

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 45/2023
CA 53/2022
CIV-2018-409-000077

BETWEEN: **PHILIP WILLIAM ROUTHAN and
JULIE VERONICA ROUTHAN**
(as trustees for the **Kaniere Family Trust**)

Appellants/Cross-respondent

AND: **PGG WRIGHTSON REAL ESTATE
LIMITED**

Respondent/Cross-appellant

**RESPONDENT'S SUBMISSIONS IN SUPPORT OF
CROSS-APPEAL**

Dated: 17 November 2023

Next Event: Hearing 11-12 March 2024

I have made appropriate inquiries to ascertain whether these submissions contain any suppressed information and I certify that, to the best of my knowledge, these submissions are suitable for publication.

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CONTENTS

Introduction.....	2
Narrative of Facts	4
What is the correct assessment of quantum?	7
The Court of Appeal’s approach to the measure of loss – discount from “<i>average efficient</i>”	7
The competing valuations	8
<i>PGG’s assessment of loss.....</i>	<i>8</i>
<i>The Trust’s assessment of loss.....</i>	<i>11</i>
Court of Appeal’s approach to loss – land value	13
Conclusion	15

MAY IT PLEASE THE COURT:**Introduction**

- [1] These submissions are filed in support of the cross appeal by the Respondent, PGG Wrightson Real Estate Ltd (“PGG”), that the Court of Appeal was wrong to quantify damages arising as a consequence of the misrepresentation at \$300,000. PGG submits that the correct assessment of proved loss, based on diminution in value is either nil or, at its highest, \$50,000.
- [2] These submissions proceed on the basis that the Court of Appeal was correct to assess damages based on diminution in value of the property and, in doing so, correctly applied the principles discussed and applied in cases such as *SAAMCO*¹, *BNZ v Guardian Trust*², *BPE*³, *Khan*⁴ and *Manchester Building Society*⁵. PGG supports the decision of the Court of Appeal in that regard.
- [3] PGG will make submissions in support of the Court of Appeal decision to assess damages based on diminution of value when responding to the submissions of counsel for the appellants, Mr and Mrs Routhan, trustees of Kaniere Family Trust (along with independent trustee, Reginald Garter) (“the Trust”), on its appeal. These submissions are confined to the issue of the correct quantum of damages, assessed on the basis of diminution in value as a consequence of PGG’s negligent misrepresentation of the average three-year production of milk solids fat per kilogram (kg/MS).
- [4] The represented average three-year production was 103,000 kg/MS (which was the actual three-year average production for the period

¹ *South Australia Asset Management Corp v York Montague Ltd* (SAAMCO) [1997] AC 191 (HL).

² *Bank of New Zealand v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 213.

³ *Hughes-Holland v BPE Solicitors* [2017] UKSC 21.

⁴ *Meadows v Khan* [2021] UKSC 21.

⁵ *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20.

2006-2008). The correct three-year average production for the relevant 2007-2009 period was 98,749 kg/MS: a relatively small difference of 4.3%.

- [5] The only expert evidence which addressed the difference in value of the farm, had the representation been true, and the value of the property based on the actual three-year average production, was that of PGG's valuation expert, Peter Hines⁶.
- [6] Mr Hines assessed the value as misrepresented (103,000 kg/MS) as \$2,950,000 and the value based on the actual three-year average (97,000 kg/MS⁷) as \$2,900,000; a difference of \$50,000. Accordingly, PGG says that damages properly attributable to PGG's misrepresentation should be assessed at no more than \$50,000.
- [7] Mr Hines' analysis, comparing the value as represented as against the value based on the actual three-year average production, was the correct method of measuring any recoverable loss suffered as a consequence of the misrepresentation.
- [8] The Trust's expert valuer, Mr Hancock, based his retrospective valuation of the farm as at 2010 on what he described as the "*average efficient*" production for a farm in the area⁸. The Court of Appeal, for the reasons summarised at paragraph 144 of the judgment, rightly rejected the Hancock valuation as being an appropriate measure of loss suffered as a consequence of the misrepresentation.
- [9] The Court of Appeal decided, however, to make its own (admittedly unscientific) assessment of loss by discounting Mr Hancock's calculated loss and arriving at a loss of \$300,000⁹. PGG says that the

⁶ 2 September 2020 Valuation Report, Coast Valuations Ltd [CB 305.2764](#)

⁷ The actual three-year average was 98,729kg/MS; however, Mr Hines was instructed to value the farm on the lower production of 97,000kg/MS because that was the figure Mr Cook handwrote on the page from the PGG proposal [CB 305.2944](#)

⁸ BOE Hancock [CB 201.0135](#)

⁹ CoA [145]

Court of Appeal was wrong to embark on its own assessment and, in any event, arrived at an incorrect assessment of \$300,000.

Narrative of Facts

- [10] The Trust had a “*dream*” of running a dairy farm on the West Coast of the South Island to run in conjunction with their nearby run-off property¹⁰.
- [11] In early 2010, the Trust unsuccessfully tried to purchase a property known as the Moynihan farm¹¹. Upon the failure of that purchase, it moved quickly to attempt the purchase of two adjoining farms, one known as *Casa Finca*, and the subject farm (“the farm”) owned by Mr Nelson Cook’s company, Cooks Stud Farms Limited¹².
- [12] The farm had previously been marketed by CRT Limited; however, that agency had lapsed and the Trust approached Mr Cook to try and acquire the farm via Greg Daly, a representative of PGG. The Trust provided the CRT promotional material for the farm (“the CRT brochure”) to Mr Daly¹³.
- [13] PGG was requested to provide new promotional material to the Trust in order to obtain funding from Rabobank¹⁴. Accordingly, Mr Daly produced the PGG Proposal¹⁵, which envisaged joint purchase of both the farm and *Casa Finca*. The PGG Proposal contained material about both properties and inputs to the farm systems of the respective properties.
- [14] There was conflicting evidence as to what information Mr Cook gave to Mr Daly as to the current milk production. However, the

¹⁰ BOE Routhan CB 201.0001 paragraph 7

¹¹ BOE Routhan CB 201.0001 paragraph 14

¹² BOE Routhan CB 201.0001 paragraph 22

¹³ BOE Routhan CB 201.0001 paragraph 25

¹⁴ BOE Routhan CB 201.0001 paragraph 40

¹⁵ CB 305.2914

High Court found: “...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. This finding was not disturbed by the Court of Appeal. The PGG Proposal largely adopted the material in the CRT brochure with further information provided by Mr Cook.

[15] The Trust did not seek the actual (as opposed to three-year average) milk production for the previous seasons for either the farm or *Casa Finca*. It was content to rely on the three-year averages referred to in the PGG Proposal¹⁷.

[16] The Trust had retained a farm consultant, Mr Ross Bishop, to provide advice in relation to the proposed purchases.

[17] Mr Bishop provided turnover forecasts for the combination of the farm and *Casa Finca*. Mr Bishop’s forecasts were based on average production figures provided from the dairy company for the whole of the West Coast region.

[18] Mr Bishop’s forecasts took no account of actual production of the two farms (the subject farm and *Casa Finca*)¹⁸. As noted by the Court of Appeal, Mr Bishop’s forecasts were based on production of 245,000kg/MS for the two farms.¹⁹

[19] The farm was purchased pursuant to an Agreement for Sale and Purchase dated 19 October 2010²⁰. The purchase of *Casa Finca* fell through prior to settlement of the farm²¹. No revision of Mr Bishop’s

¹⁶ HC para 32

¹⁷ NOE Routhan [CB 203.0622](#) page 91, line 33

¹⁸ BOE Bishop [CB 202.0361](#) paragraph 10, NOE Bishop p411 line 12-17

¹⁹ CoA para 40

²⁰ [CB 302.1093](#)

²¹ BOE Routhan [CB 201.001](#) para 22

forecasts was undertaken following the *Casa Finca* purchase not proceeding.²²

[20] Upon taking control of the farm in December 2010, the Trust almost immediately noticed that production was not at the level required to reach 103,000 kg/MS²³ (being the three-year average production described in the CRT brochure and PGG Proposal).²⁴

[21] The Trust attributed the lower production to quality of the cows leased by the Trust from the vendor of the farm, Mr Cook. A dispute arose between the Trust and Mr Cook over the cows, which was determined in Mr Cook's favour at an arbitration in 2014.

[22] Evidence given at the arbitration showed that, although the farm had achieved a three-year average of 103,000 kg/ms for the period 2006-2008, the three-year average for the period of 2007-2009 (as covered by the PGG Proposal) was less at 98,729 kg/ms; a variation of 4.3%²⁵.

[23] The Trust alleged that it would not have bought the farm, had it known the correct three-year average²⁶, and attributes all operating losses incurred thereafter, various capital expenditures and loss of value on sale in 2020, to the PGG misrepresentation. The Trust also claimed, in addition, sums it says it would have made if it had purchased another property instead of the farm it purchased. The total claim in the High Court was \$3,184,000²⁷ plus interest.

²² CoA para 50; HC para 223

²³ BOE Routhan CB 201.001 para 77

²⁴ Court of Appeal paras 27-29 regarding the CRT brochure; para 41 regarding the PGG Proposal.

²⁵ BOE Routhan CB 201.001 para 126

²⁶ BOE Routhan CB 201.0001 para 114

²⁷ CoA para 7

What is the correct assessment of quantum?

[24] The normal measure of loss as a consequence of a misrepresentation is the difference between the value of the property, with and without the misrepresentation.²⁸ The Court of Appeal was right to conclude in this case that:

“... 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.”²⁹

[25] PGG relies on Mr Hines’ evidence and says that this “normal” measure of loss in this case is no more than \$50,000, being the difference between his assessment of value on the basis of the farm having three-year average production figure of 103,000kg/MS as compared with his assessment of value of the farm based on the actual average production figure of (approximately) 97,000kg/MS.³⁰

[26] This is consistent with the Court of Appeal’s assessment of the correct measure of loss in *Shabor Limited v Graham*:

“Mr McLaughlin assessed the difference in value of the Property on the basis it carried 7,500 Stock Units and 5,500 Stock Units to be approximately \$530,000...”³¹

The Court of Appeal’s approach to the measure of loss – discount from “average efficient”

[27] Rather than simply accepting Mr Hines’ unchallenged assessment of the diminution in value of the farm attributable to the misrepresentation, the Court of Appeal decided to make its own (admittedly unscientific), assessment of loss based on diminution of

²⁸ *Cox and Coxon Limited v Leipst* [1990] 2 NZLR 15, *Roberts v Jules Consultancy Ltd and Ors* [2021] NZCA 303, *Shabor v Graham* [2021] NZCA 448

²⁹ CoA para 128

³⁰ The actual three-year average was 98,729kg/MS; however, Mr Hines was instructed to value the farm on the lower production of 97,000kg/MS because that was the figure Mr Cook handwrote on the page from the PGG Proposal [CB 305.2944](#)

³¹ *Shabor v Graham* [2021] NZCA 448 paragraph 231

value.³² It decided that the assessment should be done by discounting the loss estimated by Mr Hancock of \$480,500³³.

[28] The Court of Appeal held, in assessing the quantum of damages:

“The recoverable damages fall in the range of 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 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.”³⁴

The competing valuations

PGG’s assessment of loss

[29] The valuation expert for PGG, Mr Hines, provided a report dated August 2016 which was a retrospective valuation of the property as at 19 October 2010³⁵. He valued the farm at \$2,900,000.

[30] In September 2020, Mr Hines was asked by PGG to provide retrospective valuations based on actual three-year average figures as follows³⁶:

- (a) as at 19 October 2010 based on production of 97,000kg/MS – value \$2,900,000;
- (b) as at 19 October 2010 based on production of 103,000kg/MS – value \$2,950,000;
- (c) as at 1 June 2014³⁷ based on production of 97,000kg/MS – value \$2,900,000;

³² CoA at [143] and [144]

³³ CoA at [144]

³⁴ CoA para 141

³⁵ CB 304.2000

³⁶ CB 305.2764

³⁷ 1 June 2014 was used as the notional date by which the Trust should have sold the farm.

(d) as at 1 June 2014 based on production of 103,000kg/MS – value \$2,950,000.

[31] Mr Hines was asked to assess the market value of the property on the basis of the production figures which were directly related to the substance of the misrepresentation which was the subject of the Trust's claim. Mr Hancock's valuation took no account of the historical levels of actual production, did not assess any difference in value attributable to the misrepresentation and was unrelated to the representations.

[32] As found by the Court of Appeal³⁸, Mr Hancock's valuation is not a reliable basis upon which to determine diminution in value as a consequence of the misrepresentation. The Trust has failed to prove any loss which is properly attributable to the misrepresentation.

[33] The Court of Appeal rejected Mr Hines' evidence that the farm was worth \$2.9 million with the average three-year production of 97,000 kg/MS. It reasoned that the farm had previously been on the market for \$2.9 million and not sold, and the vendor was willing to accept \$2.8 million.³⁹

[34] This is not, however, a reliable basis for rejecting Mr Hines' evidence as to market value. It is axiomatic that a property is only ever worth what a buyer will pay for it; however, a registered valuer is able to objectively make an assessment as to a reasonable market value. In addition, in this case there was evidence that the vendor was prepared to accept less than market value because the Trust was willing to take on the vendor's farm manager as part of the purchase agreement.⁴⁰

³⁸ CoA para 147

³⁹ CoA para 142

⁴⁰ BOE Cook CB 202.0341 at para 13.

- [35] The Court of Appeal also wrongly rejected Mr Hines' evidence because it was based upon the production figure for the three-year average, rather than the most recent annual production figure (which was in the region of 90,000 kg/MS).⁴¹
- [36] However, the misrepresentation was as to the three-year average production figure; so, the valuation based on the true average three-year production figure, (and therefore the market value based on that historical average) is the appropriate figure by which the difference in value should be measured at the date of purchase.
- [37] That the assessment carried out by Mr Hines is the correct approach to assessing loss based on diminution in value is reflected in numerous authorities.⁴² In the absence of any attempt by the Trust to prove its loss on a correct basis, it is respectfully submitted that the loss suffered is no more than \$50,000, being the diminution in value as assessed by Mr Hines.
- [38] Finally, Mr Hines' assessment is broadly consistent with other, independent assessments of the farm's value.
- [39] Mr Hines completed an earlier valuation of the farm for Cook Stud Farms dated 10 September 2009.⁴³ Mr Hines valued the farm as at September 2009 at \$2.9m. This valuation was completed before the Trust had considered buying the farm.
- [40] This assessment was based on a three-year average of 103,000kg/MS, noting production levels between 98,000 and

⁴¹ CoA para 143

⁴² *Shabor v Graham* [2021] NZCA 448, *Cox and Coxon Limited v Leipst* [1990] 2 NZLR 15, *Aldrie Holdings Limited v Clover Bay Park Limited* [2016] NZHC 250, *Harvey and Aldrie Holdings and Roberts v Jules Consultancy Limited and Ors* [2021] NZCA 303.

⁴³ 302.0616

107,000kg/MS, but also that production would be: “...more likely to be in the vicinity of 95,000kg/MS ... as a self-contained unit”.⁴⁴

[41] Further, a wholly independent valuer had also assessed the farm for Mr Cook in 2009; Property Advisory prepared a valuation dated September 2009.⁴⁵ The farm is referred to as “#Dairy1” and was valued at \$2,720,000, on an “average efficient” production level of 87,000kg/MS.

[42] These two independent assessments of value, wholly removed from the litigation, are strongly indicative of the farm’s actual market value. The actual price paid of \$2.8 million, sitting between the two figures, would seem entirely appropriate, supporting PGG’s argument that there has been no loss.

[43] The approach of using an external valuation, rather than relying on expert evidence, has been utilised in *Cemp Properties (UK) Ltd v Dentsply Research and Development Corporation (No2)*⁴⁶, as cited by the Court of Appeal⁴⁷.

The Trust’s assessment of loss

[44] The Trust, in 2021, instructed its expert valuer, Mr Hancock, to address, among other things, the market value of the farm based on the condition of the property as at October 2010. Mr Hancock based his assessment of value on information provided by the Trust as to their assessment of the condition of the property and his assessment of “average efficient” production of farms in the area of the farm.

⁴⁴ 302.0622

⁴⁵ 301.0325

⁴⁶ *Cemp Properties (UK v Dentsply Research and Development Corp (2))* [1991] 2 EGLR [197] (CA)

⁴⁷ CoA para 115, footnote 62

[45] Mr Hancock arrived at a valuation of \$2,165,000 exclusive of dairy company shares (worth \$154,500⁴⁸), based on his “...assessment of average efficient management and production achieved on comparable type properties...”.⁴⁹ His valuation was not related to actual or average production figures of the farm as at 2010 or in the three preceding years.⁵⁰

[46] As referred to above, the Trust’s farming expert, Mr Bishop, appears to have used an approach based on average figures for the district and not the actual figures when advising the Trust on the purchase. This tends to support PGG’s submission that historical production is of relatively small importance when assessing value, and is only one of a multitude of factors to be taken into account. Mr Hines, both in his report⁵¹ and when cross examined, confirmed that historical production is of little importance from the perspective of a purchaser⁵².

[47] The Court of Appeal recognised this, stating:

“...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”⁵³

[48] The Court of Appeal rightly recognised the error of relying upon Mr Hancock’s average efficient production when assessing loss attributable to the misrepresentation:

“...PGG was not asked to assess the average efficient production level. The Trust did not make any enquiry about the average production level for the farm, nor did it ask Mr Cook about his farming methods or how he had achieved the historically high

⁴⁸ CoA para 136

⁴⁹ Mr Hancock’s BOE CB 201.0135 at para 52 and Appendix D.

⁵⁰ CoA para 137 and NOE Hancock CB 203.0906 p295

⁵¹ Coastal Valuations Ltd Report 2 September 2020 CB 305.2764 pp 6 (Section 1.0), 13 (Valuation 2).

⁵² NOE Hines CB 2014.1165 p553 at lines 10-20 p558 lines 31-24, p599 lines 1-3, 31-34, p560 lines 1-4, 16-23

⁵³ CoA para 137

*production levels he did in fact achieve. PGG is not responsible for these failures which also contributed to the overpayment.*⁵⁴”

[49] The Court of Appeal accepted the Trust’s submissions that Mr Hines’ evidence was not a “*true market valuation*”⁵⁵. It is submitted that the Court of Appeal was wrong to accept this apparent criticism.

[50] The correct way to assess any difference in value of the property arising from the misrepresentation is to ask what the value of the property was, had the represented historical three-year average production been correct, and the value based on the actual historical three-year average production. That is a necessarily objective and hypothetical assessment but is the only reliable method of ascertaining what loss is, as a matter of law, properly attributable to the misrepresentation. That is precisely what Mr Hines has done.

[51] Mr Hancock did not dispute the figure proffered by Mr Hines; only the basis upon which the quantification was undertaken.

Court of Appeal’s approach to loss – land value

[52] At paragraphs 146 and 147 of its decision, the Court of Appeal provided a “*cross-check*” of its assessed loss of \$300,000 based on Mr Hancock’s assessment of land values.

[53] PGG says this was wrong on two levels:

- (a) it refers to the 2009 production figure, as opposed to the three-year average of approximately 98,729kg/MS; and
- (b) it is not based on any expert assessment or determination of market value.

⁵⁴ CoA para 144

⁵⁵ HC para 140

- [54] At paragraph 147, the Court of Appeal calculates a difference in value of \$276,250, reflecting Mr Hancock's assessment of land value as set out in the table at paragraph 146, and inferring values based on 103,000kg/MS (being the represented three-year average production) and 90,000kg/MS (being the approximate annual production for the 2009/10 season). Notably, these inferences are not recorded anywhere in Mr Hancock's evidence.
- [55] The Court of Appeal wrongly refers to the 90,000 kg/MS figure as "*the figure PGG ought to have supplied*", when in fact the misrepresented figure was, of course, the three-year average.
- [56] Substituting the 84,000kg/MS figure with, on the one hand 103,000kg/MS and on the other, 90,000kg/MS, produces the two figures referred to at paragraph 147 in the Court of Appeal judgment; \$2,188,750 and \$1,921,500 respectively, producing a difference of \$276,250. The Court then rounded the \$276,250 assessment to \$300,000.
- [57] The misrepresentation in this case was as to the three-year average, as represented in the PGG Proposal, not the production level for the 2009 year of 90,000 kg/MS. The Court of Appeal should not have used the 90,000 kg/MS in its calculation. It should instead have used the actual three-year average production figure, namely 98,729kg/MS. The production figure for the single year 2009 was never represented by PGG (and was never investigated by the Trust).
- [58] If the correct figure of 98,729kg/MS is used for the purposes of the Court of Appeal's calculation, the resulting lower value of the farm is \$2,061,250⁵⁶, resulting in a difference of \$90,758⁵⁷. It is submitted

⁵⁶ 98,729kg.MS x multiplier of 21,250= \$2,097,991

⁵⁷ \$2,188,750-\$2,097,991=\$90,758

that, if the Court of Appeal's assessment has any validity, the loss assessed by it should have been \$90,758 not \$276,500.

[59] PGG submits, however, that the Court of Appeal's assessment is both inappropriate and unreliable. It gives too much weight to the significance of the historical production in assessing value. It is inconsistent with Mr Hines' expert evidence, and the independent valuations referred to above, which indicate a market value as at October 2010 of approximately \$2,900,000 (or net value, after allowing for the value of dairy company shares (\$154,500), of \$2,745,500).

Conclusion

[60] The burden of proving loss lies on the Trust and it has failed to discharge that burden. It is not, therefore, entitled to any damages.

[61] The only evidence as to diminution in value as a consequence of the misrepresentation is the expert evidence of Mr Hines. Based on his evidence the correct assessment of loss is either zero (on the basis that the Trust paid less than the market value based on actual three-year average production), or, at best, \$50,000, being the diminution in value based on the actual historical production figures.

Dated this 17th day of November 2023

Michael E Parker
Counsel for the respondent