

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

SC 45/2023

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

ROADMAP OF RESPONDENT'S ORAL SUBMISSIONS

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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PGG – Roadmap of Respondent Oral Submissions

Issue I-Factual Flaws in Appellant's Case

(1) – There was no negligent representation by PGG that the Farm was a low input, standalone farming system that the Routhans could replicate¹

- (a) No such representation was pleaded. The only pleaded misrepresentation was the misstated three-year average production figure of 103,000 kgMS (rather than the correct 3-year average of 97,849 kg/MS).
- (b) the only negligent misrepresentation for which PGG is legally responsible was the inaccurate representation of the 3 year average production figure.

(2) - There is no contemporaneous evidence of reliance upon the 103,0000 kgMS figure for the purpose of preparing budgets or making operational or investment decisions by the Routhans, or the incurring of further debt, in the 10 years of operating the farm. The contemporaneous evidence, and the evidence of Mr Bishop, shows that there was no such reliance².

- (a) The budget prepared by Mr Bishop, which the Appellants said they relied upon to forecast production from the Farm of 112,000 kg/MS, was a budget prepared by Mr Bishop in April 2010 in respect of a different property (the Moynihan farm). It was based on his assessment of long run average production in the West Coast and estimated combined production from the Moynihan farm and the Appellants' 73 hectare run off property. It was not reliant upon the represented historical average production of the subject farm.

¹ Statement of Claim 101.0001 at [11], [12], [36], [37], [41], [42]. High Court decision 101.0049 at [140]. Routhan NoE 203.0622 at 203.0638, 203.0709 and 203.0710. Lewis Reply BoE 202.0550 at [101]. Lewis NoE 203.0805 at 203.0824 and 203.0825.

² Routhan BoE 201.0001 at [24] and footnote 10. Bishop BoE 202.0361 at [10], [18] and [24]. Bishop NoE 203.1026 at 203.1041, 203.1052, 203.1054, 203.1057. Lewis BoE 201.0035 at [24]. Financial forecast and analysis – KFT for YE 30 June 2011 302.0864. Decision of Arbitrator J G Hardie 304.1901 at [144] and [145].

- (b) The combined budgets prepared by Mr Bishop in respect of the subject farm and another farm Casa Finca) were based on his assessment of long run average production in the West Coast and were not based on the historic three year average production of 103,000 kgMS. Mr Bishop consistently denied relying on the three-year average production for the farm when preparing his indicative combined revenue forecasts in respect of the farm and Casa Finca.
- (c) In making their operational and investment decisions in the 10 years of operation of the farm the Appellants relied on advice from various advisers including in particular, Mr Bishop, Mr Bradley and an expert agronomist. PGG had no involvement at all in any of those operational and investment decisions.³

Issue II - There were numerous differences between the farming system employed by Mr Cook and the farming system implemented by the Routhans. There is no finding that the farming system employed by Mr Cook was “*unorthodox and expensive*”.

- (a) Mr Cook was a highly experienced and award-winning farmer who had been farming several properties in close proximity to the farm for over 50 years. Mr Routhan knew that at the time of purchase⁴.
- (b) Mr Cook ran approximately 260 stock, but Mr Routhan chose to increase the stock numbers to approximately 300 stock notwithstanding comments made by Mr Cook before settlement of the purchase that if he wanted to stock that many cows he would have to find the best farm consultant in the South Island and that none of the West Coast had the experience to take an inexperienced farmer up to the level required.⁵
- (c) Mr Cook used his “elite” Holstein Friesian cows for milk production on the farm. The Routhans chose, in reliance on advice from others to lease smaller Friesian cross-breeds and some Jersey cows. They did not want to use Friesian cows of the type used by Mr Cook which are larger and have higher production per cow⁶.

³ Routhan NoE 203.0622 at 203.0729 and 203.0780. Rabobank Credit Submission Summary dated 9 September 2012 303.1542 reports at 303.1545.

⁴ Rabobank Calculations 302.1080 at 302.1087. Rabobank Credit Submission Summary 303.1696 at 303.1698.

⁵ Routhan Reply BoE 202.0512 at [27]. Routhan NoE 203.0622 at 203.0674. Savage BoE 202.0387 at [95]. Cook BoE 202.0341 at [29] and [30]. Routhan NoE 203.0622 at 203.0751. Bradley NoE 203.0774 at 203.0799.

⁶ Cook BoE 202.0341 at [30]-[32]. Routhan Reply BoE 202.0512 at [15]. Routhan NoE 203.0622 at 203.0706. G Daly – Handwritten Note 305.2913. New Zealand Dairy Statistics 308.3790 at 308.3817.

- (d) Mr Cook employed experienced and capable farm managers. The Routhans had no experience of farming and relied on Mr Bradley, a retired farmer who attended the farm approximately once a week, for advice⁷.
- (e) Wintering-off— Mr Cook had access to other properties owned by him to graze stock that were being wintered off and other non-milk producing stock. This practice was both orthodox and very good farm management. Wintering-off clearly indicates the use of other farm property, whether owned by the farmer or not.
- (f) The pasture was found by the Appellants to be in poor condition and needing replacement. That is an ordinary risk of farming and has nothing to do with historic levels of production achieved by the previous owner. Similarly, as the Appellants knew at the time of purchase, some of the infrastructure was old and would require improvement. Those matters were not the subject of any negligent misrepresentation by PGG⁸.

Issue III - The principle of the SAAMCO line of cases is correct and was applied by a full bench of the Court of Appeal in *BNZ v Guardian Trust*⁹ and other decisions of the New Zealand courts. It should be followed and applied by this Court.

Issue IV - On the facts of this case, application of the SAAMCO principle to any award of damages, should be confined to the diminution in value (if any) at the time of purchase which is properly attributable to the three-year average production figure being wrong.

Issue V - Cross Appeal

- (a) Mr Hines' assessment of diminution of value was the correct approach to assessing any loss properly attributable to the misrepresented historical production figures.¹⁰
- (b) Mr Hancock's valuation falls well below Mr Mills', Hines' and Rabobank's valuations, including the Mills and Hines' contemporaneous valuations, completed in September 2009, without the cloud of litigation. Mr Hancock's valuation is a clear outlier and cannot reasonably be considered to be the best assessment of the farm's true value.

⁷Cook BoE 202.0341 at 202.0343 and 202.0344. Sale and Purchase Agreement Between Cook and KFT 302.1093.

⁸ BoE Routhan 201.0001 at [83]-[86]. NoE Routhan 203.0622 at 203.0704. NoE Bradley 203.0774 at 203.0783. HC Decision 101.0049 at [48], [49] and [215]. CA Decision 101.0121 at [63], [64] and [121].

⁹ [1999] 1NZLR 213.

¹⁰ Valuation Report by Coast Valuations Ltd 305.2764.

(c) The methodology in assessing quantum adopted by the Court of Appeal was not the correct method of valuing the loss. In any event it was incorrectly applied.¹¹

¹¹ Respondent's Submissions in Support of Cross-Appeal dated 17 November 2023 from page 7.

Appendix 1 – Summary of Valuations

Valuer	Mr Mills September 2009	Mr Hines 10 September 2009	Rabobank 17 September 2010	Mr Hines August 2016	Mr Hines 2 September 2020				Mr Hancock 2 May 2021
DOC ID	301.0325	302.0616	302.1070 and 310.5195	304.2000	305.2764				201.0135 @ 201.0148
Value as at	Sep 2009	10 Sep 2009	17 Sep 2010	19 Oct 2010	19 Oct 2010		1 June 2014		19 Oct 2010
Assumed production	87,000 (average efficient)	95,000kgMS (as self-contained unit)	Average of 103,000 for last 3 years	97,000	97,000	103,000	97,000	103,000	84,000
Number of cows	260	240	260	260	Unspecified				Unspecified
Land Value	\$2,519,337 (Buildings & land)	\$2,350,000 (103 ha flat pasture @ \$22,500/ha & 2.5 ha buildings etc @ \$10,000)	\$2,310,000 (105 ha @ \$22,000/ha)	\$2,145,000	\$2,145,000	\$2,195,000	\$2,145,000	\$2,195,000	\$1,790,000 (102 ha Dairy Platform x \$17,500/ha & 3.5ha buildings etc @\$1,500 ha)
Buildings		\$480,000	\$350,000	\$500,000	Total value of all improvements - \$600,000				\$289,000
Shares	\$146,894	Valuation stated to include 95,000 shares	\$154,500	\$154,000	\$155,000				0
Other	\$52,000	\$70,000	NA	\$100,000	Included in buildings				\$86,000
Total Value	\$2,720,000 (including shares)	\$2,900,000 (including shares)	\$2,814,500 (including shares)	\$2,900,000 (including shares)	\$2,900,000 (including shares)	\$2,950,000 (including shares)	\$2,900,000 (including shares)	\$2,950,000 (including shares)	\$2,165,000 (excluding shares)