhan qualified his statement by adding "assuming we would have made an offer at all". Further, there was no evidence to suggest that Mr Cook would have accepted anything less than $2.8 million, let alone an offer of $2.5 million.

[106] The Judge also had the advantage of assessing the witnesses as they gave their evidence and were tested on it. These advantages cannot be replicated on appeal, and we would hesitate before interfering with the Judge's careful assessment.[44] In summary, despite there being some force in PGG's submissions on this issue, we

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43 High Court judgment, above n 2, at [132].

44 *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 at [108] per Lord Kerr, and at [200] per Baroness Hale.

have ultimately not been persuaded that the Judge erred in finding that the Trust would not have entered into the agreement had it not been misled about the historical production level.

Was the recoverable loss assessed correctly?

[107] As we have seen, there were three components to the Judge's damages award before the reduction for contributory negligence:[45]

(a)	Loss of investment in capital improvements	$680,000
(b)	Loss caused by forced sale of the Farm in 2021	$603,000
(c)	Loss caused by forced sale of the run-off property in 2021	$839,000
	Total	$2,122,000

[108] Like the Judge, we consider that the recoverable damages in the circumstances of this case will be the same whether assessed under the negligence causes of action or under s 43 of the Fair Trading Act. We will therefore commence the analysis by considering whether the losses awarded come within the scope of PGG's duty.

Did the losses awarded come within the scope of PGG's duty?

[109] A convenient starting point is the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd* (*SAAMCO*).[46] Lord Hoffmann drew a distinction between a duty to provide information for the purpose of enabling the claimant to decide upon a course of action and a duty to advise the claimant what course of action to take. In the latter case, the defendant will be liable for all the foreseeable consequences of that course of action being undertaken. However, in the former case, the defendant will be responsible only for the foreseeable consequences of the information being wrong.[47]

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45 High Court judgment, above n 2, at [196]; and set out at [7] above.

46 *South Australia Asset Management Corp v York Montague Ltd* (*SAAMCO*) [1997] 1 AC 191 (HL). Approved in *Bank of New Zealand v New Zealand Guardian Trust*, above n 42, at 683; *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [109]–[111]; and *Todd on Torts*, above n 38, at 20.3.02(1).

47 At 214.

[110] The United Kingdom Supreme Court considered the *SAAMCO* principle in *Hughes-Holland v BPE Solicitors*.[48] Lord Sumption, writing for the Court, acknowledged the confusion arising out of the imprecise advice/information labels.[49] However, the underlying nature of the distinction was clear:

> 40 In cases falling within Lord Hoffmann's "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. … If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against. …
>
> 41 By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, … the defendant's legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else's decision.

[111] Lord Sumption clarified that the scope of duty analysis applies irrespective of whether the case can be characterised as a "no transaction" case:[50]

> 51 [Counsel for the appellant] relied on the decision in *Steggles Palmer* for the proposition that none the less where the defendant ought to have reported some fact which was fundamental to the claimant's decision whether to proceed, the whole loss flowing from the transaction was recoverable as such. I agree that that is what Chadwick J appears to have decided in *Steggles Palmer*, but I consider that he was wrong to do so. The facts of *Steggles Palmer* were no different in any legally relevant respect from those of *Colin Bishop*. The duty of the solicitors depended on their retainer, which was agreed before any breach of duty occurred and appears to have been in substantially similar terms in both cases. In both cases, it extended to the care with which the solicitor answered the questions in the lender's standard reporting instructions, but not to the decision whether to proceed with the transaction. It followed that the loss flowing from the decision to lend could not as such be within the scope of their duty. Chadwick J's approach was to make the measure of damages depend not on the scope of the duty but on the gravity of the particular breach and on his assessment of the objective quality of the reasons why the lender would have

48 *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599.

49 At [39].

50 At [51]–[52] (Citations omitted).

responded by refusing to proceed. In effect, he reverted in *Steggles Palmer* to the distinction between "no transaction" and "successful transaction" cases which had been rejected in *SAAMCO*. His observation that the lender had been deprived of the opportunity to make the decision that he would have made is only another way of saying that this was a "no transaction" case.

52 For the same reason, I consider that the Court of Appeal was wrong to apply the reasoning in *Steggles Palmer* in *Portman Building Society v Bevan Ashford* [2000] PNLR 344 where the facts were indistinguishable. Otton LJ, delivering the leading judgment, declined to ask himself whether the scope of the solicitor's duty extended to the lender's decision or only to the material which the solicitor contributed to that decision, because in his view the distinction was irrelevant in a case where the facts withheld were sufficiently grave. He put the point in this way …

> "where a negligent solicitor fails to provide information which shows that the transaction is not viable or which tends to reveal an actual or potential fraud on the part of the borrowers, the lender is entitled to recover the whole of his loss. In other words, the whole of the loss suffered by the lender is within the scope of the solicitor's duty and is properly recoverable."

This involves the same error as affected Chadwick J's analysis in *Steggles Palmer*, namely that the mere fact that the breach of duty caused the lender to proceed when he would otherwise have withdrawn was enough to make the solicitors legally responsible for the lender's decision and all its financial consequences. All "no transaction" cases have this characteristic, whether or not the fact withheld or misrepresented goes to the viability of the transaction or the honesty of the counterparty, because in all of them the fact withheld or misrepresented is ex hypothesi sufficiently fundamental to have caused the lender to walk away had he known the truth.

[112] The UK Supreme Court recently re-visited the scope of duty issue in negligence cases in two decisions released on the same day, *Manchester Building Society v Grant Thornton UK LLP*[51] and *Meadows v Khan*.[52] The majority[53] in *Manchester Building Society* suggested that a helpful model for analysing the place and role of the scope of duty principle highlighted in *SAAMCO* was to ask six questions:[54]

> (1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

[51] *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783.
[52] *Meadows v Khan* [2021] UKSC 21, [2022] AC 852.
[53] Lord Hodge and Lord Sales wrote for the majority which included Lord Reed, Lord Kitchin and Lady Black. The same Supreme Court judges formed the majority in *Meadows v Khan*.
[54] *Manchester Building Society v Grant Thornton UK LLP*, above n 51, at [6]; see also *Meadows v Khan*, above n 52, at [28].

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question).

[113] The majority considered that the scope of duty question is governed by the purpose of the duty which is to be determined objectively by reference to the reason why the advice was given.[55] The distinction between "information" and "advice" had proved to be unsatisfactory and should be dispensed with.[56] Where the advice is sought about a particular risk or a proposed activity having that risk, the court will focus on the risk the advice or information was intended, and was reasonably understood, to address.[57] However, the majority approved Lord Sumption's explanation of the underlying rationale for the distinction (quoted in part at [110] above).[58] They considered that an examination of the purpose of the duty would assist in isolating those factors which the defendant is responsible for out of what may be a wide range of factors contributing to the claimant's loss.[59] The duty nexus question will be important where the court needs to separate out from the loss the claimant has suffered through entering into the transaction, that part of the loss attributable to the defendant's negligence.[60]

55 At [13].
56 At [18]–[19].
57 *Meadows v Khan*, above n 52, at [41].
58 *Manchester Building Society v Grant Thornton UK LLP*, above n 51, at [20]–[21].
59 At [25].
60 *Meadows v Khan*, above n 52, at [41].

[114] Lord Leggatt, writing separately, agreed that the information/advice labels should be dispensed with, and he also approved Lord Sumption's explanation of the relevant distinction in *Hughes-Holland*. In particular, an adviser will not be liable for the full range of risks associated with a potential transaction if their contribution is limited to advising on particular matters or a subset of considerations relevant to the claimant's decision.[61]

[115] The Trust asked PGG to provide updated production information as this was plainly important to its purchase decision. The information was relevant to the expected return from the Farm. Importantly, it would show how production for the most recent year compared with the average over the preceding three years, in particular whether production was declining, being maintained, or increasing. The risk the information was intended to address was that the Trust would pay too much for the Farm. PGG assumed a responsibility to provide accurate information and is liable for the consequences of negligently supplying incorrect information. The normal measure of that loss is the difference between the price paid and its true market value (in other words, if the property had been correctly described).[62] There are of course no inflexible rules when it comes to the assessment of damages, including as to the date the assessment should be undertaken.

[116] The production information PGG provided was only one of the factors relevant to the Trust's purchase decision. PGG did not assume a responsibility to advise the Trust on whether to enter into the agreement. It is therefore not liable for all the consequences resulting from the Trust's decision to purchase the Farm, let alone for the downstream consequences of other decisions made by the Trust in the 10-year period post purchase. In particular, we do not consider PGG can be held liable for the losses occasioned by the dramatic fall in the milk price and reduction in revenue which resulted in the decline in the value of the Farm, the Trust's inability to service its increasing level of borrowings (including because of the Trust's significant capital expenditure) and the consequent erosion of its equity. In our view, PGG

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61 *Manchester Building Society v Grant Thornton UK LLP*, above n 51, at [92].

62 *Cemp Properties (UK) v Dentsply Research and Development Corp (No 2)* [1991] 2 EGLR 197 (CA) at 200 per Sir Nicholas Browne-Wilkinson VC.

assumed no duty to protect the Trust against those types of losses and it is not reasonable to require it to underwrite them.

[117] The Judge found that the Trust could have sold the run-off property at the time the Farm was purchased for $1.6 million but it was ultimately forced to sell it 10 years later for $761,000, suffering a distressed sale discount of $839,000.[63] There is no suggestion that PGG was aware that the historical production information would be relied on by the Trust in deciding whether to retain the run-off property at the time it purchased the Farm. The prospect that PGG could foresee that the information would be relied on by the Trust in deciding to retain the run-off property over the subsequent 10-year period is even more remote. In our assessment, the losses sustained by the Trust resulting from the forced sale of the run-off property in 2020 fall well outside the scope of PGG's duty. PGG assumed no duty to the Trust to protect it against this type of loss because that was not the purpose for which the information was sought.

[118] For similar reasons, developed below, we reach the same conclusion in respect of the loss occasioned by the forced sale of the Farm in 2020. We consider the loss of investment on capital improvements conceptually falls within this same category and leads to the same answer. The calculation of the forced sale loss on the Farm takes the purchase price as the starting point and deducts the price paid on the sale 10 years later. The resultant figure for the Farm is adjusted by the expected drop in price of comparable farms in the region over that 10-year period. In other words, it is said to be a forced sale discount. The calculation takes no account of the additional $680,000 of capital expenditure on the Farm even though the purchaser obtained whatever benefit was added by this expenditure. By excluding the figure from the calculation and claiming this capital expenditure separately as a total loss, the inherent assumption is that the purchaser paid nothing for these improvements. The rationale for claiming it from PGG is that this expenditure was wasted and none of it was recovered from the purchaser. It is therefore another consequence of the forced sale. The Judge recognised this.[64] Even if that assumption was not sound, the value of the capital improvements would then need to be added to the original purchase price to calculate

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63 High Court judgment, above n 2, at [60] and [196].
64 At [196].

the loss in accordance with the Trust's thesis. However viewed, these losses are all forced sale losses.

[119] As noted, the information PGG supplied was relevant to the Trust's assessment of the productive capacity of the Farm and therefore its value at the time of purchase in 2010. The Trust became aware almost immediately upon taking possession that the production it was achieving was well below the historical performance based on the information it had been given. It nevertheless made the decision to retain the Farm and take the various steps described above in an attempt to increase production and carry out other improvements to the property. PGG had no input into any of these decisions and its advice was not sought or reasonably relied on for these purposes.

[120] The decision to terminate the cow lease is a good illustration. PGG gave no advice about the quality of the herd supplied by Mr Cook or whether proper grounds existed to terminate that lease. The Trust's wrongful decision to cancel the lease and contest the matter at the arbitration came at a direct cost to the Trust of some $270,000. It also necessitated the purchase of a replacement herd at a cost of $700,000 with increased borrowings of $620,000. PGG had no role in this expensive exercise and cannot reasonably be expected to underwrite the consequences of it, including its undoubted contribution to the additional financial burden placed on the Trust which led to the eventual forced sale of both properties.

[121] Similarly, PGG was not asked to assess the condition of the pasture. The information it provided was not sought and could not reasonably be relied on for that purpose. The Trust must take responsibility for its failure to assess the condition of the pasture as part of its due diligence. It seems likely that the poor condition of the pasture would have been obvious had it been inspected by a trained eye at the time of purchase given it was assessed as being in dire condition within months of settlement. For these reasons, we consider that the costs associated with re-grassing the Farm, including the associated loss in production, fall outside the scope of PGG's duty. The downstream forced sale losses to which this expenditure and lost production contributed cannot be visited on PGG.

[122] The same disconnect exists between the production information provided by PGG in 2010 and the Trust's decisions years later to carry out capital improvements (feed pad and stand-off area, fencing, water supply system and laneway improvements) and increase its borrowings to fund these. Mr Kalderimis submits that it was reasonable for the Trust to incur these costs in an effort to lift production to the level represented. However, even if that was correct (which is doubtful given the observations made by the Judge to which we refer below), these would properly be characterised as expectation damages, being costs incurred to achieve a promised expectation. Such damages can only be recovered against a contractual counterparty for a breach of warranty or under s 35 of the Contract and Commercial Law Act 2017 for a misrepresentation inducing the contract. These types of expectation losses are recoverable in contract but not in tort or for breach of the Fair Trading Act.[65] PGG's obligations were not to mislead or provide negligently incorrect information. It did not promise performance of any representation about production levels.

[123] In any event, the Judge appears not to have been satisfied that most of these costs were reasonably incurred to improve production:[66]

> [228] However, there is some merit to the criticism that they unreasonably undertook capital expenditure which had no bearing on production or productivity. While the decision to re-sow pasture was taken on expert advice and appeared to be logically connected to improving production, it is not clear that much of the other capital expenditure was directly linked to improving production or, if it was, that an adequate cost-benefit analysis was undertaken given the Trust's cashflow difficulties because of poor production levels. For example, while the construction of a feed pad and stand-off area would improve utilisation of supplementary feed, it was not clear to me that the Routhans had considered whether that lift in utilisation justified the cost of such a structure when they were cashflow constrained, nor was it clear why it was built to a 600 cow capacity. Similarly, while Mr Routhan has explained why the water system was upgraded (Mr Cook would let the herd into the creek to drink when the troughs could not keep up with what the cows needed), it is not clear why other capital works, such as on the laneways, fencing and farm buildings, were not deferred until the farm was producing at a capacity to meet the cost of this work. In my view these decisions exacerbated the financial decline of the farm and contributed to the losses suffered.

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65 *Cox and Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 26; *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 (CA) at [13]; and *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 at [62].

66 High Court judgment, above n 2.

[124] We agree with the Judge's observations that most of the capital expenditure was not reasonably incurred to improve production. It follows that these costs would probably not be recoverable even if expectation damages were claimable, which they are not. However, for present purposes, the more important point is that the production information supplied by PGG pre-purchase was not sought for the purpose of making any of these investment decisions years later. PGG could not reasonably anticipate that its advice would be relied on for this purpose. Equally, the Trust could not reasonably rely on the information supplied by PGG in deciding to carry out these capital improvements.

[125] We conclude that the losses caused by the forced sale of the properties in 2020 were the consequence of the decisions made by the Trust post-purchase, including its decision to carry out substantial capital improvements to the Farm and take on increasingly high levels of debt leaving it vulnerable to the dramatic fall in milk prices. PGG cannot reasonably be expected to underwrite the consequences of these decisions by the Trust in respect of which it had no input or control. In our view, these losses fell outside the scope of PGG's duty.

[126] We add for completeness that we consider there are other difficulties telling against the correctness of the damages awarded. In particular, we do not consider that PGG caused these losses in the required sense, rather, its breach of obligation did no more than provide the opportunity for their occurrence.[67] For the reasons already given, there is at best only a very tenuous causal nexus between PGG's representation in 2010 and the various management and investment decisions the Trust made in the following years. The required threshold in negligence of a "material and substantial" causal link is not made out, nor is there a "clear nexus" in terms of the Fair Trading Act claim on the view we take of the evidence.[68] To illustrate, the information provided by PGG in 2010 about the production achieved on the Farm in prior years cannot in our view be said to have had any material operative influence on the Trust's decisions in the 2013 financial year to invest in infrastructure, including to construct a 600-cow capacity feed pad and stand-off area on the run-off property.[69]

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[67] *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28].
[68] At [28]; and *Red Eagle Corp Ltd v Ellis*, above n 39, at [29], quoting *Goldsbro v Walker*, above n 39, at 401.
[69] *Price Waterhouse v Kwan*, above n 67, at [28].

[127] Given our conclusion that the damages that were awarded, being the forced sale losses incurred on the sale of the Farm and the run-off property in 2020 (including the loss of investment on capital improvements) are not recoverable from PGG, the question whether the Judge was correct to reduce those damages for contributory negligence falls away. The Judge made this reduction because much of the capital expenditure was not directly linked to improving production, there was no adequate cost-benefit analysis and some of the capital expenditure should have been deferred until the Farm was producing at a level to meet the costs.[70] Given that these losses were outside the scope of PGG's duty, none of these losses are recoverable anyway.

What losses, if any, are recoverable?

[128] We now turn to consider whether the evidence discloses losses that are recoverable, including whether the Trust overpaid for the Farm in reliance on the incorrect information supplied by PGG. As noted, the normal measure of loss is the difference between the price paid and the true market value of the property if it had been correctly described. The assessment is usually made at the time of the breach (here the date of the agreement), but a later date can be chosen if this is necessary to do justice to the parties in the circumstances of the particular case.

[129] Mr Kalderimis relies on such cases as *Esso Petroleum Co Ltd v Mardon* and *Downs v Chappell* for the proposition that a date later than the date of the transaction may need to be chosen to produce a just result in cases where a plaintiff is "locked in" to a loss-making purchase in reliance on a misrepresentation, particularly where this remains undiscovered.[71] He submits that this is such a case and that it is appropriate that the damages be assessed at the time the properties were on sold in December 2020.

[130] Lord Browne-Wilkinson explained in *Smith New Court Securities Ltd v Citibank NA* why the normal date for the assessment of damages — the date of the transaction — may need to be departed from in some circumstances:[72]

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70 High Court judgment, above n 2, at [228]–[229].
71 *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB 801; and *Downs v Chappell* [1997] 1 WLR 426 (CA).
72 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) at 266.

> In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realisation as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or resale other factors will have influenced the value or resale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of the transaction date rule. But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired.

[131] *Esso Petroleum* is an example of a "locked-in" case. The respondent, Mr Mardon, entered into a lease of a new petrol station from April 1963 in reliance on a grossly overstated estimate of annual petrol sales (200,000 gallons) made by Esso Petroleum as lessor. Actual petrol sales were a small fraction of this figure, ranging from 58,375 to 86,502 gallons over the three-year period of the lease. By September 1964, within 18 months of taking possession, Mr Mardon had lost all his capital and had a substantial overdraft.[73] The Court was satisfied that Mr Mardon had no option but to attempt to carry on with the business in an attempt to recover his losses, there being no realistic possibility of finding anyone else to take it over. Ormrod LJ concluded:[74]

> In my judgment he had scarcely an option to do otherwise. He was trapped, as he said, by his losses and his only hope was to carry on in the hope of recovering his position if he could. … [T]he trading position failed to improve. At this stage [Mr] Mardon raised with [Esso Petroleum] the possibility that [it] might give him a "prime site" to run with or "carry" the unsuccessful … site as a last resort. [Esso Petroleum] did not reject this and discussions took place over a period of time but came to nothing, and the end came in April 1967.

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73 *Esso Petroleum Co Ltd v Mardon*, above n 71, at 820 per Lord Denning MR and at 828 per Ormrod LJ.

74 At 829.

> I think that the whole of this tragic story is directly attributable to the original mistake of [Esso Petroleum] and that [it] co-operated with [Mr] Mardon in his unsuccessful attempts to escape its consequences.

[132] *Downs v Chappell* involved a claim by Mr and Mrs Downs as purchasers against Mr Chappell as vendor for a fraudulent misrepresentation as to the profitability of a bookstore business inducing its purchase.[75] Mr and Mrs Downs did not discover the true position until after approximately 18 months of unprofitable trading. By then, they had an unviable business and shop premises with a reduced value and limited marketability.[76] After reviewing *Esso Petroleum* and other authorities, Hobhouse LJ stated:[77]

> Where a party has been misled, it must always be relevant to consider his position when he discovered the truth. Until that time the misrepresentation will be continuing to affect him and he cannot be expected to mitigate his loss.
>
> …
>
> In a misrepresentation case, where the plaintiff would not have entered into the transaction, he is entitled to recover all the losses he has suffered, both capital and income, down to the date that he discovers that he had been misled and he has an opportunity to avoid further loss.

Mr and Mrs Downs were awarded damages of £44,000. This figure represented the diminution in value of the business between the date of the transaction and the earliest date at which it was reasonable to sell the property after they had discovered the falsity of Mr Chappell's representation in March 1990.[78]

[133] Leggatt J summarised the principle established by these authorities in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*:[79]

> 185. The principle which I derived from the [*Smith New Court Securities*] case is that the appropriate date at which to assess the claimant's loss will generally be the earliest date at which:
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> i) the claimant was aware of the facts giving rise to the claim;

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75 *Downs v Chappell*, above n 71. We note that although one aspect of Hobhouse J's reasoning (his suggested cross-check) was rejected in *Smith New Court Securities v Citibank NA*, above n 72, at 267 per Lord Browne-Wilkinson and at 283 per Lord Steyn, the decision has otherwise been approved.

76 At 437.

77 At 441 and 443.

78 At 444–445.

79 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm).

> ii) the claimant could readily have sold the property acquired as a result of the defendant's wrong at a price which fairly reflected the value of the property; and
>
> iii) it would not have been unreasonable for the claimant to sell the property (referred to by Lord Browne-Wilkinson as being "locked into" the investment).
>
> 186. Where these conditions are satisfied and the claimant did not in fact sell the property at the relevant date, this can be seen as the claimant's free choice and any subsequent gain or loss can properly be regarded as a consequence of the claimant's trading decision to retain the property rather than the defendant's wrong.

[134] The Trust was not locked into the investment in the relevant sense. Unlike the position in *Esso Petroleum* and *Downs v Chappell*, the Trust faced no impediment to selling either or both of these properties at any time until Rabobank directed that the properties be sold in September 2017 (by which time it was difficult to find a buyer). There is no evidence to show that the Trust could not have had recourse to the market if it had wished to extricate itself at any time prior to that date. Even if the date for assessment of damages could be deferred until late 2014, being the date the Trust became aware of the misrepresentation, the recoverable damages would be the same. The valuation evidence referred to at [138]–[139] below indicates that the Farm could have been realised for its 2010 value in 2014 (disregarding the capital improvements). Further, it is not appropriate to assess damages at a later date in order to capture losses that are irrecoverable for whatever reason, including because they are beyond the scope of a defendant's duty or too remote. For these reasons, we consider it is appropriate to assess the Trust's loss at the normal date, being the date of the transaction. If anything, this approach favours the Trust because interest on the damages award will run from that much earlier date.

[135] Mr John Hancock, a registered valuer called by the Trust, assessed the market value of the Farm at the date of purchase in October 2010 as being $2,165,000 excluding the dairy company shares as follows:

Land value	$1,790,000
Improvements	$364,000
Chattels	$11,000
Market value	$2,165,000

[136] Mr Hancock noted that the Westland Milk Products share price was $1.50 per share. Given the sale included 103,000 dairy company shares, another $154,500 would need to be added to make a proper comparison with the purchase price of $2.8 million. On this basis, the amount the Trust paid for the Farm over Mr Hancock's assessment of market value was $480,500 ($2,800,000 less $2,319,500).

[137] In carrying out his valuation, Mr Hancock had no regard to the historical production levels achieved on the Farm. Rather, he based his valuation on the average efficient production for the Farm which he assessed as being in the vicinity of 84,000 kgMS per annum. The assessed average efficient production level was in turn based on the industry average achieved in the area. The good sense of this approach to the valuation exercise is supported by the expert evidence that it is possible to drive high levels of production, well above the average achieved in a particular district, by various farm management methods including stock management practices and rates of fertiliser application. This at least partly explains the significant disparity between the production achieved by Cooks Farms and that achieved by the Trust. It also underscores that historical production figures form only part of the relevant picture and cannot be relied on as an accurate predictor of future production performance or a driver of value.

[138] Mr Peter Hines, a registered valuer retained by PGG, confirmed that the "average efficient" methodology is the preferred valuation practice. He explained that this is based on an assessment of what an average efficient operator would be able to achieve using a grass-based system with moderate inputs of supplementary feed and wintering cows off for eight weeks. The assessment is based on average production levels achieved locally using these parameters. However, Mr Hines was instructed to value the Farm based on assumed rather than average efficient production levels. Taking account of all improvements, chattels, and dairy company shares he arrived at valuations as at the time of sale in October 2010 on this basis as follows:

Assumed production	Valuation
103,000 kgMS	$2,950,000
97,000 kgMS	$2,900,000

[139] Mr Hines also assessed the value as at 1 June 2014 based on the same assumed production levels and came to the same answers. We note that Mr Daly was asked by the Trust to provide a market appraisal for the Farm in May 2016. He assessed its market value at that time based on expected production of around 90,000 kgMS as being $3.15 million including land and buildings.

[140] Mr Kalderimis submits that Mr Hines' valuations should be ignored because they are not true market valuations given that they are premised on instructed levels of production. We accept this criticism. They are not true market valuations for that reason. However, the valuations serve to illustrate the arguably minor consequence of the information supplied by PGG being wrong. On the basis of Mr Hines' valuations, the difference in value attributable to PGG's misstatement is only $50,000. In other words, if one accepts that the historical three-year average production level drives market value (contrary to the approach taken by Mr Hancock), the error in the information supplied by PGG accounts for a $50,000 loss of value according to Mr Hines. If the information supplied by PGG had been correct — 103,000 kgMS average production over the past three years — Mr Hines says the Farm would have been worth $2.95 million but it would still be worth $2.9 million if the correct three-year average production of 97,000 kgMS was used to determine value. PGG claims that the damages should be nil because both of these figures exceed the purchase price.

[141] The recoverable damages fall in the range between zero (based on Mr Hines' evidence that the true value of the Farm was more than the Trust paid for it even taking account of the reduced production) and $480,500 taking Mr Hancock's figure. Neither valuation was materially contested. The challenge was to the underlying assumptions upon which they were predicated, not to the resultant valuations arrived at. In other words, the divergence between the valuers simply reflects the different assumptions they were instructed to adopt.

[142] The zero damages contention is based on the claim that the Farm was worth $2.9 million at the time of the purchase. Given the marketing campaign conducted by CRT failed to achieve a sale at that price and Mr Cook, an informed, willing, but not

overly anxious seller, accepted $2.8 million for it, we are satisfied the Farm was not worth $2.9 million in October 2010.

[143] We also reject the $50,000 figure. It is based on assumed production of 97,000 kgMS whereas the correct figure for the preceding year was 90,000 kgMS. The calculation focuses on the reduced three-year rolling average and takes no account of the significant decline in production in the prior year, which PGG was specifically asked to verify.

[144] We also consider that there are difficulties with Mr Hancock's figure of $480,500. PGG was not advising on whether the Trust should enter into the transaction or what price should be paid. The information it supplied was only part of the material relevant to the Trust's decision to enter into the purchase agreement. PGG's responsibility did not extend to the purchase decision, and it is only liable for the consequences of the information it supplied being wrong. In accordance with the reasoning in *Manchester Building Society*, the loss for which PGG is liable must be confined to the information it was responsible for, isolated from the wide range of factors contributing to the Trust's purchase decision and its subsequent loss. It follows that it would only be appropriate to adopt Mr Hancock's figure of $480,500 if the entirety of the payment above market value was attributable to the erroneous information supplied by PGG. However, this is not the case. Mr Hancock's figure assumes that the informed market (vendor and purchaser) would assess the price based on 84,000 kgMS, being the average efficient production capacity of the Farm. PGG was not asked to assess the average efficient production level. The Trust did not make any enquiry about the average efficient production level for the Farm, nor did it ask Mr Cook about his farming methods or how he had achieved the historically high production levels he did in fact achieve. PGG is not responsible for these failures which also contributed to the overpayment.

[145] We therefore consider that the loss of $480,500 based on Mr Hancock's valuation needs to be discounted. Doing the best we can on the available evidence, we assess the recoverable loss as being $300,000. There is no exact science in this figure. However, it is supported by calculating the proportionate reduction in the purchase price based on the difference between actual production in the year prior

to purchase of 90,000 kgMS (which would have been apparent if PGG had supplied the correct information) and the figure supplied of 103,000 kgMS. We set out below how we arrive at this figure.

[146] Mr Hancock assessed the land value as follows:

Land class	Area (ha)	kgMS	Land value/ha	Total
Dairy platform	102	84,000	$17,500	$1,785,000
Buildings, lanes, streams and sidlings	3.5		$1,500	$5,250
Total	105.5	84,000	$16,967	$1,790,000

[147] On that basis, we infer that the dairy platform land value would have been $2,188,750 if the correct production figure had been 103,000 kgMS (the figure supplied by PGG) and $1,912,500 if the correct production figure had been 90,000 kgMS (the figure PGG ought to have supplied). The difference between these latter two figures is $276,250. Recognising that there can be no precision and that the relationship between increased production and land value per hectare may not necessarily be linear, we round this to $300,000. That equates to approximately 11 per cent of the overall purchase price and is in line with the percentage overstatement of historical production by PGG.

[148] Standing back, that figure seems to us to be proportionate to PGG's contribution to the Trust's loss and provides what we consider is a fair and reasonable outcome, doing justice to both parties.[80] By way of cross-check, this figure coincidentally aligns with the figure of $300,000 Mr Routhan himself suggested in his correspondence with PGG in June 2016, long after he had become aware of the correct position and had considered the financial implications for the Trust.

80 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41; and *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 46, at [156].

[149] Contributory negligence generally arises at the time of, or before, a defendant's breach.[81] In principle, contributory negligence ought to apply only to loss that is otherwise legally recoverable.[82] PGG pleaded numerous particulars in support of its defence that any damages should be reduced for contributory negligence. Given our conclusion as to the legally recoverable damages and that these should be assessed at the date of the transaction, the only relevant particulars are those alleging inadequate due diligence by the Trust.[83]

[150] The specific failures in due diligence pleaded and urged by PGG before us were the Trust's alleged failures to obtain the actual production figures and to commission forecasts of the financial viability of the Farm as a standalone venture. It can be seen that only the first of these factors could have any bearing on the price paid and therefore to the loss as we have assessed it. The Trust received information about the average production achieved over the preceding four years. It was entitled to rely on PGG to supply accurate information. The Judge was clearly justified in concluding on the evidence that the Trust was not negligent in failing to make any further inquiry about this.

Costs

[151] PGG is entitled to costs on the appeal because it is the successful party, the amount of the judgment having been substantially reduced and the Trust's cross-appeal having been dismissed. We consider that costs should follow the event for a complex appeal on a band C basis and usual disbursements. We make an order accordingly and certify for second counsel.

[152] The Trust succeeded in the High Court and its entitlement to costs in that Court should remain undisturbed because the outcome on appeal confirms that judgment was properly entered in the Trust's favour, albeit the judgment should have been for a lesser sum.

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81 James Edelman *McGregor on Damages* (21st ed, Sweet & Maxwell, London, 2021) at 6-014.

82 Andrew Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 124; but see *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) at 210 per Lord Hobhouse and 214–215 per Lord Millet.

83 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 534.

Result

[153] The appeal is allowed.

[154] The High Court judgment is set aside and replaced with judgment for the respondents in the sum of $300,000 plus interest under the Interest On Money Claims Act 2016 from the date of settlement of the purchase on 20 December 2010 until the judgment debt is paid in full.

[155] The cross-appeal is dismissed.

[156] The respondents must pay costs to the appellant for a complex appeal on a band C basis and usual disbursements. We certify for second counsel.

[157] The respondents' entitlement to costs in the High Court is undisturbed.

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