IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 45/2023
[2025] NZSC 68

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

Hearing:	11–12 March 2024
Further Submissions:	22 March 2024
Court:	Winkelmann CJ, Glazebrook, Ellen France, Kós and Miller JJ
Counsel:	D R Kalderimis, T Nelson and O T H Neas for Appellants L J Taylor KC, M E Parker, J Eckford and C J J Mair for Respondent
Judgment:	26 June 2025

JUDGMENT OF THE COURT

A **The appeal is allowed. We fix damages payable by the respondent at $780,500, with interest as specified at [234].**

B **The cross-appeal is dismissed.**

C **The respondent must pay the appellants one set of costs of $50,000 plus usual disbursements. We allow for second counsel.**

REASONS

SUMMARY OF REASONS
(Given by the Court)

[1] This summary of the Court's reasons on the principal issues must be read alongside the full reasons.

Background

[2] In 2010, the Routhans bought a dairy farm near Hokitika.[1] The real estate agent, PGG Wrightson Real Estate Ltd (PGG), carelessly misrepresented to the Routhans that the farm's recent milk production historical average was steady at 103,000 kg of milk solids (kgMS) per season. In fact, the farm's recent production was substantially less than that, and in decline. The Routhans would not have bought the farm had they known the truth. They never achieved 103,000 kgMS, and the farming business declined until their bank forced them to sell the farm in 2020. The Routhans lost their incoming equity. They sued PGG for damages in negligence and under the Fair Trading Act 1986.

[3] The Courts below established that PGG is liable to the Routhans. The remaining issue in this Court is how much PGG must pay, and on what basis. This Court has also been asked whether and how New Zealand courts should apply the House of Lords decision in *South Australia Asset Management Corp v York Montague Ltd* (*SAAMCO*),[2] as refined in subsequent English decisions. The Court of Appeal applied *SAAMCO* in this case to limit PGG's liability to the difference between the price paid and the value of the farm had PGG's representations been true.

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1 The appellants bought the farm in their capacity as trustees of the Kaniere Family Trust.
2 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL).

The scope of duty principle and the *SAAMCO* cap

[4] A majority comprising Winkelmann CJ, Glazebrook, Ellen France and Miller JJ confirmed that the "scope of duty" principle, which was discussed in *SAAMCO*, forms part of New Zealand's law of negligence.[3] The principle requires the court to consider the position at the time the defendant's duty arose or was assumed and inquire for what kinds of risk was the defendant taking responsibility and whether the allocation of risk was a fair one in the circumstances. This helps to ensure a defendant is liable only for harm that resulted from the risks that made the defendant's conduct negligent in the first place.

[5] Kós J dissented as to the analytical framework. He took the view that the scope of duty principle was developed as part of the English courts' departure from *Anns v Merton London Borough Council*, a departure not taken in New Zealand, and that it should not represent part of duty analysis here.[4] The underlying extent to which a defendant assumed risk remained useful, however, as a backward-looking cross-check, within or immediately following analysis of causation and remoteness, to ensure liability does not extend to risks not assumed by the defendant.

[6] Separate from the scope of duty principle, *SAAMCO* has been understood as creating a "cap" for liability. If the defendant negligently provided the plaintiff with information for the purpose of helping them to decide upon a course of action, then the defendant's liability was said to be limited to the foreseeable consequences of that information being wrong.

[7] A majority comprising Glazebrook, Kós and Miller JJ held that the Court of Appeal erred by using the *SAAMCO* cap as the "normal" measure of damages in this case.[5]

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3 Below at [139] and [150] per Glazebrook and Miller JJ and [328] per Winkelmann CJ and Ellen France J.

4 Below at [239]–[241] per Kós J citing *Anns v Merton London Borough Council* [1978] AC 728 (HL).

5 Below at [170] per Glazebrook and Miller JJ and [279] per Kós J.

[8] Winkelmann CJ and Ellen France J preferred the view that the *SAAMCO* cap can be a useful tool or cross-check to identify whether loss that was caused in fact by the defendant's breach falls within the scope of their duty of care.[6]

PGG's duty of care

[9] Glazebrook, Kós and Miller JJ found that PGG's duty of care extended both to the risk that the Routhans would pay too much for the farm and to the risk that the Routhans would produce less than the represented historical average following acquisition.[7] That was because of PGG's role in negotiating and documenting the contract between the Routhans and the vendor. PGG knew why the Routhans wanted the historical production information, it assumed responsibility for having that information verified and updated by the vendor, and it knew the Routhans would rely upon that information because only the vendor (or the dairy company, with the vendor's authorisation) could verify it.

[10] In dissent, Winkelmann CJ and Ellen France J agreed with the Court of Appeal that the scope of PGG's duty of care extended only to the risk that the Routhans would pay too much for the farm.[8] The real estate agent did not advise the Routhans in connection with their decision to purchase nor their subsequent decisions regarding how to operate the farm, and there were other misstatements relating to how the previous owner farmed the property which were independently operating causes of the Routhans' post-purchase losses.

The extent of PGG's liability

[11] The Court was unanimous that PGG could not be held liable for the full extent of post-purchase loss claimed by the Routhans.

[12] Glazebrook, Kós and Miller JJ found that PGG was liable only for the following heads of loss:

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6 Below at [331] per Winkelmann CJ and Ellen France J.
7 Below at [171]–[174] per Glazebrook and Miller JJ and [278]–[279] per Kós J.
8 Below at [353]–[377] per Winkelmann CJ and Ellen France J.

(a) $480,500, being the amount the Routhans overpaid by reference to expert evidence of the farm's market value had its actual production been known;[9]

(b) $150,000, being the cost of additional fertiliser spent in an attempt to achieve the production they had been led to expect. The farm's capacity to grow grass was crucial to its milk production;[10] and

(c) $150,000, being the cost of a re-pasturing programme undertaken by the Routhans, on advice, to try improve pasture quality and therefore production.[11]

[13] Glazebrook, Kós and Miller JJ rejected PGG's arguments that the Routhans were contributorily negligent in respect of the post-purchase losses listed above. The Routhans acted as they did, in respect of that expenditure, because they reasonably relied on information provided by PGG.[12] There was no reason to reject the High Court's findings that the Routhans took appropriate professional advice, were competent dairy farmers who achieved well compared to regional averages, and took reasonable efforts to increase production.

[14] However, Glazebrook, Kós and Miller JJ found that PGG was not liable for other heads of loss: namely, revenue shortfalls, increased debt servicing costs, additional supplementary feed, and the Routhans' long-term capital investments into the farm. These losses either were not caused in fact by PGG's breach, or they were not reasonably foreseeable, or the evidence did not make clear how much was attributable to PGG's breach, or they were already counted in other awards, notably the overpayment for the farm.[13]

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9 Below at [183] per Glazebrook and Miller JJ and [317] per Kós J. Compare below at [393]–[398] per Winkelmann CJ and Ellen France J.

10 Below at [209]–[211] per Glazebrook and Miller JJ and [326] per Kós J.

11 Below at [212] per Glazebrook and Miller JJ and [326] per Kós J.

12 Below at [231]–[232] per Glazebrook and Miller JJ and [308]–[312] per Kós J.

13 Below at [206]–[207], [215], [221]–[222] and [228] per Glazebrook and Miller JJ. See also below at [324]–[325] per Kós J.

[15] Winkelmann CJ and Ellen France J dissented. On their view of the scope of PGG's duty, none of the post-purchase losses were properly attributable to PGG's breach. The substantial cause of these losses was the misunderstanding (not created by PGG) as to the farming method the previous owner had used.[14] There were other causes too: the Routhans did not use the farming method that was represented to them; the Routhans became aware almost immediately upon taking possession that they were achieving well below expectations and nevertheless decided to retain the farm; and the Routhans took multiple business decisions that were not reasonably foreseeable by the real estate agent.[15]

[16] Winkelmann CJ, Ellen France and Kós JJ also observed that an award for revenue losses would be an expectation measure.[16]

Result

[17] The Court has allowed the Routhans' appeal by a majority comprising Glazebrook, Kós and Miller JJ, but without fully reinstating the High Court award. PGG must pay the Routhans $780,500 in damages, with interest, alongside $50,000 in costs plus usual disbursements.[17] The Court also unanimously dismissed PGG's cross-appeal, which related to how the overpayment should be calculated.[18]

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14 Below at [380]–[381] per Winkelmann CJ and Ellen France J.
15 Below at [382]–[384] per Winkelmann CJ and Ellen France J.
16 Below at [323] per Kós J and n 554 per Winkelmann CJ and Ellen France J.
17 Winkelmann CJ and Ellen France J would have confirmed the judgment of the Court of Appeal, which awarded the Routhans $300,000 plus interest: below at [400].
18 Below at [180] per Glazebrook and Miller JJ, [317] per Kós J and [398] per Winkelmann CJ and Ellen France J.

GLAZEBROOK AND MILLER JJ
(Given by Miller J)

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Introduction

[18] A real estate agent carelessly misrepresented a dairy farm's recent milk production history, causing the purchasers both to pay too much for the farm and, following purchase, to pursue what they had been given to understand was the farm's existing production level.

[19] The farm was a 105-hectare dairy farm near Hokitika. It was prosaically named Farm 258, its identifier in the records of Westland Co-operative Dairy Company Ltd (Westland Dairy Co).[19] The appellants, the Routhans, bought it in their capacity as trustees of the Kaniere Family Trust (the Trust).[20] The respondent, PGG Wrightson Real Estate Ltd (PGG), was the real estate agent appointed by the vendor.

[20] The case has two distinctive features. The first is that in making the representations PGG exceeded the scope of its authority from its principal and vendor of the farm, Cooks Stud Farms Ltd (Cooks Farms). The second is that the Routhans did not sue Cooks Farms for PGG's precontractual misrepresentations. Rather, they sued PGG in tort. As we explain below, PGG joined Cooks Farms as a third party but that claim was discontinued before trial.[21]

[21] The judgments of the Courts below have established that PGG misrepresented the farm's production levels and that PGG is liable to the Routhans in negligence.[22] The remaining issue is what damages it must pay, and on what basis.

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19 The company has since renamed to Westland Dairy Company Ltd.

20 In these reasons, references to the Routhans should be taken as references to the appellants acting in their capacity as trustees of the Kaniere Family Trust unless otherwise indicated.

21 See below at [79].

22 *Routhan v PGG Wrightson Real Estate Ltd* [2021] NZHC 3585, (2021) 16 TCLR 274 (Dunningham J) [HC judgment] at [117] and [196]; and *PGG Wrightson Real Estate Ltd v Routhan* [2023] NZCA 123, (2023) 24 NZCPR 97 (Gilbert, Mallon and Wylie JJ) [CA judgment] at [106].

[22] Following acquisition, the farm's production was consistently well below the levels represented by PGG. The Routhans' attempts to increase production were unsuccessful. Their mortgagee eventually forced them to sell it a decade after the purchase. They invited the trial Judge, Dunningham J, to award damages on the basis that but for the wrong they would have purchased another, hypothetical property and farmed it successfully.

[23] The Judge found that the Routhans would not have purchased Farm 258 but for PGG's misrepresentations.[23] In other words, this was a no-transaction case. But she declined to base damages on a hypothetical alternative purchase.[24] Instead, she awarded a sum representing the Routhans' losses attributable to the forced sale, plus expenditure on capital improvements that were not reflected in the sale price, less a global deduction of 20 per cent for contributory negligence.[25]

[24] The Court of Appeal allowed PGG's appeal in part, limiting its liability to the difference between the price paid and the value of the farm had PGG's representations been true.[26] The Court rested that decision on what we will call the *SAAMCO* cap, following the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd* (*SAAMCO*).[27] We examine *SAAMCO* and its status in New Zealand law below from [107].

[25] This Court granted leave to appeal, confined to the measure and quantum of damages.[28]

The farm purchase

The Routhans' search for a suitable farm through PGG

[26] In late 2009, Mr Routhan contacted Greg Daly, a well-known local real estate agent who worked for PGG. The Routhans sought his assistance in purchasing a farm

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23 HC judgment, above n 22, at [192].
24 At [193]–[194].
25 At [196] and [229].
26 CA judgment, above n 22, at [148].
27 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) [*SAAMCO*].
28 *Routhan v PGG Wrightson Real Estate Ltd* [2023] NZSC 127 (Glazebrook, O'Regan and Kós JJ) [SC leave judgment] at [1]. See below at [100].

in the Kokatahi/Kowhitirangi Valley with a capacity of 500–600 cows, preferably close to a 73-hectare property in Hokitika which the Routhans had purchased on behalf of the Trust in 2000 (the run-off property). Mr Routhan had been a successful businessman in the plumbing, gasfitting and drainlaying industry but had not previously farmed; Mrs Routhan however had been brought up on a dairy farm.

[27] 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 kg of milk solids (kgMS) per annum. The Routhans offered $4 million for this property but their offer was declined after another agent, Shari McLaughlin of CRT Real Estate Ltd (CRT), convinced the owner she could sell it for more.

The introduction to Farm 258

[28] CRT had been approached in mid-2009 by Nelson Cook, an experienced farmer and sole director of Cooks Farms, to list Farm 258 for sale. Ms McLaughlin prepared a brochure (the CRT brochure) containing information about Farm 258, including that it had averaged "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". Attached to the brochure was a Ravensdown Ltd fertiliser programme which recommended applying 147 kg of nitrogen per hectare for the 2009/10 season.[29] The brochure represented that the fertiliser applied was "[a]s per recommendation".

[29] In early 2010, Ms McLaughlin approached the Routhans and gave them a number of brochures advertising farms for sale in the Hokitika region, including the CRT brochure. Although CRT did not hold a current listing for Farm 258, Ms McLaughlin thought it might suit the Routhans' requirements and she understood that Mr Cook would be open to an offer of $2.8 million—$100,000 less than the original asking price.

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[29] There was no plan for the 2010/11 season but there was evidence that it is usual to test for fertility every second or third year.

[30] Mr Routhan noted that the CRT brochure reported average production from Farm 258 of 103,000 kgMS over the past three seasons. Because the brochure was produced before the end of the 2009/10 season, he understood it to refer to the 2006/07, 2007/08 and 2008/09 seasons.

PGG's misrepresentations

[31] Mr Routhan told Mr Daly of Ms McLaughlin's approach and gave him the CRT brochure. He asked Mr Daly to obtain production details and pricing for Farm 258, as well as a neighbouring farm (Casa Finca). Mr Routhan wanted Mr Daly to confirm that production for the 2009/10 season had remained at the average level specified in the CRT brochure. Dunningham J found that Mr Daly knew the Routhans would rely on this information, without making further inquiry.[30] She explained that production figures were not public. They could be obtained only from the vendor or from the dairy company with the vendor's consent.[31]

[32] On 7 September 2010, Mr Daly met with Mr Cook, who confirmed he was still interested in selling Farm 258 (though no agency agreement was entered into until more than a month later).[32] By the time their briefs of evidence were prepared more than 10 years later, neither could recall exactly what was said at this meeting. Mr Daly's recollection was that he had asked Mr Cook about the farm's milk production and was told the average was still the same, which Mr Daly took to mean 103,000 kgMS as stated in the CRT brochure. Mr Cook said it was not his practice to give out production figures and he would have referred Mr Daly to the dairy company. The Judge found that Mr Cook did not confirm that milk production for the most recent season was 103,000 kgMS, though he likely 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.[33]

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30 HC judgment, above n 22, at [106].

31 At [105].

32 On 11 October: see below at [41]. Dunningham J preferred Mr Cook's recollection that there was an initial phone call with Mr Cook followed by an in-person meeting where the details in the CRT brochure were discussed: HC judgment, above n 22, at [30].

33 HC judgment, above n 22, at [31]–[32].

[33] Mr Daly relayed to Mr Routhan that Mr Cook would sell Farm 258 for $2.8 million and said that average production remained steady at around 103,000 kgMS (or words to that effect). Mr Routhan reasonably took that as confirmation that Farm 258 had maintained average production at that level for the past four seasons, including the 2009/10 season which had since ended. The facts that the average was now an average over four seasons and had been achieved from 260 cows on 105 ha using a grass-based system (with half the stock wintered off) indicated that the farm was in excellent condition, with strong fundamentals in soil and pasture quality.

[34] The average of 103,000 kgMS was incorrect. The farm had produced 106,280 kgMS in 2006/07, 107,921 kgMS in 2007/08, 97,930 kgMS in 2008/09 and 90,337 kgMS in 2009/10. The rolling three-season average at the end of the 2009/10 season was not 103,000 kgMS but 98,729 kgMS. That is the figure that PGG ought to have reported to Mr Routhan.[34]

[35] The brochure also overstated the number of cows milked and understated the quantity of fertiliser applied. It stated that approximately 260 cows were milked. In fact the average was 237 cows.[35] It stated that the attached Ravensdown fertiliser recommendations (147 kg of nitrogen per hectare) had been followed. In fact much more fertiliser had been applied.[36] These misrepresentations influenced the Routhans' management of the farm after they took possession, as we explain below.

[36] Dunningham J found that a high and consistent level of production from a grass-based farming system mattered to the Routhans.[37] The drop in the rolling average indicated that the most recent season's production had fallen markedly. Had they been given the actual production average they would have inquired, asking whether production in earlier seasons was artificially high and why it was in sharp decline by the time of sale. They might have learned, for example, that production in the 2006/07 and 2007/08 seasons was attributable to the application of much larger

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34 We note that the Court of Appeal held that the figure PGG ought to have disclosed was 90,000 kgMS but counsel in this Court agreed that the correct figure was 98,729 kgMS, being the farm's rolling three-season average. See CA judgment, above n 22, at [147].

35 See below at [60].

36 See below at [64].

37 HC judgment, above n 22, at [174]–[175].

quantities of nitrogen fertiliser than the CRT brochure represented, the use of more supplementary feed, and the fact that not only half of the herd (as represented in the CRT brochure) but also the heifers were being wintered off the property. We add that they might also have learned that, as the Judge found, the farm was milking not the 260 cows represented but only about 237.[38]

[37] After receiving Mr Daly's assurance, Mr Routhan sought indicative financial forecasts and analysis from Ross Bishop, a farming financial consultant, to assess whether the proposed purchase was worth pursuing. Mr Bishop delivered these reports to the Routhans on 10 September 2010.[39]

[38] It was usual practice for a farm financier to require a written proposal or prospectus to verify information about the farm. Mr Routhan told Mr Daly that the Trust needed finance and asked him to prepare a proposal for their bank, Rabobank New Zealand Ltd (Rabobank). It was prepared on the basis that the Trust would buy both Farm 258 and Casa Finca and work them together with the Routhans' run-off property. Mr Daly acknowledged in evidence that he had understood the Routhans and Rabobank would rely on the information in the proposal.

[39] Mr Daly prepared the proposal (the PGG proposal) using the CRT brochure as a base and updating it with further information from Mr Cook. The PGG proposal confirmed that the average production for the "last 3 years" was 103,000 kgMS from 260 cows. It also attached the Ravensdown fertiliser programme and stated that it had been followed. As noted by the Court of Appeal, the only material changes between the CRT brochure and the PGG proposal were to the following items on the first page:[40]

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]

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38 See below at [60] and n 53.

39 PGG was declined leave to argue that the Routhans relied on Mr Bishop, and not PGG's misrepresentations about production levels, when deciding to buy Farm 258: see below at [100].

40 CA judgment, above n 22, at [41] (alterations in original).

"Shares" meant shares in Westland Dairy Co. The number was 103,000 because the number of shares which were to be transferred with the property corresponded to its milk production.[41]

[40] On 15 September 2010, Mr Routhan signed a Rabobank loan application for the Trust, having provided the bank with copies of the PGG proposal and Mr Bishop's financial forecasts. In a section of the loan application headed "Property details", Mr Routhan recorded alongside "Carrying capacity" the figures "123,000 m/s" for Casa Finca and "103,000 m/s" for Farm 258 ("m/s" referring to kgMS).

[41] Mr Daly prepared an agency agreement which he and Mr Cook signed at a meeting on 11 October 2010. Mr Daly backdated the agreement to 1 September 2010. The explanation for the delay in completing it is that he had trouble contacting Mr Cook and arranging the necessary meeting.

[42] It was PGG's practice when executing an agency agreement to have the vendor sign a Rural Information Sheet to confirm information about the property. The standard form Rural Information Sheet provided, in the case of a dairy farm, for details about stock on hand, stock wintered, dairy company shares and production history. Normally the agent would use this information when completing a proposal for the purchaser's bank, but in this case the proposal had been prepared before the agency agreement.

[43] The agency agreement contained a checklist. Mr Daly ticked the "yes" box next to "Rural Information Sheet Completed". In fact, Mr Cook did not sign or approve the information sheet which Mr Daly had prepared for the meeting. When he asked Mr Cook to confirm the production figures, Mr Cook responded that he would have to check them first. The information sheet was left with him. Mr Daly did not tell the Routhans that Mr Cook had declined to confirm production, nor did he pursue Mr Cook for the information after the meeting.[42]

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41 The correspondence is not precise. Rather, it is the maximum that a shareholder could sell into the dairy company, based on what its board considered was the probable supply of milk.

42 Sometime after selling the farm to the Routhans, Mr Cook did sign the information sheet, altering it to record an average production figure of 97,000 kgMS for the three seasons preceding purchase, but he could not recall when he did that and it has not been suggested that the amended sheet was disclosed to the Routhans at any relevant time. See HC judgment, above n 22, at [22] and [55].

[44] Michael Curragh, Mr Daly's manager at PGG, signed a PGG form headed "Particulars of Real Estate Sale". It included a checklist which Mr Curragh ticked, relying on Mr Daly, to confirm that the agency agreement had been completed. Dunningham J found that the box should not have been ticked because the agency agreement was incomplete without a signed Rural Information Sheet.[43] The Particulars document again recorded milk production at 103,000 kgMS. It is common ground that, although this appears to be an internal PGG document, Mr Routhan received a copy on 18 October 2010. He was given it because he requested details of PGG's in-house complaints and disputes process when asked to agree to that process.[44] He gave evidence that he noted the production figure and took it as confirmation of what Mr Daly had told him.

[45] It will be seen that three separate representations about Farm 258's production were made by PGG: the first was made orally on 7 September, the second in the PGG proposal and the third in the particulars of sale.

The agreement for sale and purchase

[46] Mr Curragh drafted the agreement for sale and purchase.[45] The vendor was Mr Cook's company, Cooks Farms. The Trust was the purchaser. The agreement described the land and specified the price, $2.8 million, and the settlement date, 20 December 2010. It was not subject to finance, presumably because the Routhans had secured sufficient commitment from their financiers.

[47] The agreement did not contain a warranty about production levels, but it did incorporate a set of further terms and conditions. These included provisions:

(a) specifying that the purchase price was inclusive of 103,000 Westland Dairy Co shares;

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43 At [36].

44 There was no suggestion of any dispute at the time; Mr Routhan was checking what it was that he had been asked to agree to do in the event a dispute did arise.

45 On the form approved by the Real Estate Institute of New Zealand Inc and the Auckland District Law Society Inc (8th ed, 2006) (the REINZ/ADLS form). See HC judgment, above n 22, at [28].

(b) making the agreement conditional on the purchaser obtaining a satisfactory milk supply contract (which can only have been with Westland Dairy Co);

(c) making the agreement conditional on due diligence by the purchaser within 15 working days;

(d) agreeing that the purchaser would lease approximately 260 cows from the vendor on terms to be agreed before settlement, with any dispute over the cows being resolved by arbitration; and

(e) agreeing that the property was sold as a going concern for tax purposes. The agreement also recorded that the existing farm manager would be kept on until the end of the season.

[48] The agreement also recorded that PGG acted as Cooks Farms' agent on the sale.

The purchase

[49] On 19 October 2010 Mr Routhan signed the agreement for sale and purchase of Farm 258 in his capacity as a trustee of the Trust. Mr Cook signed it for Cooks Farms. He also signed a transfer of 103,000 Westland Dairy Co shares in consideration for $154,500, which appears to have been their nominal value. (As noted above, the purchase price for Farm 258 included the shares).[46]

[50] Dunningham J found that the Routhans' due diligence was adequate and reflected common practice at the time.[47] That was despite the fact they did not ask for Farm 258's actual season-by-season production or request further details of the farming system Mr Cook had used. (The expert witnesses at trial agreed that the information in the PGG proposal was insufficient to fully represent the farming system). Nor did the Routhans obtain a valuation or any other independent advice about the quality of the farm.

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46 See above at [39].
47 HC judgment, above n 22, at [221].

[51] Rabobank approved a loan of $4.8 million on 24 November 2010 anticipating the purchase of both Farm 258 and Casa Finca. However, the owner of Casa Finca decided not to sell. That reduced the Trust's borrowing from Rabobank to $2,080,000. That sum comprised $1.3 million for the purchase of Farm 258 and $780,000 to refinance an existing loan from ASB Bank Ltd. The balance of $1.5 million for the purchase of Farm 258 was funded by a loan from Tony Timpson, a close friend of the Routhans, at bank term deposit interest rates. The trial Judge found that Mr Timpson's loan came with no requirement for security and no expiration date, and would not expire should the Routhans be unable to meet their commitments to him.[48] Rabobank had required that he agree to these terms so that the bank could treat his advance as "quasi-equity".

[52] The purchase price of $2.8 million was entirely funded by debt, namely the loans from Rabobank and Mr Timpson. However, the Routhans did introduce equity to the farming business which they conducted on Farm 258 and the run-off property. Their evidence was that it came to approximately $1,570,000, comprising existing equity of $820,000 in the run-off and $750,000 from the sale of other properties.[49] The cash was used as working capital on Farm 258. Notably, it funded some of the infrastructure improvements.

Post-purchase

[53] The Routhans were unable to produce 103,000 kgMS at any time during the 10-year period following settlement on 20 December 2010. Production fluctuated between a high of 88,503 kgMS (in the 2013/14 season) and a low of 60,597 kgMS (in 2019/20).[50] Rabobank ultimately forced the sale of both the run-off property and Farm 258 in September 2017, and both properties were eventually sold in December 2020.

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48 At [181].

49 CA judgment, above n 22, at [22]. In an internal credit submission dated 26 July 2011, Rabobank calculated the Routhans' equity as $1,510,000. In written submissions the appellants claimed their ingoing net equity was $1,580,000. At the hearing the appellants primarily used $1,570,000. We understand this difference to be attributable to rounding: the precise ingoing net equity was $1,575,496.

50 See CA judgment, above n 22, at [5].

[54] In the intervening years, the Routhans made numerous investment and management decisions, some under pressure from Rabobank to improve production. These decisions necessitated a substantial increase in the level of the Trust's borrowing, from $3.58 million at settlement to $4.8 million by July 2013.[51] We survey specific losses which the Trust claims to have suffered, focusing on the period between purchase and 16 November 2014, when the Routhans discovered that Farm 258's recent production had been misrepresented.

Revenue shortfalls

[55] The Routhans' gross milk revenue shortfall to 30 June 2015 was at least $482,064.[52] This figure represents the difference in milk revenue between their actual production and from 103,000 kgMS (that is, if the representation had been true).

Supplementary feed

[56] Mr Routhan deposed that in the first year after purchase the trustees spent $47,379.87 on extra feed (and transportation of that feed) and $7,857.72 on milk powder for calves who would otherwise have been fed from daily milk production.

The cow leases

[57] As noted above, the trustees agreed to lease cows from Cooks Farms. They leased 270 cows between 20 December 2010 and 31 May 2011, and 300 cows and 75 heifer calves between 1 June 2011 and 31 May 2013. The number exceeded the 260 mentioned in the PGG proposal (and the agreement for sale and purchase) because the Routhans believed the run-off gave them the capacity to increase production.

[58] On taking possession the Routhans realised that milk production was well below the claimed historical average. In March 2011 Allan Bradley, a retired farmer

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51 Rabobank increased the credit limit to $2.7 million in June 2012 (for the replacement herd mentioned below at [58]), to $2.83 million in September 2012 and to $3 million in July 2013. Mr Timpson advanced a further $300,000 in April 2013. See below at [72].

52 The experts assumed that on the alternate scenario, where Farm 258 achieved 103,000 kgMS, the Routhans parked their capital and did not commence farming until the 2011/12 season. For this reason, this figure does not capture any estimated gross revenue shortfall in the 2010/11 season.

whom they engaged as their farm advisor, inspected the cows and opined they were poor milk producers, identifying this as the main cause of low production levels. The Routhans accordingly told Mr Cook on 25 November 2011 that they intended to terminate the second cow lease from 31 May 2012. Mr Cook responded that they had no right to do so. He blamed poor production on their inexperience. The Routhans cancelled the lease on 25 November 2011, with effect from 31 May 2012. They paid $700,000 to buy a replacement herd comprising smaller animals. The rationale was that because these animals were smaller the farm could sustain more of them. $620,000 of that sum was borrowed from Rabobank.

[59] Mr Cook invoked the arbitration clause. There was a disclosure process. The Routhans learned for the first time that PGG's representations about Farm 258's production were incorrect. The information came in the form of certified production certificates from Westland Dairy Co which the Routhans received, after initial resistance from Mr Cook, on 16 November 2014.

[60] There was evidence at trial that stock levels had been overstated in the CRT brochure and PGG proposal, although the experts agreed that the exact stocking rate by Mr Cook remains unclear. According to the diaries of a former manager Farm 258 had historically milked 220 cows on average, not 260. It appears that for the three seasons represented in the PGG proposal, there were in fact only 237 cows on average.[53] If so, overstocking in reliance on the PGG proposal might help to explain the leased herd's performance. However, that was not apparent at the arbitration, where it appears to have been understood that 260 cows had been milked.

[61] Mr Cook won the arbitration. The arbitrator reasoned that misrepresentations about historical production were beyond jurisdiction because they were made in connection with the agreement for sale and purchase, not the leases. The leases contained no implied term that the cows supplied would produce on average 103,000 kgMS per season. The Routhans were entitled to cancel the second lease[54] for non-disclosure of production records which would allow them to make informed

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53 Dunningham J recorded the average as 233 cows: HC judgment, above n 22, at [58].

54 It appears that they would have been entitled to cancel the first lease for the same reason. The arbitrator described the second lease as effectively a continuation of the first, but with more cows. They did not have production records for the cows supplied under the first lease either.

decisions to reject animals on quality grounds, but they could not defer the effect of cancellation for six months, as they had attempted to do. Had they claimed damages for breach of Mr Cook's obligation to supply the animals' production history at the outset, a different outcome might have resulted.

[62] The award, which was delivered in August 2015, cost the Routhans $269,165.98. That sum comprised approximately six months' unpaid rent for the cows ($24,779.71), an award representing some rental for the remaining year of the second lease ($20,000), interest on these sums ($15,233.37), the arbitrator's fees ($80,125), and legal costs ($129,027.90).

[63] We return to the causal connection between these losses and PGG's breach of duty below at [216]. For reasons explained there, it is necessary to go into a little further detail about the sequence of events which led to the arbitration.

Fertiliser

[64] As noted earlier, the PGG proposal stated that Ravensdown's recommendation of 147 kg of nitrogen per hectare had been followed. The quantity actually applied under Mr Cook's ownership could not be established exactly at trial. There was evidence that he had purchased quantities of 451 kg/ha in the peak production years, but he owned other properties and it may not all have been applied to Farm 258. A 2009 valuation report recorded that 400 kg/ha was typically applied to the property each year. Simon Glennie, an independent expert engaged by the Routhans, estimated that Mr Cook's manager must have applied about 347 kg/ha of nitrogen to produce the feed needed to achieve the farm's peak production. PGG's expert witnesses responded that it could not be known how much fertiliser had been applied, but they did not defend the higher figures as economic or sustainable. Dunningham J found that 350–400 kg/ha of nitrogen was being applied to Farm 258 in the seasons shortly before settlement.[55]

[65] In an attempt to increase the production they were achieving, the Routhans applied more fertiliser than the 147 kg/ha recorded in the PGG proposal. At the

[55] HC judgment, above n 22, at [58(a)].

beginning of the 2011/2012 season, Ravensdown recommended that they apply 196 kg/ha of nitrogen. Mr Routhan gave evidence that they actually applied 265 kg/ha.[56] They spent $42,081.55 throughout 2011, more than had been budgeted for that year. They later reduced the quantity applied, initially on the advice of Mr Bradley who thought Mr Cook had degraded the pasture by applying too much nitrogen, and after 2014 at the insistence of Rabobank. Mr Routhan's evidence, which the Judge accepted, was that the over-budget expenditure totalled $150,000.[57]

Pasture renewal

[66] In another attempt to address the production shortfall the Routhans renewed the pasture, relying on Mr Bradley's opinion that it was in a dire state and the advice of an agronomist, Chris Sanders of PGG Wrightson Seeds Ltd.[58] As a stop-gap measure, grass seed was direct-drilled into the pasture in late 2011. The entire farm was then re-pastured over three seasons commencing in 2012. The Judge accepted Mr Routhan's estimate that the re-pasturing cost $150,000.[59]

[67] The re-pasturing took one-third of the farm out of production for two to three months in each of the three seasons. The Routhans sought to compensate for it by buying more supplementary feed. The evidence does not show how much was attributable to more pasture being out of production for renewal than would be normal on a dairy farm.[60]

Milking frequency

[68] In another attempt to increase revenue, a decision was made to continue milking during the winter of 2013. That contributed to a shortage of grass in the following season, which led the Routhans to reduce milking from twice- to once-daily

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56 This figure represents nitrogen applied in the first year post-purchase, rather than nitrogen applied during the 2011/12 season.

57 HC judgment, above n 22, at [51(d)].

58 The Routhans also received advice from Chris Tibbotts, a field specialist from PGG.

59 HC judgment, above n 22, at [51(c)]. The farm accounts, which are in evidence, suggest this was a reasonable estimate.

60 But see above at [56].

in the spring of 2014 for the balance of the 2014/15 season.[61] That in turn contributed to production of just 64,674 kgMS in that season.[62]

Infrastructure improvements

[69] The Routhans undertook several capital improvements in the two years following settlement. Mr Routhan's evidence, which the Judge accepted, was that they spent approximately:[63]

(a) $440,000 on a new concrete feed pad and stand-off area on the run-off property;

(b) $250,000 to fully re-fence Farm 258;

(c) $116,000 to replace the water supply system;

(d) $8,000 to install feed troughs in the cowshed to feed palm kernel extract; and

(e) $150,000 on extensive improvements to laneways and culverts.

[70] These were long-term improvements. Because the Routhans were initially spending capital they had brought to the farm, they did not have to seek Rabobank's approval.[64] The bank began to impose constraints in 2013, and in October 2014 it insisted that no unbudgeted capital expenditure be incurred without its consent. Thereafter it only permitted funding for expenditure which it considered essential.

Additional borrowings and falling returns from dairying

[71] Between settlement in December 2010 and the end of the 2014/15 season, the Trust's financial position deteriorated to the point where the Routhans had lost their

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61 They also did so briefly in 2011: HC judgment, above n 22, at [157], n 37.

62 Mr Lewis estimated that the decision reduced the season's production by at least 15 per cent, which generally corresponded with other expert evidence.

63 HC judgment, above n 22, at [51].

64 The further advance of $300,000 from Mr Timpson (see below at [72]) appears to have been spent in the same way.

equity and could not trade their way out. The evidence of Christopher Lewis, an expert called by the Routhans, was that they had by then "reached an unrecoverable position". Dunningham J agreed, finding that by that time they had no equity in the property and had lost their capital investment.[65]

[72] A number of factors contributed to the losses which the Routhans accumulated by the time they were forced to sell. First, to meet the expenditure itemised above (excluding the costs associated with the arbitration) the trustees increased their borrowings from $3.58 million to $4.8 million:

(a) In June 2012, Rabobank advanced $620,000 for the purchase of the replacement herd.

(b) In September 2012, Rabobank advanced $130,000 for capital and operating expenditure.

(c) In April 2013, Mr Timpson advanced $300,000.

(d) In July 2013, Rabobank advanced $170,000 to fund capital expenditure and working capital. This brought the total facility to $3 million. The interest rate was increased at this time to reflect the increased risk, which Rabobank classified as "high".

[73] In April 2015 Rabobank placed the Trust under the oversight of its Special Asset Management division. It 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, including Mr Timpson's loans. The Trust's debt servicing costs increased from $188,373 in the 2012 financial year to $330,474 in the 2017 financial year.[66] Mr Lewis estimated that,

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65 HC judgment, above n 22, at [187].

66 We omit bank fees. Interest was payable both to Rabobank and Mr Timpson. We note also that during the 2013/14 season the Routhans moved their balance date from 31 March to 30 June.

if Farm 258 produced 103,000 kgMS, the Routhans would have by 30 June 2015 avoided $204,306 in debt servicing costs.[67]

[74] Second, the milk price declined sharply. The Westland Dairy Co farm gate price fell from $7.57 per kgMS in the 2013/14 season to a low of $3.62 per kgMS in the 2015/16 season.

[75] Third, the value of the land fell following the decline in the milk price.

Forced sale

[76] In September 2017, Rabobank insisted that the Routhans put the Trust's properties on the market. They did as instructed but found it difficult to secure a buyer. On 5 October 2017 they entered into an agency agreement with Mr Daly's new agency, Greg Daly Real Estate Ltd, for the run-off property. A price between $1.4–$1.65 million was negotiated with the neighbours, but the sale fell through because they could not secure funding. The trustees then engaged Mr Daly to conduct a deadline sale process for Farm 258 by private treaty in March and April 2019, but no sale resulted. In May 2019 Rabobank arranged for the Routhans to engage Ernst & Young Transactional Advisory Services Ltd to help prepare Farm 258 and the run-off for sale and to oversee the sale process. Mr Daly was re-engaged in March 2020 to attempt a sale of the farm and the run-off, but COVID-19 rules limited property inspections and the marketing campaign produced few enquiries.

[77] Eventually, in December 2020, the Routhans succeeded in selling the run-off property for $761,000 (a loss of $839,000 based on its 2010 value) and Farm 258 for $1.5 million (a loss of $1,145,500).[68]

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67 Neil McAra, an expert called by PGG, instead estimated a figure of $190,479.

68 See CA judgment, above n 22, at [7(a)] and [107]. The sale excluded dairy company shares, for which the Routhans were paid out in 2019 upon the sale of Westland Dairy Co. For this reason, we assess the loss based on the purchase price at $1,145,500 not $1,300,000.

The Routhans' claim in negligence

[78] The Routhans pleaded five causes of action. We need not address the two which were brought in deceit and under the Fair Trading Act 1986.[69] The second and third causes of action sought to hold PGG vicariously and directly liable for the negligence of Mr Daly and Mr Curragh. The fourth pleaded negligent misstatement. In each cause of action the Routhans pleaded that but for PGG's breaches of duty they would not have purchased Farm 258 but would have purchased an alternative farm. They sought to recover loss defined as the net difference in financial position between the Trust's actual position and its position had they purchased an alternative farm. The alternative farm was a hypothetical property which they would not have been forced to sell. It would have produced about 103,000 kgMS, making an operating profit, and would have allowed the Routhans to sell the run-off property in 2010 to reduce debt and provide working capital. The relief sought comprised declarations of liability, damages of not less than $3 million (which sum included ongoing operating losses), and interest and costs.[70]

[79] The Routhans did not sue Cooks Farms (or Mr Cook) in respect of the misrepresented stocking rate, fertiliser application rates, use of supplementary feed or the extent to which cows were wintered off. Nor did they plead these as misrepresentations, although they were carried over by Mr Daly from the CRT brochure into the PGG proposal. Mr Cook and Cooks Farms were originally joined as third parties to the proceedings by PGG but that claim was discontinued in June 2021. It is no longer an issue that PGG can be held liable as Cooks Farms' agent: PGG assumed personal responsibility to the Routhans as to create a special relationship between them.[71]

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69 Leave was not granted on the deceit cause of action and the parties accept that the measure of damages under the Fair Trading Act 1986 is the same as in tort.

70 See also below at [194]–[203].

71 See *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) at 837–838; and *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [33] per William Young P and Arnold J (with whom Glazebrook and Ellen France JJ agreed on this point).

The High Court judgment

[80] Dunningham J found PGG liable in negligence and for misleading and deceptive conduct under s 9 of the Fair Trading Act.[72] It had failed to act as a reasonably prudent real estate agent in various respects. Notably, Mr Daly incorrectly represented that there had been no change to average production figures following the 2009/10 season, he failed to verify key details about the farm, including the production figures, and he did not tell the Routhans that Mr Cook had refused to confirm the production figures.[73] Mr Curragh failed to supervise Mr Daly adequately, instead confirming that an agency agreement had been completed when it had not. The Judge dismissed the claim in deceit, finding that Mr Daly had not knowingly or recklessly misled the Routhans.[74]

[81] The Judge found PGG's negligence was a material and substantial cause of the Routhans' losses stemming from their inability to achieve the represented average production level.[75] She rejected PGG's claim that the Routhans' own negligence was the real cause of their losses. They had conducted adequate due diligence based on the information provided by PGG, which they had no reason to doubt at the time.[76] They had an advisor prepare budgets.[77] After the purchase they had sought professional advice and, relying on that advice, made what she found to be reasonable efforts to improve production.[78] She also found that their losses were not attributable to inexperience; they were competent dairy farmers and their results were good relative to regional averages.[79] Nor did she accept that their losses were the product of intervening causes, in the form of Rabobank's decision to fund the purchase and the failure of the Routhans and/or Rabobank to cut their losses sooner.[80] To reach these

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72 HC judgment, above n 22, at [116]–[117] and [139]–[141].
73 At [116].
74 At [128]–[130].
75 At [190].
76 At [221].
77 At [222]–[224].
78 At [225] and [228].
79 At [225]–[227].
80 At [178]–[187].

conclusions she must have rejected or discounted much of the expert evidence adduced by PGG.[81]

[82] However, the Judge found there was "some merit to the criticism that [the Routhans] unreasonably undertook capital expenditure which had no bearing on production or productivity".[82] The re-pasturing programme and the water system upgrades were justified but other improvements, such as the feed pad and stand-off area, the fencing and laneways and the farm buildings, "exacerbated the financial decline of the farm and contributed to the losses suffered".[83]

[83] As noted earlier, the Judge did not accept that the Trust should be put in the position it would have been in had it bought a hypothetical property roughly equivalent to Farm 258 as represented, there being too many variables to satisfy her that this would have happened.[84] Rather, the Routhans were entitled to compensation for their lost equity in Farm 258 and the run-off property, and their investment in capital improvements to improve production.[85] She was satisfied that they had effectively lost their capital investment by November 2014, when they realised, as she put it, that "they had not bought the farm that had been represented to them".[86]

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81 There was extensive expert evidence, much of it focused on whether the misrepresentations misled the Routhans, whether they conducted adequate due diligence, whether they should have realised before 2014 that they had been misled, Mr Cook's actual farming practices relative to those represented in the PGG proposal, the competence and farming practices of the Routhans relative to that of the manager who achieved the peak production figures for Mr Cook, the viability of the venture and the hypothetical alternative farm, the associated questions whether the loan from Mr Timpson should be treated as debt or de facto equity and whether the Routhans would have retained the run-off had they purchased an alternative farm, whether Rabobank acted negligently in financing the purchase, and whether the Routhans should have been forced to sell sooner.

82 HC judgment, above n 22, at [228].

83 At [228].

84 At [144] and [193]–[195].

85 At [195].

86 At [187].

[84] Dunningham J calculated the loss on sale of Farm 258 and the run-off at $1,442,000.[87] That sum was calculated as:

(a) $603,000, being that part of the total difference between the purchase price in 2010 and the sale price in 2020 ($1,300,000) that was attributable to forced sale conditions;[88] and

(b) $839,000, being the difference between the value of the run-off in 2010 and its sale price in 2020.

[85] She assessed the loss of investment in capital improvements not reflected in the forced sale price at $680,000, making a total of $2,122,000.[89]

[86] The Judge rejected a claim for interest costs of $1,062,000 that allegedly would have been avoided had the Routhans purchased a comparable property instead; she accepted they would have purchased another property but there were too many variables to satisfy her that they would have avoided the interest loss in that counterfactual.[90] The measure of damages was the same in negligence and under s 43 of the Fair Trading Act.[91]

[87] Finally, the Judge adjusted the award for contributory negligence in the form of capital expenditure which did not improve productivity but contributed to the Routhans' losses.[92] She reduced the total award by 20 per cent, to $1,697,600.[93]

The Court of Appeal judgment

[88] The Court of Appeal agreed that PGG had negligently misrepresented the production figures, inducing the Routhans to purchase Farm 258.[94] It upheld the

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87 At [196].

88 The Judge accepted Mr Glennie's evidence, which reached this figure by benchmarking against six other dairy farms of comparable size to estimate how much of the fall in the value of Farm 258 was attributable to forced sale conditions. But we assess the loss based on the purchase price at $1,145,500 not $1,300,000: above n 68.

89 HC judgment, above n 22, at [196].

90 At [193].

91 At [191] and [196]. This conclusion was not disputed before us and we express no view about it.

92 At [228]–[229].

93 At [229]–[230].

94 CA judgment, above n 22, at [106].

Judge's decision to dismiss the claim in deceit.[95] It further agreed that the measure of damages was the same in negligence and under the Fair Trading Act.[96] But the Court took a different approach to the calculation of damages, resting its decision on the scope of PGG's duty as agent.[97]

[89] The Court found that PGG's duty was to provide updated production information.[98] That information was relevant to the expected return from Farm 258. Importantly, it would show how production for the most recent season compared with the average over the preceding three seasons, in particular whether production was declining, being maintained, or increasing. The risk that the production information was intended to address was that the Routhans would pay too much for the farm.

[90] However, PGG had not assumed responsibility to advise the Routhans on what course of action to adopt.[99] Its duty was confined to supplying specific information which they wanted to decide what to do. Following *SAAMCO* and subsequent English cases,[100] the Court held that the scope of PGG's duty was confined to the consequences of the production information being wrong.[101] The normal measure of damages for negligently supplying the information in this case was the difference between the price paid for Farm 258 and its true market value at that time, had it been correctly described.[102] The Court cited *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp (No 2)*, in which Sir Nicolas Browne-Wilkinson V-C held that was the normal measure of damages for a fraudulent misrepresentation inducing a contract but added that consequential losses directly caused by the misrepresentation could also

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95 At [87].
96 At [108]. See above n 91.
97 At [108]–[109].
98 At [115].
99 At [116].
100 *SAAMCO*, above n 27; *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599; *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783 [*MBS v Grant Thornton*]; and *Meadows v Khan* [2021] UKSC 21, [2022] AC 852.
101 CA judgment, above n 22, at [109] and [115]–[116] citing *SAAMCO*, above n 27, at 214 and *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 [*Altimarloch*] at [109]–[111] per Tipping J (but see below n 236). The Court recognised, as discussed below at [117] and [124], that subsequent English cases recognised the distinction between information and advice can be elusive.
102 CA judgment, above n 22, at [115].

be recovered where the normal measure did not fully compensate the plaintiff.[103] The Court held that PGG was not liable for all the consequences resulting from the Routhans' decision to purchase, let alone the downstream consequences of other decisions made in the decade that followed.[104] In particular, PGG was not responsible for:[105]

> … 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.

Nor was it reasonable to hold PGG liable for the Routhans' loss on sale of the run-off property a decade later.[106] There was no suggestion that PGG knew the Routhans would rely on the production information when deciding whether to retain the run-off, and PGG had assumed no duty to protect the Routhans against loss of that kind.

[91] The Court also found that the Routhans could not recover losses on the forced sale of Farm 258 in 2020, or for expenditure on capital improvements.[107]

[92] The Court gave three reasons for these conclusions. First, post-purchase losses lay beyond the scope of PGG's duty.[108]

[93] Second, the losses were not caused by PGG's misrepresentations because the Routhans had learned almost immediately that production was well below the represented level.[109] The Routhans' losses resulted from post-purchase decisions to carry out substantial and mostly unreasonable capital improvements and assume increasing debt which left the farm vulnerable to the decline in milk prices.[110] PGG had no input into any of those decisions. The Court instanced the termination of

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103 *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp (No 2)* [1991] 2 EGLR 197 (CA) at 200 citing *McConnel v Wright* [1903] 1 Ch 546 (CA) and *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA).

104 CA judgment, above n 22, at [116].

105 At [116].

106 At [117].

107 At [118].

108 At [116]–[125].

109 At [119].

110 At [123]–[125].

the second cow lease, the re-pasturing of Farm 258 and the capital improvements.[111] There being no substantial causal connection, PGG's negligence did no more than provide the occasion for the losses to occur.[112]

[94] Third, there was evidence that the Routhans could have sold the farm in 2014 for the price paid in 2010.[113] That being so, the Court reasoned that they were not locked into their investment.[114] It distinguished *Esso Petroleum Co Ltd v Mardon* and *Downs v Chappell*, cases in which businesses were sold on a "going concern" basis and the plaintiffs were able to recover not only the difference in value on purchase but also some losses subsequently incurred.[115]

[95] The Court accordingly returned to what it described as the normal measure, being the difference between the price paid and the market value of Farm 258 at that time.[116]

[96] The Court rejected PGG's argument that damages should be fixed at nil, on the basis that Farm 258 was actually worth more than the Routhans paid for it, or $50,000, on the basis that that was the difference in valuations prepared by Peter Hines, a valuer called by PGG, with assumed production of 97,000 kgMS and 103,000 kgMS respectively.[117] The Court was satisfied that Farm 258 was not worth $2.9 million at the time of purchase, despite Mr Hines's valuation, because the farm had previously been on the market at that price and not sold. Mr Hines also had not completed true market valuations and had taken no account of the significant decline in production.[118]

[97] The Court largely accepted the evidence of John Hancock, a valuer called by the Routhans,[119] who assessed the farm's market value in 2010 at $2,319,500 including

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111 At [120]–[122].
112 At [126].
113 At [134]. The Court appears to have drawn this inference from Mr Hines's valuation of the farm as at 1 June 2014: at [138]–[139].
114 At [133]–[134] citing *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [2020] 1 CLC 428 at [185]–[186].
115 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA); and *Downs v Chappell* [1997] 1 WLR 426 (CA).
116 CA judgment, above n 22, at [128].
117 At [142]–[143]. See at [138] and [140].
118 At [140] and [143].
119 There was no real controversy about the valuation evidence. Differences among the witnesses were explained by the assumptions they had adopted: see at [141].

the dairy company shares, $480,500 less than they paid for it.[120] However, the Court discounted that figure on the ground that the above-market payment was not wholly attributable to the production information.[121] The price paid was also attributable to omissions of the trustees, who had not asked PGG to assess the farm's average efficient production (a metric which is preferred for valuations) and had not asked Mr Cook how he achieved historically high production levels.

[98] The Court fixed the recoverable loss at $300,000.[122] It based that figure on Mr Hancock's valuation, which invited an inference that the land value would have been $2,188,750 if the correct production figure was 103,000 kgMS and $1,912,500 based on the correct production figure of 90,000 kgMS.[123] The Court rounded the difference, $276,250, to $300,000. It found that sum a fair and reasonable estimate of PGG's contribution to the Routhans' losses.[124]

[99] No deduction was made for contributory negligence. The question whether the Judge was right to deduct part of the forced sale and capital improvement losses fell away, since those losses were not recoverable.[125] With respect to the decision to purchase, the Court rejected PGG's submission that a deduction should be made for the Routhans' failure to undertake adequate due diligence, agreeing with Dunningham J that they were entitled to rely on PGG to supply accurate information.[126]

The appeal and cross-appeal

[100] The approved question for which the Routhans were granted leave to appeal was whether the Court of Appeal was correct in varying the damages awarded in the High Court.[127] PGG was granted leave to cross-appeal in part. The Court declined

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120 At [135]–[136]. That valuation was based on an average efficient production of 84,000 kgMS per annum: at [137].
121 At [144].
122 At [145].
123 At [147]. As noted above n 34, the figure which ought to have been disclosed was 98,729 kgMS, being the farm's rolling three-season average, but on our approach nothing turns on this.
124 At [148].
125 At [126] and [149] citing Andrew Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 124.
126 At [150].
127 SC leave judgment, above n 28.

leave to revisit liability in deceit and the question whether PGG's misrepresentations caused the Routhans to buy Farm 258.[128] The Court explained that the focus of the appeal is the "application of the so-called *SAAMCO* principle limiting liability in the case of the provision of information to a ceiling based on a difference in value".[129] So that this Court might resolve quantum, the approved question permitted the parties to pursue other arguments relating to the measure of damages awarded.

Submissions on the appeal

[101] The Routhans' principal argument was that PGG assumed responsibility for supplying verified production information and should be liable for all foreseeable loss caused by the Routhans' reliance on that information, especially as it earned a commission on the transaction. Mr Kalderimis argued that, properly understood, *SAAMCO* does not cap liability for a misrepresentation inducing a purchase at the difference between purchase price and actual value. The "cap" should be used, if at all, to cross-check that damages reflect the risk assumed by the defendant. In this case, the losses claimed were closely associated with the risk of purchasing an uneconomic farm based on incorrect information.

[102] Mr Kalderimis invited us to award the Routhans' incoming net equity, $1,570,000,[130] which included at least $570,000 for wasted expenditure, instancing the costs of arbitration after the Routhans terminated the second cow lease ($269,166) and pasture improvement ($300,000).[131] He argued that this amount was a conservative account of the Routhans' losses. Had production been as represented, the Routhans would have been at least $2.2 million better off by the end of the 2019 financial year; the farm would have been worth at least what they paid for it, their revenue would have been significantly higher and they would not have entered into the futile expenditure identified above. The evidence strongly supports the trial Judge's overall quantum. The amount could be higher still, as it does not take account

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128 At [2]–[4].
129 At [1].
130 See above at [52].
131 See above at [62]. The $300,000 claimed for pasture improvements is the sum of $150,000 for additional fertiliser and $150,000 for re-pasturing: see above at [65]–[66].

of spiralling debt servicing costs caused by lower-than-expected revenue and wasted expenditure.

[103] PGG generally supported the reasoning of the Court of Appeal, emphasising that the scope of its duty did not extend to buying the farm or the risks involved in carrying on the business of farming. Losses caused by the forced sale of the two properties resulted from decisions made independently by the Routhans post-purchase. Further, there was no sufficient causal nexus between the information provided by PGG and the losses claimed by the Routhans.

Submissions on the cross-appeal

[104] PGG argued that the Court of Appeal was wrong to quantify damages arising as a consequence of the misrepresentation at $300,000. Mr Taylor KC submitted that the correct assessment on the normal measure is, on the basis of Mr Hines's valuations, either nil or $50,000 at most. The Court correctly dismissed Mr Hancock's valuation, which was based on the average efficient production of Farm 258, but the Court was wrong to substitute its own, admittedly unscientific, valuation.

[105] The Routhans responded that Mr Hines's methodology was flawed, citing the Court of Appeal's findings that he had not completed true market valuations and had taken no account of the significant decline in production.[132]

Approach

[106] We begin by examining the principle for which *SAAMCO* stands and its status in New Zealand law. We analyse the appeal and cross-appeal, focusing on scope and breach of duty, factual causation, remoteness and defences. We then quantify the damages payable.

SAAMCO

[107] *SAAMCO* was decided in 1996. The case involved three appeals in which lenders sued valuers on whose valuations the lenders had relied to advance money to

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[132] CA judgment, above n 22, at [140] and [143].

borrowers who subsequently defaulted. In each case the lender would not have advanced the money but for the valuer's negligent overvaluation.[133] In each case the market value of the property had fallen substantially soon after the advance, increasing the lender's losses.[134] The Court of Appeal had held that where there would have been no transaction but for the overvaluation, the valuer was liable for the whole of the loss.[135]

[108] Lord Hoffmann delivered the only reasoned speech in the House of Lords. He explained that before damages were quantified it was necessary to decide for what kind of loss the lender was entitled to compensation.[136] The Court of Appeal had erred by starting with the proposition that damages ought to restore the plaintiff to the position it would have been in but for the defendant's negligence. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort) must show that the duty was owed to them and that it was a duty in respect of the kind of loss suffered. His Lordship noted that normally the law limits liability to consequences attributable to that which made the act wrongful.[137]

[109] Lord Hoffmann reasoned that where the defendant is liable in negligence for providing information, liability should be limited to "the consequences of the information being inaccurate".[138] He explained that the valuations were commissioned to provide estimates of a property's market value. It was not in dispute that the lenders would rely on the valuations when deciding whether and how much to lend. But the valuer would not be privy to other considerations the lender might take into account, such as how much money the lender has available, how much the borrower needs, the strength of the borrower's covenant and so on.[139]

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133 *SAAMCO*, above n 27, at 210.

134 In each case the advances were made in 1990. It appears the market was declining by that time. The first sale of a secured property was made in 1992: at 222–223. The invasion of Kuwait on 2 August 1990 appears to have been a contributing factor: *South Australian Asset Management Corp v York Montague Ltd* [1995] 2 EGLR 219 (QB) at 219 and 223.

135 See *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 (CA) at 419–420.

136 *SAAMCO*, above n 27, at 211.

137 At 213.

138 At 213.

139 At 211.

[110] This principle was illustrated using the parable of a mountaineer whose doctor negligently pronounces his knee fit and who, relying on that opinion, goes on an expedition where he suffers a mountaineering injury that has nothing to do with his knee. Lord Hoffmann considered that, on the Court of Appeal's reasoning, the doctor would be liable because the mountaineer would not have gone on the expedition but for the negligent advice.[140] The correct view was that the injury was not caused by the doctor's bad advice because it would have happened even if the doctor's advice had been correct. To find otherwise would be to hold the doctor responsible for consequences which, though foreseeable in general terms, did not appear to have a sufficient causal connection to the subject matter of the duty.

[111] Lord Hoffmann sought to state this principle more generally, distinguishing cases in which the defendant provided information from those in which the defendant advised on a course of action:[141]

> A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.
>
> The principle thus stated distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.

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140 This conclusion has been challenged on the ground that the Court of Appeal accepted there may be situations where the negligence was not the effective cause of the loss: DW McLauchlan "A Damages Dilemma" (1997) 12 JCL 114 at 130 citing *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, above n 135, at 406–407. Professor Jane Stapleton says that Lord Hoffmann was wrong to say the injury would have happened anyway, because the conduct was a cause in fact if he would not have gone climbing: Jane Stapleton "Conceptual Interplay between Elements of the Tort of Negligence" in *Three Essays on Torts* (Oxford University Press, Oxford, 2021) 65 at 91, n 78. This is true but goes no further than but-for causation and the English courts accept that the question is whether but-for losses should be excluded.

141 *SAAMCO*, above n 27, at 214 (emphasis in original).

[112] The measure of damages for breach of a duty to take care to provide accurate information was distinguished from the measure of damages for breach of a warranty that the information was accurate:[142]

> In the case of breach of a duty of care, the measure of damages is the loss attributable to the inaccuracy of the information which the plaintiff has suffered by reason of having entered into the transaction on the assumption that the information was correct. One therefore compares the loss he has actually suffered with what his position would have been if he had not entered into the transaction and asks what element of this loss is attributable to the inaccuracy of the information. In the case of a warranty, one compares the plaintiff's position as a result of entering into the transaction with what it would have been if the information had been accurate. Both measures are concerned with the consequences of the inaccuracy of the information but the tort measure is the extent to which the plaintiff is worse off because the information was wrong whereas the warranty measure is the extent to which he would have been better off if the information had been right.

[113] This principle required that in an information case recoverable loss should be assessed using a cap, under which the court inquired whether claimed losses would still have been suffered had the information been correct.[143] This became known as the *SAAMCO* "cap" and we will adopt that terminology.[144]

Leading decisions since SAAMCO

[114] The judgment of the House of Lords was met with academic criticism. Briefly, commentators argued that there was no policy reason why the damages in tort may not exceed those payable had the claim been brought in contract,[145] that the distinction between information and advice was elusive and unsatisfactory,[146] and that the cap can produce anomalous results.[147] With respect to the last of these points, commentators observed that the judgment resulted in one of the lenders, SAAMCO

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142 At 216.

143 At 214, applied to the facts at 222–224.

144 Lord Hoffmann himself rejected the term, stating that he did not wish to exclude the possibility that other kinds of loss might flow from the valuation being wrong: at 219–220.

145 Jane Stapleton "Negligent Valuers and Falls in the Property Market" (1997) 113 LQR 1 at 3–6; McLauchlan, above n 140, at 117–124; and Burrows, above n 125, at 120–127.

146 Stapleton, above n 145, at 2–3; and Hugh Evans "The scope of the duty revisited" (2001) 17 PN 146 at 167–168.

147 McLauchlan, above n 140, at 122–124; and Hugh Evans "Solicitors and the scope of duty in the Supreme Court" (2017) 33 PN 193 at 204. See also *MBS v Grant Thornton*, above n 100, at [105] per Lord Leggatt SCJ.

itself, recovering part of the market value loss which it would have suffered in any event.[148]

Hughes-Holland v BPE Solicitors

[115] The United Kingdom Supreme Court revisited *SAAMCO* in *Hughes-Holland v BPE Solicitors*, a 2017 case in which the plaintiff had lent money on the mistaken understanding that it would be used to develop a disused building as offices.[149] The defendant solicitors negligently confirmed that was the purpose of the loan. The plaintiff would not have entered the transaction at all had he known that the borrower would apply the money to his company's own liabilities to a bank. The venture failed, but it would have done so even if the money was used as intended.

[116] Delivering the judgment of the Supreme Court, Lord Sumption SCJ stated that *SAAMCO* had been much misunderstood.[150] The *SAAMCO* principle was not a principle of causation.[151] Rather, it stood for the long-established scope of duty principle.[152] It was generally a necessary, but not always sufficient, condition for the recovery of a loss that it would not have been suffered but for the breach of duty.[153] He cited the 1954 judgment of Denning LJ in *Roe v Minister of Health* for the proposition that the law limits recovery by inquiring whether the consequences can fairly be regarded as within the scope of the risk.[154] The law employs the intimately linked concepts of duty, factual causation and remoteness to limit liability to consequences for which the wrongdoer should be held responsible.

[117] Lord Sumption SCJ acknowledged that the distinction between advice and information is unsatisfactory because the terms are neither distinct nor mutually

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148 McLauchlan, above n 140, at 128; and Evans, above n 147, at 200. Lord Leggatt SCJ entertained a similar analysis in *MBS v Grant Thornton*, above n 100, at [102]–[103]. See also *Hughes-Holland v BPE Solicitors*, above n 100, at [45]–[46]; Nick Hegan "*SAAMCO*, The Scope of the Duty and Liability for Consequences" (2007) 38 VUWLR 465 at 469–470; and Benjamin Liu "More Than Basic: Causation in Securities Misstatement Cases" (2016) 27 NZULR 54 at 59.

149 *Hughes-Holland v BPE Solicitors*, above n 100, at [4]–[5].

150 At [34].

151 At [36].

152 At [21] and [38].

153 At [20].

154 At [21] citing *Roe v Minister of Health* [1954] 2 QB 66 (CA) at 85.

exclusive.[155] The true distinction is between transactions in which the professional adviser is to consider all matters relevant to the transaction and transactions in which the adviser contributes a limited part of the information on which the client will rely when assessing the transaction and is not responsible for identifying other relevant considerations or advising on the commercial merits.[156] The fact that information is known to be vital to the client's decision—that is to say, it is a no-transaction case—does not turn an "information" case into an "advice" case.[157]

[118] With respect to the *SAAMCO* cap, Lord Sumption SCJ explained that it is simply a consequence of giving effect to the distinction between loss flowing from negligent and erroneous information and loss flowing from the decision to enter the transaction at all.[158] He acknowledged that it can be hard to tease out consequences attributable to wrong information and accepted that the cap can be a "mathematically imprecise" way of relating recoverable losses to the breach of duty.[159]

[119] *Hughes-Holland v BPE Solicitors* did not settle the controversy over *SAAMCO*. Writing in 2019, Professor Andrew Burrows, as he then was, contended that difficulties remained.[160] The Supreme Court had failed to explain why the liability of a professional person who supplied information should be limited to consequences flowing had the information been correct. And in practice the cap is difficult to apply and capable of producing unacceptable results.[161] Professor Burrows gave the example of negligent advice that a proposed product would infringe another person's intellectual property rights; under *SAAMCO* a claim for lost profits would fail because no profits would have been earned had the advice been correct.[162]

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155 At [39].
156 At [40]–[41].
157 At [42].
158 At [45].
159 At [46].
160 Burrows, above n 125, at 117.
161 At 123–125.
162 At 124.

Meadows v Khan and *Manchester Building Society v Grant Thornton*

[120] The United Kingdom Supreme Court returned to *SAAMCO* in a pair of judgments delivered in June 2021.[163] The Court agreed in the result for each case but Lord Leggatt and Lord Burrows SCJJ, who had been appointed to the Court in 2020, wrote separately.

[121] In *Meadows v Khan*, the plaintiff consulted a doctor about the risk that she was a carrier of the haemophilia gene.[164] The doctor negligently failed to order a genetic test, relying instead on a blood test that showed only that the plaintiff herself did not suffer from haemophilia. Had the plaintiff known she carried the gene she would have undergone a blood test when pregnant that would show whether the foetus had haemophilia, and if the test was positive she would have terminated the pregnancy. She gave birth to a son who had haemophilia and was also autistic. The two conditions were unrelated. The question was whether she could recover costs associated with her son's autism as well as those attributable to haemophilia.

[122] In *Manchester Building Society v Grant Thornton UK LLP* (*MBS v Grant Thornton*), the plaintiff engaged an accounting firm to advise whether it could employ hedge accounting to offset, within regulatory constraints, the volatility of long-term interest rate swaps that it entered to hedge against the cost of borrowing to fund its mortgage lending.[165] The defendant negligently advised that it could use hedge accounting to value mortgages which were backed by swaps. The plaintiff relied on the advice to enter further swaps. After seven years the defendant realised the plaintiff could not use hedge accounting. That forced the plaintiff to restate its mortgages at book value, meaning they no longer offset the fair value of the swaps, which had since become a substantial liability due to falling interest rates. To maintain sufficient regulatory capital, the plaintiff had to close out its swaps and take a substantial loss.

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163 *MBS v Grant Thornton*, above n 100; and *Meadows v Khan*, above n 100. These judgments were recently referred to by the Court in *BDW Trading Ltd v URS Corp Ltd* [2025] UKSC 21, [2025] 2 WLR 1095 at [32] per Lord Hamblen and Lord Burrows SCJJ (with whom Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Richards SCJJ agreed).

164 *Meadows v Khan*, above n 100, at [3] per Lord Hodge DP and Lord Sales SCJ (with whom Lord Reed P, Lord Kitchin and Lady Black SCJJ agreed).

165 *MBS v Grant Thornton*, above n 100, at [50] per Lord Leggatt SCJ.

[123] Delivering the principal judgment in *Meadows*, Lord Hodge DP and Lord Sales SCJ (with whom Lord Reed P, Lord Kitchin and Lady Black SCJJ agreed) explained that the *SAAMCO* or scope of duty principle is that "a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care".[166] The term "scope of duty principle" was preferred because the principle pre-dates *SAAMCO* and it applies to cases in which there is no need to employ the cap when deciding whether particular losses are within the scope of duty.[167] The cap is useful in some cases when inquiring into whether there is a sufficient nexus between the harm and the duty of care (the duty nexus), but in others the scope of duty inquiry may reveal the fair allocation of risk between the parties without recourse to a cap.[168]

[124] Lord Hodge DP and Lord Sales SCJ addressed the information/advice distinction, citing *Hughes-Holland v BPE Solicitors* and stating that there is in reality a spectrum along which cases fall according to their particular circumstances.[169] Where a professional advisor is not guiding the entire transaction the duty nexus question assumes central importance. Their Lordships proposed a model which they found helpful and which might bring clarity to the scope of duty principle. It comprised six questions:[170]

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

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166 *Meadows v Khan*, above n 100, at [36] quoting *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All ER (Comm) 929 at [11] per Lord Lloyd.

167 *Meadows v Khan*, above n 100, at [36] per Lord Hodge DP and Lord Sales SCJ.

168 *MBS v Grant Thornton*, above n 100, at [23] per Lord Hodge DP and Lord Sales SCJ (with whom Lord Reed P, Lord Kitchin and Lady Black SCJJ agreed); and *Meadows v Khan*, above n 100, at [53] and [63] per Lord Hodge DP and Lord Sales SCJ.

169 *Meadows v Khan*, above n 100, at [41] citing *Hughes-Holland v BPE Solicitors*, above n 100, at [39]–[44].

170 At [28] per Lord Hodge DP and Lord Sales SCJ.

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).

[125] Lord Hodge DP and Lord Sales SCJ explained that the model was not exclusive or comprehensive. Further, the six questions need not be answered in a particular sequence, and some (for example, (2) and (5)) might be examined together.[171] The *SAAMCO* cap is considered at question five.[172]

[126] Lord Burrows SCJ observed that the *SAAMCO* cap had been applied to professional services to the extent that it imposed a limit on recoverable losses that differed from the restrictions of remoteness and legal causation (which, in his view, is a separate concept from remoteness and can alternatively be labelled "intervening cause").[173] He would leave open the question whether, and if so how, *SAAMCO* might apply in other cases.[174] He agreed that it may assist if employed as a flexible cross-check.[175] The more limited the advice or information being provided, the more useful the cap and associated counterfactual analysis is likely to be.[176]

[127] Lord Leggatt SCJ suggested the cap may be most useful where, as in the valuer cases, it is necessary to divide into separate elements what on its face is a single loss, or where it is necessary to explain why the subject matter of the defendant's negligent advice or other wrong was causally irrelevant to the injury, as in Lord Hoffmann's mountaineer example.[177]

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171 At [29] per Lord Hodge DP and Lord Sales SCJ.
172 At [53] per Lord Hodge DP and Lord Sales SCJ; and *MBS v Grant Thornton*, above n 100, at [12] per Lord Hodge DP and Lord Sales SCJ.
173 *MBS v Grant Thornton*, above n 100, at [179].
174 At [179]; and *Meadows v Khan*, above n 100, at [71(i)] per Lord Burrows SCJ.
175 *MBS v Grant Thornton*, above n 100, at [192] per Lord Burrows SCJ.
176 At [196] per Lord Burrows SCJ.
177 At [106] per Lord Leggatt SCJ.

[128] Lord Burrows SCJ characterised the model proposed in the principal judgment as in some respects novel.[178] He preferred a more conventional approach which involved seven main questions:[179]

> (1) Was there a duty of care owed by the defendant to the claimant? (the duty of care question)
>
> (2) Was there a breach of the duty of care? (the breach, or standard of care, question)
>
> (3) Was the damage or loss factually caused by the breach? (the factual causation question)
>
> (4) Was the damage or loss too remote from the breach of duty? (the remoteness question)
>
> (5) Was the damage or loss legally caused by the breach of duty? (the legal causation, or intervening cause, question)
>
> (6) Was the damage or loss within the scope of the duty of care? (the scope of duty question)
>
> (7) Are there any defences? (the defences question)

[129] On his approach, the *SAAMCO* (or, as we have called it, the scope of duty) principle would be considered as the sixth question.[180] The fifth question focuses on whether the chain of causation has been broken by intervening acts of the plaintiff or third parties, or natural events. The seventh question includes contributory negligence, voluntary assumption of risk, illegality and limitation.

[130] The Supreme Court unanimously found for the doctor in *Meadows v Khan*. On the facts, the scope of the duty was confined to losses resulting from the matter on which she offered advice.[181] All other risks associated with pregnancy and childbirth, including autism, were assumed by the plaintiff herself.[182] There was a causal link between the negligent advice and the losses associated with her son's autism, but that

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178 *Meadows v Khan*, above n 100, at [78].

179 At [79] per Lord Burrows SCJ.

180 At [80] per Lord Burrows SCJ.

181 At [65] and [67] per Lord Hodge DP and Lord Sales SCJ, [77] per Lord Burrows SCJ and [84] per Lord Leggatt SCJ.

182 At [65] per Lord Hodge DP and Lord Sales SCJ, [77(ii)] per Lord Burrows SCJ and [95] per Lord Leggatt SCJ.

was not relevant to the scope of duty and the duty nexus question yielded a straightforward answer.[183] The *SAAMCO* cap produced the same outcome.[184]

[131] The Court unanimously allowed the plaintiff's appeal in *MBS v Grant Thornton*, finding that Grant Thornton had been engaged to advise on the use of hedge accounting within the plaintiff's regulatory constraints and the losses were within the scope of the duty assumed.[185] Because the plaintiff had been overly ambitious in its use of the swap methodology, damages were reduced by 50 per cent for contributory negligence.[186]

Charles B Lawrence & Associates v Intercommercial Bank Ltd

[132] In *Charles B Lawrence & Associates v Intercommercial Bank Ltd*, a 2021 judgment of the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago, a valuer had negligently valued residential land at $15 million on the basis that planning permission would be obtained for commercial development and there were no occupiers.[187] The valuer expressly assumed that the guarantor had good title. The lender lent $3 million. In fact the guarantor's title was defective and the land had no value as security.[188] It was necessary to quantify that part of the lender's loss which was attributable to overvaluation and exclude that part which was attributable to defective title, with respect to which the valuer had assumed no obligation.[189] Under the *SAAMCO* cap, though, the court would assume the property was worth $15 million (assuming no defect in title) and the lender would have suffered no loss

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183 At [68] per Lord Hodge DP and Lord Sales SCJ, [73(iii)] and [77(ii)] per Lord Burrows SCJ and [92]–[93] per Lord Leggatt SCJ.

184 At [68] per Lord Hodge DP and Lord Sales SCJ, [77(iii)] per Lord Burrows SCJ and [95] per Lord Leggatt SCJ.

185 *MBS v Grant Thornton*, above n 100, at [38] per Lord Hodge DP and Lord Sales SCJ, [142] per Lord Leggatt SCJ and [206] per Lord Burrows SCJ.

186 At [39] per Lord Hodge DP and Lord Sales SCJ, [174] per Lord Leggatt SCJ and [211] per Lord Burrows SCJ.

187 *Charles B Lawrence & Associates v Intercommercial Bank Ltd* [2021] UKPC 30, [2022] 1 LRC 655 at [2].

188 At [3]–[4]. The Privy Council recorded that the mortgage security was valueless for want of title to the land. The lender appointed receivers who attempted to sell the land. It is not clear from the trial Court and Court of Appeal judgments whether the power to appoint receivers was conferred under the mortgage or a separate debenture. The bank pleaded that it had been unable to sell the land, which presumably explains why proceeds of sale were not brought into account: *Intercommercial Bank Ltd v Charles B Lawrence and Associates* HC Trinidad and Tobago CV2012-01258, 16 October 2014 at [6]; and *Charles B Lawrence & Associates v Intercommercial Bank Ltd* CA Trinidad and Tobago CA318/2014, 15 April 2019.

189 *Charles B Lawrence*, above n 187, at [15].

because it would have sufficient security to repay the loan.[190] This would mean the defective title loss fell within the scope of the duty. The Privy Council accepted that the loss caused was appropriately measured not by inquiring what loss would have been suffered had the advice been correct but by taking the loan amount and deducting the residential land value of the property at the date of valuation (assuming there was good title).[191]

SAAMCO *not followed at final appellate court level in Australia or Canada*

[133] In *Kenny & Good Pty Ltd v MGICA (1992) Ltd*, a negligent overvaluation caused the mortgagee's insurer to suffer almost $2 million AUD in loss, being the deficiency under the mortgage after the security had been realised in a fallen market.[192] The property was in development and the valuer assessed it on both an "as is" basis and "on completion". But for the negligent "on completion" valuation there would have been no transaction.[193] Had the *SAAMCO* cap been used, damages would have been limited to around $1.5 million, being the difference between the valuation and the true value of the property at the time of valuation.[194] However, the insurer recovered its entire loss.

[134] A majority in the High Court of Australia declined to follow *SAAMCO*.[195] The case was treated as distinctive because the valuer had assumed the risk of a market decline.[196] For that reason the principles of contract law were found by McHugh and Gummow JJ to be applicable when assessing damages.[197] Had the valuer not assumed that risk, it appears liability would have been limited to the difference between the amount lent and what would have been lent had the valuation been

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190 At [19].

191 At [11] and [26].

192 *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25, (1999) 199 CLR 413. The valuation had been prepared for a bank, but upon the bank's instructions it specified that the valuation might be relied upon by the eventual mortgagee and the mortgagee's insurer in the same way as the bank.

193 At [8] per Gaudron J.

194 At [12] per Gaudron J.

195 At [28] per Gaudron J, [61]–[62] per McHugh J and [80] per Gummow J. Kirby and Callinan JJ at [122] instead decided the case closely on the facts and opted not to formulate general principles. Gaudron J found *SAAMCO* contrary to the common-sense requirement for causation laid down in a previous decision of the Court: at [28] citing *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

196 At [25] per Gaudron J, [59]–[61] per McHugh J, [80] per Gummow J and [115] and [124] per Kirby and Callinan JJ.

197 At [35], [44] and [57]–[58] per McHugh J and [75] and [81] per Gummow J.

accurate.[198] McHugh J, with whom Gummow J agreed, cited *SAAMCO* for the scope of duty principle.[199] Gummow J observed that English law had formulated the duty at some level of abstraction from any particular facts, which was contrary to the Australian approach.[200] He held that the existence and scope of a duty of care requires scrutiny of the precise relationship between the parties.

[135] In the Canadian case of *Deloitte & Touche v Livent Inc (Receiver of)*, a company's directors fraudulently manipulated its accounts.[201] The auditor discovered irregularities but did not resign. Instead, it approved a press release and provided a comfort letter for a public offering of shares. It later prepared a statutory audit which did not identify the fraud despite the company's increased risk profile and further discoveries. New equity investors later discovered the fraud. The company's receivers sued the auditor. The principal question was whether a novel duty of care arose in respect of the press release and comfort letter. The Supreme Court of Canada agreed that the scope of duty did not extend so far, because the press release and comfort letter were directed to investors and not issued for the purpose of assisting shareholders in overseeing management.[202]

[136] By majority, the Court also found that a duty to assist shareholders in scrutinising the conduct of management did arise in respect of the statutory audit, on which shareholders depended to exercise management oversight.[203] The auditor was liable for the difference between the company's value when the auditor ought to have produced an accurate audit and its value on liquidation, minus a contingency reduction.[204] These losses flowed naturally from the breach of duty because it was reasonably foreseeable that but for the breach of duty the shareholders would have declared bankruptcy earlier.[205]

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198 At [35] per McHugh J and [80] per Gummow J. If it were argued, it appears Gaudron J would have limited liability to the difference between the property value at the time of the borrower's default, had the negligent valuation been correct, and the sale amount: at [26]–[29].

199 At [33].

200 At [78].

201 *Deloitte & Touche v Livent Inc (Receiver of)* 2017 SCC 63, [2017] 2 SCR 855.

202 At [2], [55] and [111] per Karakatsanis, Gascon, Brown and Rowe JJ and [153]–[154] per McLachlin CJ, Wagner and Côté JJ.

203 At [66]–[67] per Karakatsanis, Gascon, Brown and Rowe JJ citing *Hercules Managements Ltd v Ernst & Young* [1997] 2 SCR 165.

204 At [14] and [112]–[113] per Karakatsanis, Gascon, Brown and Rowe JJ.

205 At [64]–[65] per Karakatsanis, Gascon, Brown and Rowe JJ.

[137] The majority distinguished *SAAMCO*, describing the principle for which it stood as that recovery for pure economic loss is denied when the plaintiff's injury would still have occurred had the defendant's negligent misstatement been true.[206] The case was not analogous to that of Lord Hoffmann's mountaineer, because subsequent trading losses were not an alternate and unrelated cause of the company's losses. Rather, shareholders relied on the audit when exercising oversight of subsequent business decisions. The majority added that full consideration of *SAAMCO* should await a suitable case and observed that the *SAAMCO* principle, at least as applied by the dissenting Judges, conflicted with Canadian jurisprudence establishing that "a defendant is liable if the plaintiff proves — in respect of causation — that the defendant caused the plaintiff's injury in fact and in law".[207]

[138] In partial dissent, McLachlin CJ, Wagner and Côté JJ agreed that the auditor's scope of duty extended to the audit's purpose to provide reports on which the company's shareholders could rely to supervise the company's management.[208] But the scope of the auditor's duty did not extend to the company's poor business decisions.[209] To so find would be to expose the auditor to an unfair and indeterminate allocation of loss from decisions taken in reliance on an audit. Alternatively, the loss was too remote. On the facts, the receivers did not prove reliance or that any reliance prevented shareholders from taking effective action.[210]

SAAMCO *in New Zealand caselaw*

[139] *SAAMCO* has been cited in a number of New Zealand decisions, but it has not been cited consistently or adopted as authority for an element of liability in negligent misstatement.[211] The judgment is orthodox insofar as it recognises that a court must inquire into the scope of the duty assumed or imposed.[212] As Lord Lloyd explained in *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd*, there was

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206 At [90]–[93] per Karakatsanis, Gascon, Brown and Rowe JJ.
207 At [94]–[95] per Karakatsanis, Gascon, Brown and Rowe JJ (citations omitted).
208 At [152].
209 At [165] and [170]–[172] per McLachlin CJ, Wagner and Côté JJ.
210 At [159], [161] and [169] per McLachlin CJ, Wagner and Côté JJ.
211 Kellee Candy and Rob Merkin "Recent Developments in Liability Law and Liability Insurance" (2022) 26 NZBLQ 257 at 258; and Guy Tompkins "The scope of duty for professional negligence" [2023] NZLJ 208 at 211.
212 See *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) at 95–96 citing *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL) at 240–241.

nothing new in that principle, which had stood in English tort law since *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (*The Wagon Mound (No 1)*).[213] Indeed, it was implicit in *McElroy Milne v Commercial Electronics Ltd*.[214] In *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* (*BNZ v NZGT*), Gault J, writing for the majority of the Court of Appeal, cited *SAAMCO* as authority for the scope of duty principle:[215]

> Recent cases show a trend in favour of analysis by reference to the scope of the duty, and inquire as to the risks against which there was a duty to protect the plaintiff. In [*SAAMCO*] the House of Lords approached in this way a case of breach of a contractual duty of care while noting that the concurrent duty in tort was of the same scope. In the speech of Lord Hoffmann, with whom the other members agreed, it was said that the real question in such a case is the kind of loss in respect of which the duty is owed. To some extent this is merely to restate the question asking what losses is it reasonable that the law should require the wrongdoer to compensate, but it is a helpful analytical approach …

[140] The distinction drawn in *SAAMCO* between information and advice has sometimes been found useful by New Zealand courts insofar as it informs the scope of duty or remoteness. In *BNZ v NZGT*, Gault J stated that:[216]

> The scope of a duty to inform, or inform correctly, has not commonly been found to extend to protect against losses arising from some independent cause where breach of the duty merely creates or preserves the circumstances in which that loss can be incurred.

The Court found that the scope of the duty to inform could not assist the plaintiff if it extended only to protect against the possibility of a false understanding about the existence of unsecured loans, for on the facts the loss would have been suffered anyway.[217]

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213 *Aneco Reinsurance Underwriting Ltd (in liq) v Johnson & Higgins Ltd*, above n 166, at [11] citing *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388 (PC) [*The Wagon Mound (No 1)*]. See also *Hughes-Holland v BPE Solicitors*, above n 100, at [22].

214 See *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41–43 per Cooke P. *McElroy Milne* was cited in *SAAMCO*, but not for the scope of duty principle. Lord Hoffmann cited it as an illustration of recovery extending to costs of the plaintiff's reasonable attempts to cope with the consequences of the defendant's breach of duty: *SAAMCO*, above n 27, at 219.

215 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 683 per Richardson P, Gault, Henry and Blanchard JJ.

216 At 683 per Richardson P, Gault, Henry and Blanchard JJ.

217 At 683 per Richardson P, Gault, Henry and Blanchard JJ.

[141] In *Boyd Knight v Purdue*, a firm of accountants had negligently certified in a finance company prospectus that they had audited the company's accounts and, in their opinion, the financial statements gave a true and fair view of the state of the company's affairs.[218] The company was actually in serious trouble. Had the truth been discovered by the defendant, no prospectus could have issued. Investors sued, claiming that they had relied on the accounts in the general sense that they invested because the accounts had been audited. The Court of Appeal found it foreseeable that investors, acting reasonably, would rely on the accounts and the accountants ought to have anticipated that they would do so.[219] Blanchard J, with whom Gault and Salmon JJ agreed, found that a duty to take care was owed to investors when certifying the accounts for inclusion in the prospectus.[220] But the accountants' duty was to provide information, not to advise on the state of the company's affairs or its creditworthiness.[221] The investors failed because they could not prove causation in fact.[222] They did not prove reliance on the basic features of the accounts (profit, shareholders' funds, and perhaps the ratio of assets to liabilities), still less any particular feature of the accounts without which the investment would not have been made.[223] Gault J, concurring, cited *SAAMCO* for the proposition that the scope of liability in negligence for carelessly providing inaccurate information is limited to the consequences of the information being wrong, but he appears to have done so to emphasise that the scope of duty in the case at hand was confined to the accuracy of information in the accounts.[224] He found that the investors' loss did not flow from reliance on the accuracy of the accounts.

[142] In *Sherwin Chan & Walshe Ltd (in liq) v Jones*, a firm of accountants had negligently advised one of its clients about the tax implications of the controlled foreign company tax regime on intercompany debt within the plaintiff group.[225] One of the questions at trial was whether liability was limited to consequences of

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218 *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [21]–[22] per Blanchard J (with whom Gault and Salmon JJ agreed).

219 At [52] per Blanchard J.

220 At [52] per Blanchard J. See also at [8] per Gault J.

221 At [54] per Blanchard J.

222 At [2] per Gault J and [59] per Blanchard J. The Court of Appeal made this point when distinguishing *Boyd Knight* in *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [30].

223 *Boyd Knight v Purdue*, above n 218, at [57] and [59] per Blanchard J.

224 At [15]–[16].

225 *Sherwin Chan & Walshe Ltd (in liq) v Jones* [2012] NZCA 474, [2013] 1 NZLR 166 [*Sherwin Chan* (CA)] at [2].

incorrect information or extended to a positive duty to advise.[226] It was not in dispute on appeal that, as the trial Judge found, the duty was of the latter kind.[227] Harrison J, writing for the Court of Appeal, cited *BNZ v NZGT* for the proposition that when assessing liability for the performance of professional services a court inquires into the scope of the duty assumed and the risk against which the professional had a duty to protect the client.[228] He also spoke of the *SAAMCO* distinction between information and advice in causation terms, stating that the distinction is designed to ensure the wrongdoer is not liable for losses arising from an independent cause in circumstances where the breach of duty simply creates or allows an opportunity for loss.[229]

[143] It does not appear that there is any New Zealand case, prior to this one, in which a court has applied the *SAAMCO* cap to limit liability, but there are decisions in which *SAAMCO* was distinguished.[230]

[144] This Court cited *SAAMCO* in *Marlborough District Council v Altimarloch Joint Venture Ltd*, which concerned the allocation of liability between two parties which had separately made the same misrepresentation, stating that a rural property came with resource consents allowing the owner to extract a specified volume of water from a stream on the property.[231] The water was needed because the purchaser planned to plant grapes. The vendors were liable in contract for the misrepresentation, which had been made by their agent when negotiating the agreement for sale and purchase, and the Council was liable in negligent misstatement for carelessly making the misrepresentation in a Land Information Memorandum (LIM). The Council's liability was independent of the vendors' in the sense that the scope of duty was determined not by knowledge of the commercial context or the terms of the contract but by its

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226 *Jones v WHK Sherwin Chan & Walshe* (2011) 25 NZTC ¶20-065 (HC) [*Sherwin Chan* (HC)] at [102]–[114].

227 At [108]; and *Sherwin Chan* (CA), above n 225, at [44]. The issue on appeal was whether the scope of liability extended to certain losses said to have resulted from the negligent tax and structural advice.

228 *Sherwin Chan* (CA), above n 225, at [36] citing *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, above n 215.

229 At [36]–[37] citing *SAAMCO*, above n 27, at 214 and *Price Waterhouse v Kwan*, above n 222, at [27]–[28].

230 See *Westbay Seafoods Ltd v Harcourt & Co Ltd* HC Wellington CP23/89, 8 September 1997 at 62; and *Sherwin Chan* (HC), above n 226, at [195]–[203]. The Court of Appeal in the latter case did not consider the *SAAMCO* cap: see above at [142].

231 *Altimarloch*, above n 101.

statutory duty to disclose accurate information when issuing a LIM.[232] The contractual measure of damages payable by the vendors—being the cost of securing the promised quantity of water by constructing a dam to store water—exceeded the tort measure payable by the Council, being the amount by which the purchase price exceeded the value of the property.[233] The Council argued that it had caused the purchaser no loss because the purchaser would recover in full from the vendors. The Court held (by majority) that the plaintiff was entitled to sue the Council without having to factor in the value of its contractual rights against the vendors,[234] and that (for differing reasons) there was no basis for ordering the Council to contribute to damages payable by the vendors.[235]

[145] For present purposes, the significance of *Altimarloch* is, first, that the purchaser need not give credit for the value of its contractual rights, if any, against the vendors and, second, that damages in tort comprised the difference between the price paid and the property's value without the promised water right.[236] That was the correct measure having regard to the limited scope of the Council's duty in that case. The Court did not discuss the *SAAMCO* cap. As we have noted, no question arose of the tort measure being larger than the contract measure payable by the vendor to the purchaser under the agreement for sale and purchase.

[146] In summary, New Zealand courts have recognised that *SAAMCO* stands for the long-established scope of duty principle, which establishes that recoverable loss is limited not only by causation and remoteness but also by the scope of the defendant's duty. The now-abandoned distinction in English law between information and advice has been correctly understood as directed to the scope of duty. The *SAAMCO* cap has been referred to but not previously adopted.

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232 At [87] and [98] per Tipping J (with whom the other judges agreed on this point).

233 At [66] per Blanchard J, [172] per Tipping J and [194] per McGrath J. The tort measure was not directly appealed: see at [178] per McGrath J.

234 At [72]–[73] per Blanchard J, [200] and [208] per McGrath J and [234] per Anderson J.

235 At [57] per Elias CJ, [75] per Blanchard J and [124] per Tipping J.

236 Tipping J cited *SAAMCO* for these propositions at [109]–[111] and [121], although he was in the minority on the first proposition as he concluded the vendors' contractual liability meant the Council's misstatement had not caused loss.

New Zealand methodology in negligence

[147] Speaking generally, New Zealand courts approach claims in negligence by inquiring into the nature of the actionable subject matter, the existence of a duty of care, breach of that duty, factual causation and remoteness.[237] Where the subject matter is information or advice that is said to have caused economic loss, courts have followed *Caparo Industries plc v Dickman*, under which liability typically arises where:[238]

(a) the advice is required for a purpose made known to the adviser;

(b) the adviser knows that the advice will be communicated to the advisee specifically or as a member of an ascertainable class;

(c) the adviser knows the advice is likely to be acted on without independent inquiry; and

(d) the advisee does act on the advice to its detriment.

[148] Still speaking generally, New Zealand courts have been wary of "formulae" or methodologies that require a staged analysis for liability in negligence or negligent misstatement.[239] The authorities recognise that inquiries into the existence of a duty, its scope and remoteness are factual and normative in nature, requiring that the court decide what is fair and reasonable in the particular circumstances.[240] In *McElroy Milne*, Cooke P explained that:[241]

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237 See *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, above n 215, at 686–687 per Tipping J; and Stephen Todd "Negligence: The Duty of Care" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 153 at 155–156.

238 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 638 per Lord Oliver as cited in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [189] per Blanchard, McGrath and William Young JJ and *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [80].

239 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 293–294 per Cooke P citing *First City Corp Ltd v Downsview Nominees Ltd* [1990] 3 NZLR 265 (CA) at 275. See also *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 526–527 per Richardson J; and *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 519–520 per Richardson P, Blanchard and Hammond JJ citing *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1052 per Lord Pearson.

240 In *The Grange*, above n 238, Blanchard J described concepts used to determine the existence of a novel duty of care as "amorphous": at [147] per Blanchard, McGrath and William Young JJ.

241 *McElroy Milne v Commercial Electronics Ltd*, above n 214, at 41.

> … the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

That remains the guiding principle. Whether damage and fault are sufficiently connected for liability is a question of fact and degree.[242]

[149] The New Zealand authorities also recognise that some considerations, notably foreseeability, may be examined at more than one stage of the inquiry into duty, breach and resulting loss, detracting from the usefulness of prescriptive methodologies.[243] As Lord Denning MR put it in *Lamb v Camden London Borough Council*, "the three questions—duty, causation and remoteness—run continually into one another".[244] In *BNZ v NZGT*, the majority in the Court of Appeal reflected on the impossibility of prescribing principles applicable to all cases and noted that Commonwealth authorities had examined relevant considerations with reference variously to scope of the duty, to causal nexus between wrong and loss, and to remoteness of damage.[245] In *North Shore City Council v Attorney-General* (*The Grange*), which concerned a novel duty of care, Blanchard J for the majority observed that a difficulty with a two-stage formulation (proximity and policy) is that some matters may be assessed at either stage and may even need to be considered at both.[246]

[150] What can be said is that liability in negligence ought generally to be confined to harm that resulted from the risks that made the defendant's conduct negligent in the first place. It is necessary to consider the position at the time the duty arose or was assumed and inquire for what kinds of risk was the defendant taking responsibility and

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242 *Fleming v Securities Commission*, above n 239, at 523 per Cooke P.

243 See *The Grange*, above n 238, at [149] per Blanchard, McGrath and William Young JJ.

244 *Lamb v Camden London Borough Council* [1981] QB 625 (CA) at 634. See also *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [34] per Elias CJ and Anderson J.

245 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, above n 215, at 682–683 per Richardson P, Gault, Henry and Blanchard JJ. For this reason, it is sometimes necessary to focus on what judges do rather than what they say: Stapleton, above n 140, at 66.

246 *The Grange*, above n 238, at [149] per Blanchard, McGrath and William Young JJ.

whether the allocation of risk was a fair one in the circumstances.[247] That is a forward-looking inquiry.[248]

[151] Breach requires an inquiry into what the defendant's duty required of them in the particular circumstances.[249]

[152] It is necessary to examine causation in fact, looking for a sufficient connection between the losses actually suffered and the breach of duty.[250] The connection between breach and loss must be more than *de minimis* or trivial. This principle recognises that the "but-for" test of factual causation can be over-inclusive, so that it is sometimes inappropriate to speak of a loss being caused in fact by the breach. As Henry J said in *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand*:[251]

> Failure to meet [the "but-for" test] must of course negate causation, but what must still be established by a plaintiff is that in a commonsense practical way the loss claimed was attributable to the breach of duty, and thus justifies the Court in imposing responsibility on the defendant for the loss.

It is also necessary to distinguish loss caused by the breach from loss for which the breach merely provided the occasion.[252]

[153] The losses also must not be too remote.[253] The remoteness inquiry incorporates what was described by Lord Hodge DP and Lord Sales SCJ in *Meadows* as the duty nexus question and the "legal responsibility" question, known also as causation in

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247 See *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [193]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, above n 215, at 683 per Richardson P, Gault, Henry and Blanchard JJ; and *Cridge v Studorp Ltd* [2024] NZCA 483, [2025] 2 NZLR 69 at [76]. See also Todd, above n 237, at 165; Stapleton, above n 140, at 72–73; and Burrows, above n 125, at 119–120.

248 Stapleton, above n 140, at 73. Sometimes the nature of the breach can be relevant to the scope of the duty: *Couch v Attorney-General*, above n 244, at [83] per Blanchard, Tipping and McGrath JJ.

249 See *Russell v Harris* [1960] NZLR 902 (CA); *Wilson & Horton Ltd v Attorney-General*, above n 239; and Stephen Todd "Negligence: Breach of Duty" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 461 at 461–462. See also Stapleton, above n 140, at 76.

250 *Price Waterhouse v Kwan*, above n 222, at [28]; and Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1239 at [19.1]–[19.2].

251 *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 403.

252 At 399 per McKay J, 402 and 404 per Henry J and 409 and 412 per Thomas J; and *Price Waterhouse v Kwan*, above n 222, at [28].

253 See, for example, *Couch v Attorney-General*, above n 244, at [34] and [43] per Elias CJ and Anderson J; and Todd, above n 250, at [19.5].

law.[254] These considerations can be grouped under remoteness because the underlying principle is that a line must be drawn beyond which it is not reasonable as a matter of policy to require the defendant to pay.[255] The court looks back to inquire whether the losses actually suffered following the defendant's breach of duty were within the scope of that duty.[256] This is, as we have indicated, a factual and normative inquiry which focuses closely on the circumstances of the particular case.[257] Also excluded for remoteness are consequences of a type which would not have been foreseeable to a reasonable person in the defendant's position[258] and acts of the plaintiff or others, or natural events, that were not within the scope of the defendant's duty and so may be said to break the chain of causation.[259] Defences usually will be considered separately, since they normally must be pleaded and proved by the defendant. They include contributory negligence, voluntary assumption of risk, illegality and limitation.[260]

[154] Unless there is something novel about the duty or the circumstances, there may be no need to conduct an inquiry which addresses all of these matters. A given case may turn on the scope of duty or remoteness and both questions are usually answered by inquiring into the nature of the risks arising from the defendant's conduct.[261]

Should the SAAMCO *cap have been relied on as the normal measure of loss here?*

[155] We begin by observing that, following *Meadows v Khan*, the *SAAMCO* cap has been relegated in English law to a cross-check which may be useful in some cases. The question to which we now turn is what status the cap merits in New Zealand

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254 See above at [123]–[125].

255 *BDW Trading Ltd v URS Corp Ltd*, above n 163, at [68] per Lord Hamblen and Lord Burrows SCJJ (with whom Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Richards SCJJ agreed). See also Burrows, above n 125, at 84; and Todd, above n 250, at 1274.

256 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, above n 215, at 683 per Richardson P, Gault, Henry and Blanchard JJ; and *Sherwin Chan* (CA), above n 225, at [36]–[41]. See also Todd, above n 250, at [19.3].

257 See above at [148].

258 *The Wagon Mound (No 1)*, above n 213, at 423–426. See Todd, above n 250, at [19.5.2].

259 See, for example, *Fleming v Securities Commission*, above n 239, at 525 per Cooke P; and Todd, above n 250, at [19.4.2(1)]–[19.4.2(3)]. See also *Home Office v Dorset Yacht Co Ltd*, above n 239, at 1027–1030 per Lord Reid; and *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] AC 884 at [15]–[17] per Lord Bingham. Compare *BDW Trading Ltd v URS Corp Ltd*, above n 163, at [55] per Lord Hamblen and Lord Burrows SCJJ (with whom Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Richards SCJJ agreed).

260 See generally Stephen Todd "Defences" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1299.

261 Todd, above n 250, at 1275–1276; and Stephen Todd "Tort" [2021] NZ L Rev 483 at 490.

negligence law, which is in some respects distinctive. Lord Hoffmann's mountaineer would not have had a right of action for personal injury in New Zealand.[262] Leading cases in tort have involved building defects, as to which New Zealand courts have taken a distinctive approach, and the liability in tort of public authorities exercising particular statutory duties. These characteristics may go some way to explain why New Zealand courts have adopted a relatively straightforward methodology in negligence.

[156] *SAAMCO* and the other cases discussed above exhibit the following characteristics:[263] A assumes a positive duty to assist B in connection with B's proposed transaction with C; A's breach of duty causes B to enter the transaction; B seeks to recover from A losses suffered under or in connection with that transaction; some of B's losses are not closely connected to A's breach of duty (and some may be connected only in the sense that but for the transaction they would have been avoided). In each case A was a professional adviser retained to offer B, either directly or indirectly, advice on the transaction or to supply B with information about it. It appears that in each case, except *Charles B Lawrence*, A's obligation to B was assumed pursuant to contract as well as in tort.[264] In *SAAMCO* itself, all but one of the valuers were engaged by the relevant lender.[265] (In the appeal for which the case is named, the valuer was engaged by the borrower but at the lender's request the valuation was addressed to the lender).[266]

[157] The House of Lords manifestly was concerned to limit the valuers' liability but did not explain why it was necessary to adopt a rule of wider application, nor whether the cap is best understood in scope of duty terms or as a principle of remoteness. In the parable of the mountaineer it is not clear whether the doctor ought to be excused because his duty did not extend to mountaineering risks unrelated to the condition of

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262 Accident Compensation Act 2001, s 317(1). But see s 319(1).

263 With the exception of *Meadows v Khan*, above n 100.

264 In *Charles B Lawrence*, above n 187, the valuer was engaged by the guarantor, not the lender, but the lender had required the guarantor to obtain the valuation and the valuation expressly provided that it sought to ascertain market value for mortgage purposes.

265 That is, the parties to two of the appeals were in contractual relationships with one another: *United Bank of Kuwait v Prudential Property Services Ltd* [1994] 2 EGLR 100 (QB) at 101; and the *Nykredit* case, summarised on appeal in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, above n 135, at 425. We were unable to locate the Queen's Bench decision of Judge Byrt QC in *Nykredit Mortgage Bank plc v Edwards Erdman Group Ltd*, 1 October 1993.

266 *South Australian Asset Management Corp v York Montague Ltd*, above n 134, at 220–221.

the knee (such as being struck by falling rock), or whether the mountaineering injury was too remote because the only causal connection between breach of duty and injury was that but for the doctor's advice the mountaineer would not have been present when the event which caused the mountaineering injury happened.[267]

[158] In our view, the risk that A will be required to compensate B for losses that were not the subject of A's advice or supply of information can be avoided by paying close attention to scope of duty and remoteness of damage. A court may inquire whether the breach of duty merely provided the occasion for those losses to occur. That principle is sometimes said to be easily stated but difficult to apply,[268] but it usually produces a fair and reasonable answer on the facts. As Lord Hodge DP and Lord Sales SCJ recognised in *MBS v Grant Thornton*, the outcome in *SAAMCO* itself might have been achieved by more precisely defining the valuer's duty as a duty to allow the lender to determine the amount of security it would take at market values current at the time of the advice.[269]

[159] It has been argued that the cap is best understood as a rule of remoteness which was drawn from contract, and that it was right to do so because the valuers and lenders were in contractual relationships.[270] But *SAAMCO* has traditionally been understood as a tort case, notwithstanding that the lenders also sued in contract.[271] As noted above at [112], Lord Hoffmann went to some pains to distinguish breach of a tortious duty from a breach of warranty. No effort was made to justify the cap by reference to the valuers' terms of engagement. The judgments at first instance[272] and on first appeal[273]

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267 See, for example, *MBS v Grant Thornton*, above n 100, at [97] per Lord Leggatt SCJ; Burrows, above n 125, at 120–121; Stapleton, above n 140, at 91–92; and Leo Pang "Principle, Pragmatism, and Policy in Determining the Scope of the Duty of Care and Extent of Liability for Consequences" (2021) 7 LSE L Rev 166 at 177.

268 See, for example, *Price Waterhouse v Kwan*, above n 222, at [28].

269 *MBS v Grant Thornton*, above n 100, at [24].

270 Andrew Burrows "Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues" in Simone Degeling, James Edelman and James Goudkamp (eds) *Torts in Commercial Law* (Thomson Reuters, Sydney, 2011) 367 at 373–375. Contrast Jodi Gardner and John Murphy "Concurrent Liability in Contract and Tort: A Separation Thesis" (2021) 137 LQR 77 at 86–87.

271 Burrows, above n 270, at 374.

272 *United Bank of Kuwait v Prudential Property Services Ltd*, above n 265; and *South Australian Asset Management Corp v York Montague Ltd*, above n 134, at 221. As noted above n 265, we were unable to locate the first-instance decision in *Nykredit*.

273 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, above n 135. See also *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* CA England and Wales 93/1593/C, 12 April 1995. We note that *South Australian Asset Management Corp v York Montague Ltd*, above n 134, was appealed directly to the House of Lords.

have very little to say about them (although Lord Hoffmann did examine them briefly at the end of his speech).[274]

[160] *SAAMCO* was decided only two years after the House of Lords established in *Henderson v Merrett Syndicates Ltd* that a plaintiff with concurrent claims in contract and tort is not confined to contract and may sue in either.[275] The New Zealand Court of Appeal followed suit in 1999, in *Price Waterhouse v Kwan*.[276] New Zealand courts have since established that where the plaintiff and the tortfeasor are in a contractual relationship and liability is concurrent, the plaintiff may sue in either but the law of contract will normally determine the scope of liability, measure of damages and boundaries of remoteness.[277] The rationale is that where parties have allocated risks by contract, or have had the opportunity to do so, the law should be slow to impose a different allocation from that which they expressly or implicitly adopted.[278] Following the judgment of the Court of Appeal of England and Wales in *Wellesley Partners LLP v Withers LLP*, that appears also to be the position in English law.[279]

[161] It follows that there is no need for the *SAAMCO* cap where the parties are in a contractual relationship and liability is concurrent. In practice, recovery will be governed by contract and the object of damages will be to protect B's interest in performance by allowing recovery of losses that were reasonably foreseeable in the ordinary course of things or which are taken to have been within the actual contemplation of the parties.[280] That appears to correspond generally to the measure adopted in *SAAMCO*.

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274 *SAAMCO*, above n 27, at 222–223.

275 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

276 *Price Waterhouse v Kwan*, above n 222, at [17].

277 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [40] per Tipping J; *Cooper Henderson Finance Ltd v Colonial Mutual General Insurance Co Ltd* [1990] 1 NZLR 1 (CA) at 3; and *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA) at [12], [19] and [22].

278 *Spencer on Byron*, above n 277, at [40] per Tipping J. To similar effect see *South Pacific Manufacturing*, above n 239, at 308 per Richardson J.

279 *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch 529 at [68] per Floyd LJ, [157] per Roth J and [186] per Longmore LJ.

280 *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590, [2008] 3 NZLR 31 at [26] citing *Hadley v Baxendale* (1854) 9 Exch 341 at 354, 156 ER 145 (Exch) at 151 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA) at 539. See also *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18, [2021] AC 23 at [34].

[162] Speaking generally, we would not expect the ordinary measure of damages in tort to differ from the ordinary contract measure in a case where the duty takes the form of a positive obligation to do something for the plaintiff. (We need not discuss whether there might be some difference at the margin, or whether some types of losses may be recoverable only in tort or in contract, as the case may be).[281] It is true that in contract the court asks whether the plaintiff would have been better off had the defendant's information or advice been correct, while in tort it asks whether the plaintiff is worse off because the information or advice was wrong.[282] But as we have explained, that distinction is unlikely to matter if the scope of the positive duty has been correctly ascertained.[283]

[163] Accordingly, if the cap has any role to play at all, it must be in negligence cases in which A is not also liable to B in contract for the same breach of duty. These are presumably cases analogous to contract, in that A's duty to B takes the form of a positive duty to supply B with something, such as accurate information or advice, and A's careless discharge of that duty causes B's loss. The present case falls into this category.

[164] New Zealand authorities recognise that an analogy with contract may sometimes be drawn in negligent misstatement cases in which the parties to the claim are not in a contractual relationship.[284] There is often no deliberate assumption of responsibility; rather, the law deems the defendant to have assumed responsibility where it is fair, just and reasonable to do so.[285] But sometimes the defendant assumed a positive duty to do something for the plaintiff, and where that is so the court may take into account any understanding between them and any reasonable opportunity to identify and allocate risks associated with that undertaking.

[165] In some cases, a contract to which the defendant is not a party will also supply the context for the duty of care, establishing what it is that the defendant has promised to do and the likely consequences of a breach of duty. That was the position in

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281 See *Frost & Sutcliffe v Tuiara*, above n 277, at [22].
282 See above at [112].
283 Above at [158]–[161].
284 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [99].
285 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [23]–[27].

Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd, for example.[286] It is also the position in this case. PGG was not party to the agreement for sale and purchase between Cooks Farms and the Routhans, but we have explained above that Mr Curragh drafted the agreement, inserting a number of provisions, such as the number of cows to be leased and the number of Westland Dairy Co shares to be assigned, which were based on assumptions about Farm 258's production.[287]

[166] There are at least two objections to the *SAAMCO* cap in such cases. First, the cap is a rule intended to govern other disputes; it supposes that there is a class of cases sharing similar characteristics. But the characteristics and size of that class are not apparent. The House of Lords was concerned with the position of professional advisors whose role may or may not extend to all the risks presented by the client's transaction, but professional services are normally delivered pursuant to contract.

[167] Second, the justification for court-imposed remoteness rules in contract is that the parties are taken to have assigned risks by agreement. That is a justification adopted for reasons of policy; the court is concerned that a contract-breaker should not be subjected to an unreasonable burden.[288] As a matter of fact, there may be no evidence of an agreement or tacit understanding about what might go wrong and who should accept the consequences if it does. It suffices that the parties have had the opportunity to draw risks to one another's attention.[289] That rationale cannot universally or even commonly apply where there is no contract. Whether the parties may be taken to have shared an understanding about identification and allocation of risk can only be a question of fact. That is the orthodox New Zealand approach following *McElroy Milne*, in which Cooke P suggested that "it may be best, and may achieve more practical certainty" if remoteness is treated as "a question of fact to be answered after taking into account the range of relevant considerations, among which the degree of foreseeability is usually the most important".[290]

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286 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 284. See especially at [103]–[106], [112] and [118].

287 Above at [46]–[47].

288 Andrew Robertson "The basis of the remoteness rule in contract" (2008) 28 LS 172 at 193–194.

289 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 (HL) [*The Heron II*] at 385–386 per Lord Reid.

290 *McElroy Milne v Commercial Electronics Ltd*, above n 214, at 43.

[168] A further difficulty with the *SAAMCO* cap is that the court does not focus on what the plaintiff would have done had the defendant not been careless. As in *SAAMCO* itself, the factual answer to that inquiry may well be that there would have been no transaction.[291] The losses immediately associated with loss of the transaction are in principle straightforward, although they may of course raise difficult questions of fact. Under the *SAAMCO* cap, the court instead compares the loss the plaintiff has actually suffered with its position had it not entered into the transaction and asks, "what element of this loss is attributable to the inaccuracy of the information"?[292] Lord Hoffmann envisaged that the lender and valuer might use counterfactual analysis to establish, on the one hand, that the lender might have done something more advantageous with its money, and on the other, that the lender might have entered a different transaction in which it experienced a similar loss.[293]

[169] In our view, it is not self-evident that the loss inquiry should be permitted to extend so far. It arguably was fair and reasonable as between the parties in *SAAMCO* to measure loss by reference to the finding that the transactions would not have occurred but for the negligent advice, without inquiring into what the lenders might have done instead with their money. In addition, as Lord Hodge DP and Lord Sales SCJ explained in *MBS v Grant Thornton*, there is a risk of manipulation in the *SAAMCO* world and the risk is greater the further the facts depart from comparatively straightforward examples. The exercise may lead to "abstruse and highly debatable arguments … about how the counterfactual world should be conceived".[294] That observation was made in connection with the defendant's attempt to construct an elaborate scenario to show that, had the advice been correct, the plaintiff nonetheless would have persisted with swaps and suffered the same loss.[295]

[170] For these reasons, the Court of Appeal was in error to adopt the *SAAMCO* cap as the "normal" measure of damages in this case.

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291 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*, above n 135, at 422.
292 *SAAMCO*, above n 27, at 216.
293 At 218.
294 *MBS v Grant Thornton*, above n 100, at [26] per Lord Hodge DP and Lord Sales SCJ.
295 At [26] per Lord Hodge DP and Lord Sales SCJ. See also at [147]–[149] and [167]–[168] per Lord Leggatt SCJ.

Scope of duty

[171] We turn to the circumstances of this case, beginning with the purpose for which the Routhans sought the production information from PGG. We agree with the Courts below that the immediate purpose was to inform their decision whether to buy Farm 258 at the price Mr Cook insisted upon.[296]

[172] We respectfully disagree with the Court of Appeal, however, that the risks against which PGG owed a duty to take care were confined to the risk that the Routhans would pay too much for the farm. Farm 258 was being sold as a business. Its value to a purchaser was a function of its capacity to produce milk in the future. Historical production information was the best evidence of that. The real risk against which the Routhans were seeking to protect themselves was the risk that the farm would not continue to produce at historical average levels under the same grass-based farming system as they understood Mr Cook had used.

[173] Is it fair to define the scope of PGG's duty by reference to the risk that the Routhans would produce less than the represented historical average following the acquisition? In our view it is, for three reasons directly related to PGG's role in negotiating and documenting the contract between the Routhans and Cooks Farms. First, PGG knew why the Routhans wanted the information. The farm was being sold as a going concern which would continue to supply milk to Westland Dairy Co. Between them, Mr Daly and Mr Curragh were responsible for inserting provisions to that effect in the agreement for sale and purchase.[297] Second, PGG was not being asked to locate and verify the information itself. It was being asked only to have the information which Mr Routhan had handed to Mr Daly verified and updated by PGG's principal, Cooks Farms. Third, it knew the information would be relied upon without further inquiry, since only Mr Cook (or the dairy company, with his authorisation) could verify it.

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296 HC judgment, above n 22, at [104]; and CA judgment, above n 22, at [115].

297 See above at [46]–[47]. Mr Daly's evidence was that he would complete the REINZ/ADLS form by hand, including any further conditions, and then Mr Curragh would prepare the typed agreement.

[174] For these reasons, we consider that the Court of Appeal was wrong to exclude post-purchase losses entirely. We agree that PGG did not assume duties to advise the Routhans whether to buy the farm, or to advise them about farming practices or capital investment.[298] But that is not the end of the inquiry. It is necessary to decide whether, and to what extent, post-purchase losses fell within the scope of the duty that PGG did assume.

Breach of duty

[175] PGG breached the duty by representing that the production figures had been verified when it knew that was not so. We emphasise that PGG is not liable because it passed on information that turned out to be incorrect. It is liable because it carelessly led the Routhans to believe Mr Cook had verified the production figures when it knew he had declined to do so, saying that they needed checking.[299]

The losses claimed

[176] As noted above, Mr Kalderimis invited us to award the Routhans' lost equity of $1,570,000, which included at least $570,000 for wasted expenditure.[300]

[177] The reference to lost equity might suggest that the Routhans are still pursuing damages based on the purchase of a hypothetical farm, a measure of loss which Dunningham J rejected.[301] But that is not the case. The Routhans do not now seek to recover losses calculated as the difference between their financial position after the forced sale and their position at that time had they purchased another farm. Mr Kalderimis argued rather that over a short period of time the Routhans lost all the capital they had put in, all because they were acting in reliance on PGG's misrepresentation.[302] By 31 December 2015 they had lost the overpayment of $480,500 on purchase and an estimated $1,098,056 in accumulated trading losses,

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298 CA judgment, above n 22, at [115]–[116] and [118].

299 See above at [43].

300 Above at [102]. To reach the sum of $2.2 million, which Mr Kalderimis contended represents the Routhans' true losses to the end of the 2019 financial year, would require that lost revenue of $1.18 million be added to the overpayment of $480,500 and wasted expenditure of at least $570,000.

301 HC judgment, above n 22, at [193]–[194].

302 The Routhans do not seek to recover money for which they might still have to account to Rabobank, or to Mr Timpson's estate.

which included wasted expenditure of at least $570,000. We will examine the claims under each of these headings.

The overpayment for Farm 258

[178] As we have explained, it is now settled that the Routhans would not have purchased Farm 258 but for PGG's misrepresentation.[303] There was a sufficient connection between the misrepresentation and the amount they paid. The overpayment represented the difference between the price paid and the farm's market value had its actual production been known. An overpayment was reasonably foreseeable.[304] The principal question remaining is whether the award should be reduced on the ground that, as the Court of Appeal found, the overpayment was partly attributable to causes which lay outside the scope of PGG's duty.[305] A secondary question, raised on the cross-appeal, is whether the Court of Appeal was correct to quantify the overpayment at $480,500.[306]

[179] It is convenient to deal with the amount of the overpayment first. The Court of Appeal surveyed the valuation evidence. Mr Hancock's valuation was addressed to average efficient production for Farm 258 relative to average efficient production for local comparable properties. Mr Hines agreed that "average efficient" methodology is preferred valuation practice. The Court approved of that approach, noting that it is possible to produce at levels far above district averages by using techniques such as stock management practices and rates of fertiliser application.[307] Mr Hines's opinion differed materially from that of Mr Hancock only because he had been instructed to value the farm using assumed production levels. He assumed production of 97,000 kgMS, but actual production in the most recent season was 90,000 kgMS. That assumption largely accounted for his estimate of only $50,000 for the difference in value attributable to the misrepresentation.

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303 See above at [100] and n 39.
304 See *The Wagon Mound (No 1)*, above n 213, at 423–426.
305 CA judgment, above n 22, at [144].
306 Dunningham J did not need to quantify the overpayment because, as noted, she fixed damages by reference to loss on the forced sale.
307 CA judgment, above n 22, at [137].

[180] We are not persuaded that the Court of Appeal was wrong to reject the evidence of Mr Hines and base its award on that of Mr Hancock. The amount of the overpayment at the time of purchase was $480,500, being the difference between the price paid, $2.8 million, and Mr Hancock's estimate of its market value at that time, $2,319,500. It follows that the cross-appeal will be dismissed.

[181] We turn to the question whether the Court of Appeal was correct to discount the overpayment when assessing damages payable by PGG. The Court noted the overpayment was measured by reference to average efficient production, which PGG had not been asked to obtain, and that being so, part of the overpayment lay beyond the scope of PGG's duty. It reasoned that:

> [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 v Grant Thornton UK LLP*, 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.

[182] We recognise what we take to be the Court's underlying concern that, as a matter of fact, the farm's recent peak production was inefficient. It was attributable at least in part to wasteful fertiliser use. The Routhans did not plead that PGG had been asked to verify the farming system (including fertiliser use) summarised in the PGG proposal.[308]

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[308] See above at [79].

[183] But we do not agree that a reduction in overpayment damages can be justified by reference to the scope of PGG's duty. PGG assumed a duty to have recent average production figures verified. But for its carelessness the Routhans would not have bought Farm 258. Their loss is the difference between the price paid and the farm's value at the time. Average efficient production is the best measure of the loss.[309]

[184] The Court rested its conclusion, in part, on its view that the overpayment was attributable to another cause, being the Routhans' failure to inquire into the farm's average efficient production or to ask Mr Cook for information about his farming system. This seems to us indistinguishable from a finding that the loss was in part caused by contributory negligence. Dunningham J found that "the Routhans completed adequate due diligence" and that "it was reasonable for them to rely on the production figures which they understood had been obtained directly from Mr Cook".[310] She must also have found that in 2010 it was reasonable for the Routhans not to inquire further into how Mr Cook achieved the reported production levels.[311] The Court of Appeal made deductions because of these omissions, which had the effect of attributing fault to the Routhans. The Court did not explain why it took a different view of the facts. Indeed, the Court later accepted that the Routhans were not negligent as to the purchase.[312] The Court found the Routhans were "entitled to rely on PGG to supply accurate information", referring to the average production figure.[313]

Post-purchase losses generally

[185] This is a misrepresentation case in which the plaintiffs learned the truth after some time but then carried on the business and experienced growing losses. It is necessary to decide whether the causal effects of the misrepresentation were spent at some point; and if so, when.

[186] It is implicit in Dunningham J's findings that the Routhans reasonably relied on the representation until they learned the truth on 16 November 2014, part way

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309 See CA judgment, above n 22, at [137].
310 HC judgment, above n 22, at [221].
311 At [201(a) and (c)] she recorded submissions from PGG relating to these omissions.
312 CA judgment, above n 22, at [149]–[150].
313 At [150].

through the 2014/15 season.[314] Until then they had attempted to achieve 103,000 kgMS in the belief that Farm 258 could deliver the represented average production using the grass-based farming system in the PGG proposal. She further accepted that the effects of the misrepresentation were not spent immediately upon disclosure of the true historical production figures. The Routhans reasonably refrained from selling both properties in 2015 while they tried to settle matters with PGG.[315]

[187] The Judge did not fix damages by reference to post-purchase losses caused by PGG's breach of duty. Rather, she compared the values of Farm 258 and the run-off in 2010 and on sale in 2020 relative to comparable properties, allowed for capital expenditure not reflected in the sale price, and deducted from the gross sum recoverable ($2,122,000) 20 per cent for capital expenditure that worsened the Routhans' financial position without improving productivity.[316]

[188] The Court of Appeal did not allow any post-purchase losses, reasoning that PGG was not liable because they were not within the scope of PGG's duty.[317] We have taken a different view. The Court also found that post-purchase losses were not caused by PGG's misrepresentation.[318] It reasoned that the Routhans learned almost at once that production was below the represented level and that until 2014 they could have sold Farm 258 for the price they had paid in 2010 (disregarding the capital improvements).[319] It found that they were not locked in.[320] They could have extricated themselves even if the date for assessing damages could be deferred until late 2014.

[189] We prefer the view that some post-purchase losses were as directly attributable to PGG's breach of duty as was the overpayment. These losses are recoverable, subject to causation and remoteness requirements, and any defences, for the reasons given above at [171]–[174] and below in relation to each head of loss.

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314 See HC judgment, above n 22, at [187].
315 See at [185].
316 At [196] and [228]–[229].
317 CA judgment, above n 22, at [115]–[125].
318 At [124]–[125].
319 At [119] and [134].
320 At [134].

[190] In other instances the immediate cause of the loss was a farm management decision taken by the Routhans. An example is the decision to re-pasture. We accept that these claims must be scrutinised closely. We have agreed with the Court of Appeal that PGG did not assume a duty in connection with farm management.[321] But the losses were in fact caused by PGG's breach of duty if the breach remained operative and had a sufficient connection to the loss.[322]

[191] The causal effect of PGG's breach of duty must expire within a period which is reasonable in the circumstances. It is a question of remoteness. The answer depends in this case on when the truth was known, the timing and impact of other causes (including the Routhans' own decisions), and the extent to which PGG should be held liable for losses incurred as the Routhans attempted to extricate themselves from a disastrous investment.[323]

[192] We accept Dunningham J's finding that the Routhans reasonably continued to rely on the misrepresentation until they learned the truth. For this reason it is no answer to the Routhans' claim that until late 2014 they could have sold Farm 258 for the price paid in 2010. Further, the effects of the misrepresentation were not spent immediately after they learned the truth. We adopt what we understand to be the Judge's finding that the Routhans reasonably carried on while they and Rabobank decided what to do and the Routhans attempted to negotiate with PGG.

[193] The choice of a date is somewhat arbitrary. In our view the causal effect of the misrepresentation continued until the end of the 2014/15 season, and perhaps longer. The only remedy available to the Routhans by that time was to crystallise their losses by selling either or both Farm 258 and the run-off, because by then the business had passed the point of no return.[324] They could hardly be expected to do that before the end of the season in May 2015. Thereafter losses may be recoverable to the extent

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321 See above at [174].

322 See above at [139].

323 See *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, above n 114, at [185]–[186] as derived from *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) at 266–267 per Lord Browne-Wilkinson and 284 per Lord Steyn. Lord Keith, Lord Mustill and Lord Slynn largely agreed with both of the reasoned speeches: at 269. See also *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] UKSC 6, [2025] AC 406 at [47(iv)] per Lord Leggatt and Lord Burrows SCJJ.

324 See above at [71].

they were reasonably incurred while trying to salvage something from the wreckage.[325]

Pleadings

[194] The Courts below did not allow for the specific post-purchase losses mentioned above at [177], but in each case the explanation lies in the approach they took to the assessment of damages. They were the subject of evidence and argument. We consider that we are in a position to assess them, and it would not be in the interests of the parties to further prolong the litigation by remitting quantum to the High Court.

[195] We do not share the doubts of the Chief Justice and Ellen France J with respect to pleadings and notice of the Routhans' claims.[326] We elaborate briefly on our reasoning. A plaintiff who seeks special damages must plead their nature, particulars, and amount.[327] Special damages includes (a) loss that has occurred, can be proved in fact and is precisely calculable,[328] and (b) loss that is not presumed to flow in the ordinary course from the defendant's actions and of which claim the defendant accordingly ought to have notice.[329]

[196] The objective of pleadings is that the other party should have fair and adequate notice of the case they must meet. A plaintiff must plead the material facts on which its claim is based and specify the sum claimed.[330] A plaintiff need not provide a precise claim or estimate when, at the time of filing, insufficient information is available to quantify it precisely.[331] The sum claimed may not be settled until expert evidence has been exchanged.[332]

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325 *Esso Petroleum Co Ltd v Mardon*, above n 115, at 821 per Lord Denning MR, 829 per Ormrod LJ and 833 per Shaw LJ; and *Smith New Court Securities Ltd v Citibank NA*, above n 323, at 266–267 per Lord Browne-Wilkinson and 284 per Lord Steyn.

326 Compare below n 554 per Winkelmann CJ and Ellen France J.

327 High Court Rules 2016, r 5.33.

328 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR5.33.02(3)].

329 At [HR5.33.02(4)].

330 See, for example, *Pinson v Lloyds and National Provincial Foreign Bank, Ltd* [1941] 2 KB 72 (CA) at 75 per Scott LJ and 80 per Goddard LJ; and *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363 (CA) at 366. See also High Court Rules, rr 5.26–5.27 and 5.31–5.32.

331 See *Hunt v New Plymouth District Council* [2011] NZCA 406 at [82].

332 *Pyne Gould Corp Ltd v Bath Street Capital Ltd* [2020] NZHC 1247 at [76].

[197] The pleading should also sufficiently disclose the *nature* of the claim to that sum.[333] The degree of specificity required may depend on the character of the acts which produce the losses and the circumstances in which they were suffered.[334] So, for example, in *Perestrello e Companhia Limitada v United Paint Co Ltd* a plaintiff who claimed a specified sum in contract for wasted expenditure "and damages" could not rely on that general plea to recover lost profits; the amount of lost profits could have been specified and, importantly, the rationale for recovering it was said to be incompatible with the wasted expenditure claim.[335]

[198] The Routhans pleaded that but for PGG's wrongs they would have purchased an alternative farm which would have produced approximately 103,000 kgMS on a grass-based system, and they claimed a loss of not less than $3 million, being the difference between their "actual position" and their position had they bought the alternative farm. With respect to their actual position, they pleaded that after acquisition they encountered great difficulty in achieving the represented production. They particularised the efforts made to do so by pleading that they undertook reasonable remedial initiatives (and incurred additional borrowing costs in so doing) which were reflected in "the ongoing operating losses incurred by the Trust in relation to the Farm in the 2010/2011 season, and each subsequent season through to 2019/2020". The operating losses were detailed in the Trust's accounts and in the expert and fact evidence which we examine below. So the basis on which these losses were suffered was pleaded and particularised informally.[336] Further, this is not a case in which the plaintiff at trial sought to recover losses on a basis inconsistent with that pleaded. There was no inconsistency between the alternative farm claim and a claim to recover trading losses (which includes wasted expenditure and revenue losses) on Farm 258; as the pleading makes clear, both formed part of the Routhans' claim to have lost not less than $3 million.

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333 High Court Rules, r 5.26(a); and *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84].

334 *Ratcliffe v Evans* [1892] 2 QB 524 (CA) at 532–533.

335 *Perestrello e Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570 (CA) at 579–580. But see now Maree Chetwin "Contract" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 3 at [1.6.2].

336 See, for example, *Arroyo v Equion Energia Ltd (formerly known as BP Exploration Co (Colombia) Ltd)* [2013] EWHC 3150 (TCC) at [14].

[199] We accept that the pleading might have been further particularised, but the question is whether it was adequate. In our view, it was. PGG might have sought formal particulars of the trading losses, but it did not. It simply denied the losses and met them by expert evidence. It advanced a positive case that the trading losses were attributable to the Routhans' mismanagement. The joint expert report considered the alternative scenario raised by the plaintiffs: that the Routhans' farming operation at Farm 258 was viable, assuming production of 103,000 kgMS. At trial, PGG's expert witness Neil McAra was questioned at length on Mr Lewis's model.

[200] We do not accept that trading losses were disclaimed in the High Court.[337] Dunningham J said this about the Routhans' approach:[338]

> … the Routhans are not asking the Court to consider what would have happened had Farm 258 actually been able to produce 103,000 kgMS under normal conditions, but to determine what would have happened if the transaction had not proceeded and the Routhans had purchased an alternative farm.

[201] On the face of it, the Judge was recording only that the Routhans made a larger claim. PGG has not relied on this statement to argue that the pleaded claim to trading losses was abandoned at trial; indeed, we did not hear from counsel about this passage in the High Court decision. We observe too that the Routhans advanced the claim for trading losses (as one of four alternative bases) in the Court of Appeal.[339] They were not required to file a cross-appeal or notice of intention to support the judgment on other grounds in that Court, and no point was taken about this in the Court of Appeal (or here) about it. We do not think it is open to PGG to take the point now.

[202] In this Court leave was given on the express basis that the parties might pursue "other arguments relating to the measure of damages awarded, as advanced in their leave to appeal and cross-appeal submissions".[340] The Routhans had submitted when seeking leave to appeal that their losses under the alternative farm scenario included

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337 Compare below n 554 per Winkelmann CJ and Ellen France J.

338 HC judgment, above n 22, at [145].

339 In the Court of Appeal the Routhans were defending the High Court award (although they also cross-appealed the contributory negligence and deceit findings). They advanced four alternative measures, including what they described as a total lost capital approach including trading losses. PGG did not contend that these bases were unavailable on appeal.

340 SC leave judgment, above n 28, at [1].

lost trading profits. In their written submissions, exchanged before the hearing, counsel engaged with the alleged trading losses, Mr Kalderimis relying on them to show that the Routhans lost their entire incoming equity and Mr Taylor contending that the losses would have been suffered had PGG's representations been true. Again, no pleadings point was taken.

[203] Not until after the hearing before us did Mr Taylor contend, in a memorandum filed by leave, that the Routhans had relied on a new, unpleaded representation that Farm 258 was "a standalone, low-input Farm which the appellants would be able to replicate". For the reasons just given, the claim to trading losses was sufficiently pleaded.[341] Counsel urged that we allow PGG to expand upon contributory negligence with respect to post-purchase events and sought to raise an argument, dismissed in both Courts below, that liability was excluded by a PGG disclaimer. We decline to do so. We address contributory negligence below from [229]. As the Courts below held, the disclaimer was narrowly framed and only protected PGG from liability where it received information from the vendor and relayed that to a purchaser in circumstances where PGG had no reason to doubt the accuracy of that information.[342]

Revenue shortfalls and increased debt servicing costs

[204] As we have just explained, we accept that the Routhans' claim for trading losses was adequately pleaded. We have also found that the scope of PGG's duty extended to the property's capacity to produce enough milk to maintain the represented average production level using the farming system described.[343]

[205] We have considered whether any portion of these losses is recoverable. By the end of the 2014/15 season, the Routhans' gross revenue shortfall was at least $482,064.[344] The Routhans also say that, by then, they incurred $204,306 in increased debt servicing costs.[345]

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341 Compare below n 554 per Winkelmann CJ and Ellen France J.
342 HC judgment, above n 22, at [115]; and CA judgment, above n 22, at [88].
343 See above at [172]–[173].
344 See above at [55].
345 See above at [73].

[206] But we accept that an award for revenue losses would represent a double recovery. The value of the farm was a product of its expected earning potential, meaning the overpayment is a capitalisation of the difference between the misrepresented production figure and the actual average efficient production figure, at least over the period the misrepresentation had a causal effect.[346]

[207] We also decline to make an award for increased debt servicing costs. The Routhans' growing indebtedness was substantially due to their initial borrowing level, which PGG knew nothing about, and their investment in the long-term capital improvements listed above at [69]. These investments were not made in attempts to achieve revenue which they believed the farm was already capable of producing. Rather, they were the product of other causes which should be considered independent of PGG, notably a desire on the Routhans' part to upgrade the farm's run-down infrastructure.

Avoidable expenditure

[208] We return to what Mr Kalderimis described as wasted expenditure, meaning expenditure which the Routhans incurred through PGG's negligence but did not recoup. These are losses that he argued would have been avoided had the representation been true. We assess each head of loss by reference to scope of duty, causation in fact and remoteness. We have found that the scope of PGG's duty extended not only to the price paid for Farm 258 but also to its capacity to produce a rolling average of 103,000 kgMS under the farming system described,[347] but it is necessary to consider whether each item claimed was within scope.

Additional fertiliser

[209] The farm's capacity to grow grass was, as Mr Glennie observed, crucial to its milk production under a grass-based system. For that reason, we consider that costs of improving the pasture or its productivity to achieve the represented production level were within the scope of PGG's duty.

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346 See *Canavan v Wright* [1957] NZLR 790 (CA) at 799.
347 See above at [172]–[173].

[210] The evidence established that the Routhans applied more fertiliser than had been specified in the PGG proposal, and they did so in an attempt to achieve the production they had been led to expect of the farm.[348] For that reason the expenditure has a sufficient connection to the misrepresentation. And it was reasonably foreseeable that the breach of duty would lead the Routhans to apply more fertiliser.

[211] The trial Judge accepted Mr Routhan's evidence that the amount of over-budget expenditure was $150,000.[349] She did not have to decide how much had been applied by the end of the 2014/15 season, but it is a reasonable inference that the excess was applied in an attempt to achieve the represented production and so long as Rabobank permitted. It is not clear whether the excess was calculated by reference to the Ravensdown recommendations in the PGG proposal or the post-purchase recommendations, but the latter were higher. It is not unreasonable to fix the sum for which PGG should compensate the Routhans at $150,000.

Re-pasturing

[212] For the same reasons, we consider that PGG is liable to pay costs incurred to improve pasture quality.[350] The programme was undertaken over three seasons commencing in 2012, and the amount expended was approximately $150,000.[351]

Additional supplementary feed

[213] Mr Routhan's evidence, as noted above at [56], was that $47,380 was spent on supplementary feed for the cows and $7,858 on milk powder to feed calves during the first year post-purchase, all in an attempt to increase the amount of milk being produced and supplied to Westland Dairy Co.

[214] The PGG proposal did not refer to the quantity of supplementary feed which Mr Cook had fed to the stock. The only reference to supplements was the statement that approximately half the herd had been wintered off and that 115 bales of baleage

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348 See above at [64]–[65].
349 HC judgment, above n 22, at [51(d)].
350 Dunningham J found at [228] that the decision was taken on advice and appeared to have a logical connection to improving production.
351 See above at [66]–[67].

had been made on. We nonetheless consider that the cost of purchasing additional supplementary feed in a short-term attempt to meet expected production levels would be recoverable.

[215] However, there is other evidence that the need for additional supplementary feed, over and above that budgeted, was, at least in part, a consequence of Mr Cook's decision to remove supplementary feed (baleage) which the Routhans expected to remain with the property. The issue was examined in the arbitration. The arbitrator appears to have accepted that Mr Cook did remove more baleage than was usual, causing the Routhans to purchase additional supplementary feed. The claim for supplementary feed in this proceeding is somewhat larger,[352] but we are unable to say how much of it is attributable to PGG's breach of duty. That being so, we make no allowance for it.

Herd replacement

[216] The Routhans' claim includes the sum of $269,166, being expenditure wasted terminating the second cow lease in what Mr Kalderimis termed a direct consequence of chasing the represented production. As noted above at [62], that sum comprised damages and interest, the arbitrator's fees, and legal costs. They also spent $700,000 buying a new herd, but Mr Kalderimis did not argue that they might recover that sum.

[217] We have explained above at [61] why the Routhans lost the arbitration. Their attempt to rely on PGG's misrepresentations about historical production failed for want of jurisdiction. The damages payable comprised rent (and interest on it). The balance of the loss comprised fees and legal costs.

[218] The connection between PGG's breach of duty and these losses is plainly indirect. It is necessary to say a little more about how the arbitration came to happen.

[219] The agreement for sale and purchase provided that the Routhans would lease 260 cows but said nothing more about them. Because the transaction happened mid-season, the Routhans and Mr Cook envisaged (independently of PGG) that the

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[352] Mr Routhan clarified that this was because he found more invoices for supplementary feed after the arbitration.

lease would include most of the animals already on the property. But they agreed that some Friesians would be replaced with smaller cross-bred animals. The number swapped by the time the second lease was entered was significant.[353] That led Mr Bradley to conclude that the problem must lie with the herd. That was an error—there is no reason to think the herd as a whole was of poor quality[354]—but it was an understandable one given the information available to the Routhans at the time.

[220] An opportunity to avoid the error was lost because Mr Cook did not comply with terms of the leases requiring disclosure of information about the stock.[355] The information comprised individual animal data from herd test records and a herd profile. He was obliged to provide this information at the outset. The arbitrator found that it was needed to allow the Routhans to exercise a right to reject any given animal within seven days of lease commencement. It was sufficiently important to justify cancellation for failure to provide it.

[221] It can be seen that a number of events contributed to the losses now claimed. The Routhans responded to PGG's misrepresentation by working levers of short-term production: the fertility of the soil, the quality of the pasture, and the quality of the cows. But they would not have blamed the cows had they and Mr Cook not agreed to swap some of them (and had Mr Cook not swapped more than the Routhans had expected would happen). Had Mr Cook provided the herd records, the Routhans and Mr Bradley might not have decided that the herd as a whole was of poor quality. And had the Routhans correctly terminated the lease, they would not have had to pay compensation and the costs of the arbitration would have been paid by Mr Cook.

[222] We accept that stock numbers and performance had an immediate effect on the farm's production. It was reasonably foreseeable that if production was poor the Routhans would look to the numbers and quality of stock as a possible cause. Overstocking in reliance on the PGG proposal may have contributed to the herd's

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353 There was some dispute about the numbers in the arbitration. The arbitrator's award indicates that the number swapped for the second lease was substantially more than 110. The Routhans' case was that this was more than they had expected.

354 Mr Routhan's evidence was that had they known the farm's true production they would never have come to the conclusion that Mr Cook had leased them poor-quality cows.

355 The failure to comply was disputed. Mr Cook believed he had met his obligations. We rely here on the arbitrator's finding of fact after hearing the parties' evidence.

performance. We accept Mr Routhan's evidence that but for PGG's breach of duty the lease would not have been terminated. But it cannot be said that the particular losses claimed were caused in fact or law by PGG's breach of its duty to verify the farm's recent production history. The immediate causes were coincidental and not reasonably foreseeable consequences of PGG's failure to verify the farm's recent production history.

Other expenditure

[223] We can deal with the remaining expenditure together because it all falls into the same category for present purposes.

[224] We have listed the expenditure concerned above at [69]. It was incurred in the period between 2010 and 2014. The money was spent on the feed pad and stand-off area, re-fencing, a new water supply system, feed troughs, and laneways. Mr Routhan deposed that the total expenditure on these items was $964,000.

[225] Dunningham J allowed $680,000 for this expenditure on the basis that it was caused by PGG's misrepresentation and was not recovered in the 2020 sale of the properties.[356] That sum was Mr Glennie's estimate of the minimum amount of capital expenditure that was not recouped on sale. He reasoned that the Routhans incurred it because they expected to benefit over the long term. They could not expect to recoup it if they sold in the short term, especially under forced sale conditions.

[226] As we have explained, we are not treating capital lost on the forced sales as the measure of damages. We are assessing expenditure that would not have been incurred but for PGG's breach of duty. The accounting distinction between expenditure on capital and revenue account matters insofar as it points to the expected return period for any given expenditure. For our purposes, the significance of Mr Glennie's evidence is that it tends to confirm that the expenditure was not designed to improve production, at least in the short term.

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356 HC judgment, above n 22, at [196].

[227] We accept Dunningham J's finding that but for PGG's misrepresentation none of the other expenditure that we have just itemised would have been incurred. The Routhans would not have bought the farm.[357] We also accept that the Routhans reasonably incurred expenditure until late 2014 in the belief that Farm 258 was capable of producing at the level represented, rather than around its actual average efficient production level of about 84,000 kgMS. Had the Routhans known that, they might have reconsidered some of the capital expenditure. We also accept that, by the time the Routhans learned the truth, the business was unsalvageable; they could not trade out of their difficulties and a forced sale was inevitable.[358]

[228] We are not persuaded, however, that the causal connection is sufficiently close. As a matter of fact the Routhans did not incur the expenditure in the expectation that they would materially increase production in the short term. They incurred it in the expectation that they would benefit in the long run. This conclusion accords generally with Dunningham J's finding that the Routhans incurred capital expenditure that had no bearing on production or productivity.[359]

Contributory negligence

[229] The trial Judge and the Court of Appeal found that the Routhans were not contributorily negligent in connection with the decision to purchase Farm 258.[360] Those findings do not necessarily exclude the defence that post-purchase losses were also caused by contributory negligence. The Court of Appeal did not find it necessary to consider whether the Routhans contributed to post-purchase losses.[361]

[230] We approach the defence by taking a collective view of the post-purchase losses which we have found recoverable. PGG vigorously renewed the arguments it made in the Courts below. Those which are relevant to post-purchase losses are: the Routhans' failure to inquire before and after purchase about the farming system used by Mr Cook; use of different cows and overstocking resulting from the decision to stock 300 cows; failure to supply the stock with optimum feed; the decision to

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357 At [192].
358 See above at [71].
359 HC judgment, above n 22, at [228].
360 At [221]–[224]; and CA judgment, above n 22, at [149]–[150].
361 CA judgment, above n 22, at [127].

purchase the farm mid-season; failure to retain the services of a farm manager; inexperience coupled with failure to take sound agribusiness advice; the decision to embark on certain unproductive capital expenditure; and certain management decisions, such as moving to once-daily milking during the 2014/15 season. PGG also contended that the Routhans ought to have sold Farm 258 earlier, once it was clear they would never make a profit.

[231] We do not accept these contentions. Dunningham J dismissed the contributory negligence defence in connection with the purchase, and some of her findings apply equally to post-purchase decisions. The Routhans did take appropriate professional advice.[362] They were competent dairy farmers, and their production was good compared to regional averages.[363] She was satisfied that the efforts they made to increase production, including re-sowing the pasture, were reasonable.[364] The allowance which she made for contributory negligence was confined to capital expenditure which was not directly connected to production.[365]

[232] We are not persuaded that the Judge was wrong. On the contrary, we consider that the Routhans acted as they did, in connection with the wasted expenditure that we have found recoverable, because they relied reasonably on the PGG proposal.

Quantum

[233] The sums which PGG must pay the Routhans total $780,500, comprising:

(a) $480,500, being the overpayment on purchase in 2010;

(b) $150,000, being the cost of additional fertiliser; and

(c) $150,000, being the cost of re-pasturing.

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362 HC judgment, above n 22, at [225].
363 At [225]–[227].
364 At [219] and [227].
365 At [228]. The 20 per cent global deduction equates to a 62 per cent deduction on the amount allowed for loss of investment in capital improvements not reflected in the forced sale price.

[234] Interest is payable under the Interest on Money Claims Act 2016:[366]

(a) on the overpayment, from 20 December 2010;[367] and

(b) on the cost of additional fertiliser and re-pasturing, from 31 May 2015 (the end of the 2014/15 season).

Disposition

[235] The appeal is allowed. We fix damages payable by the respondent at $780,500, with interest as specified above.

[236] The cross-appeal is dismissed.

[237] The respondent must pay the appellants one set of costs of $50,000 plus usual disbursements. We allow for second counsel. Costs in the Court of Appeal should be fixed by that Court in light of this judgment.

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366 Interest on Money Claims Act 2016, s 9(1)(a).

367 This approach differs from that of Dunningham J, who awarded interest from the date the loss on forced sale was crystallised (when the Routhans sold both properties), but accords with that of the Court of Appeal, which awarded interest on the overpayment from the date of purchase: HC judgment, above n 22, at [231]; and CA judgment, above n 22, at [154].

KÓS J

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Introduction

[238] I concur with the result reached by Glazebrook and Miller JJ in the primary reasons, and largely agree with their reasoning. I write separately on two subjects:

(a) whether the *SAAMCO* "scope of duty" principle should be retained at all (on which my view differs from the primary reasons);[368] and

(b) the extent of liability and calculation of damages (on which we agree on the outcome, but where I wish to add some particular observations of my own).

The "scope of duty" principle

[239] I consider the "scope of duty" principle promoted by *SAAMCO* has overreached its proper role and caused needless confusion, resulting in a muddling of duty analysis with what is properly causation and remoteness of loss analysis. It has

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

morphed into a premature, over-inclusive "scope of liability" inquiry instead. Sensibly, it has not been adopted in Australia or Canada.[369] It should not be adopted here either.

[240] Furthermore, the *SAAMCO* principle has limited utility in New Zealand. It was developed as part of the English departure from *Anns* duty analysis—a departure not taken in New Zealand.[370] As a discrete question, it does not represent part of the duty inquiry directed in the leading New Zealand authority, *North Shore City Council v Attorney-General* (*The Grange*).[371]

[241] I accept the extent of assumed risk—which underlies the *SAAMCO* principle—may contribute in a limited respect to the duty inquiry. But for that purpose it needs to be located within either or both of the *Anns*-based elements of duty that we still adhere to. Whether the relevant risk was assumed by the defendant may assist analysis of proximity and policy, for instance as to foreseeability of pure economic loss (although it should not be the focus of these "screening tests").[372] However, the primary utility of assumption of risk analysis lies in providing a backward-looking cross-check within, or immediately following, analysis of causation and remoteness, to ensure *liability* does not extend to risks not assumed by the defendant. For the most part it is not about duty of care at all, but loss. As Lord Burrows SCJ explained lucidly in *Meadows v Khan*, it really belongs at a later place than duty in the analytical framework for negligence, and is better located within causation and remoteness, or at least adjacent to them.[373]

[242] Negligence principles need to be coherent. And they need to be capable of coherent and consistent explanation not only to lawyers and law students, but to the very people who find themselves liable for breach of duty. *SAAMCO* and its associated "scope of duty" principle have defied coherent and consistent explanation. The primary proponent of that principle, Lord Hoffmann, has backtracked on its

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369 See *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25, (1999) 199 CLR 413; and *Deloitte & Touche v Livent Inc (Receiver of)* 2017 SCC 63, [2017] 2 SCR 855. See also above at [133]–[138] per Glazebrook and Miller JJ.

370 *Anns v Merton London Borough Council* [1978] AC 728 (HL). See below at [245]–[250].

371 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*].

372 The expression used at [169] per Blanchard, McGrath and William Young JJ.

373 *Meadows v Khan* [2021] UKSC 21, [2022] AC 852 at [79]–[80].

expression and effect.[374] As the primary reasons show, the United Kingdom Supreme Court has ebbed and waned, and remains divided on both the principle's expression and its analytical location. This Supreme Court, too, cannot land in a single place: two of us would retain *SAAMCO*,[375] two would limit its application (displacing the cap),[376] and I would essentially dispense with it altogether. What a law student, or Mr Daly, would make of the debate is difficult to say, but they would be unlikely to find it helpful or readily comprehensible.

"Scope of duty": its origins and evolution

[243] The idea of an inquiry about the "scope of duty" in negligence has existed since the 19th century. It is commonly referred to in cases both pre- and post-dating *Donoghue v Stevenson*.[377] For example, in the Scots case of *Currie v Wardrop*, involving the negligent operation of a motor bus;[378] in *Glasgow Corp v Muir*, involving the mishandling of an urn of scalding tea;[379] in *Paris v Stepney Borough Council*, involving injury to a worker's eye;[380] and in the well-known Privy Council case, *Goldman v Hargrave*.[381] But in these earlier cases the judges are really talking about two things: (1) to *whom* is the duty owed; and (2) what is the *content* of the duty? The former question was primarily, after *Donoghue v Stevenson*, a proximity issue, until Lord Wilberforce's two-stage modification in *Anns v Merton London Borough Council*.[382] The latter question was largely a matter of setting the standard of care—the effect of *Re Polemis* being that a defendant found to have been negligent was liable for all the direct consequences, whether reasonably foreseeable or not.[383] That of course changed with the Privy Council's decision in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (*The Wagon Mound (No 1)*) that "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen".[384] That inquiry fell for determination under what we call

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374 See below at [260].
375 See below at [328]–[332] per Winkelmann CJ and Ellen France J.
376 See above at [161]–[170] per Glazebrook and Miller JJ.
377 *Donoghue v Stevenson* [1932] AC 562 (HL).
378 *Currie v Wardrop* 1927 SC 538 (IH) at 555 per Lord Murray.
379 *Glasgow Corp v Muir* [1943] AC 448 (HL) at 463 per Lord Wright.
380 *Paris v Stepney Borough Council* [1950] 1 KB 320 (CA) at 324 per Asquith LJ.
381 *Goldman v Hargrave* [1967] AC 645 (PC) at 656–657 and 663.
382 *Anns v Merton London Borough Council*, above n 370, at 751–752.
383 *Re Polemis and Furness, Withy and Co, Ltd* [1921] 3 KB 560 (CA).
384 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388 (PC) [*The Wagon*

"remoteness of loss"; the pre-*Anns* decisions did not focus on scope of duty in terms of a duty to protect against one kind of harm but not another. Duty, causation and remoteness *in combination* were all calculated to resolve, as Denning LJ (as he then was) said in *Roe v Minister of Health*, a single question of liability: whether the consequence for which damages were sought was "fairly to be regarded as within the risk created by the negligence".[385]

[244] It may be noted that "scope of duty" was terminology employed by Lord Wilberforce in *Anns*—in the second of his two stages for recognition of a duty.[386] The first stage—sufficient relationship of proximity or neighbourhood that it may reasonably be contemplated that carelessness by one may be likely to cause damage to the other—emulated Lord Atkin's test in *Donoghue*.[387] But the second stage was more novel, being:[388]

> … to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[245] Given the addition of the second stage was intended to serve a restrictive purpose, it is not a little ironic that *Anns* was later criticised as enabling a "massive extension" of prima facie liability in negligence.[389] In reality, the whole purpose of duty analysis is to justify a limited entry point to a claim for negligence: Professor John Fleming took the view that duty analysis was "nothing more or less" than a lever fashioned by the courts to limit liability.[390] But it is Lord Wilberforce's final words, "or the damages to which a breach of it may give rise", which perhaps portend *SAAMCO*. The examples given by Lord Wilberforce for a *damage*-based duty limitation concerned economic loss, and referenced the Court of Appeal's decisions in *SCM (United Kingdom) Ltd v WJ Whittall and Son Ltd* and *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*—both decisions in which the limitation was

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Mound (No 1)] at 426; and see at 422 and following.

385 *Roe v Minister of Health* [1954] 2 QB 66 (CA) at 85.

386 *Anns v Merton London Borough Council*, above n 370, at 752.

387 At 751; and see *Donoghue v Stevenson*, above n 377, at 580.

388 At 752 (citation omitted).

389 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481 per Brennan J as cited in Stephen Todd "Negligence: The Duty of Care" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 153 at 160.

390 John G Fleming "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Can Bar Rev 471 at 474.

reasoned either as duty or remoteness-based.[391] In the former case, Lord Denning MR reasoned exclusion of economic loss as a matter of remoteness.[392] In the latter, he noted the limit might be reasoned either as duty or remoteness, which he regarded as unsatisfactory, and proposed a policy-based, context-sensitive rule particular to economic loss.[393]

[246] The opening presented in *Anns* was quickly taken up in a series of House of Lords decisions that began the retreat from that decision. In *Candlewood Navigation Corp v Mitsui OSK Lines Ltd*, a case concerning economic loss, Lord Fraser, writing for the Privy Council, saw rules limiting such loss as operating "to limit the scope of duty owed by a wrongdoer … at the second stage [of the *Anns* test]".[394] Shortly afterwards, in *Leigh v Aliakmon Shipping Co Ltd*, Lord Brandon (with whom all members of the panel agreed) observed that Lord Wilberforce's framework "does not provide, and cannot in my view have been intended … to provide, a universally applicable test of the existence and scope of a duty of care" in negligence.[395]

[247] That was followed in turn by the more pronounced retreat in *Caparo Industries plc v Dickman*, where Lord Bridge said:[396]

> What emerges [from the post-*Anns* authorities] is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

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391 *Anns v Merton London Borough Council*, above n 370, at 752 citing *SCM (United Kingdom) Ltd v WJ Whittall and Son Ltd* [1971] 1 QB 337 (CA) and *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA).

392 *SCM (United Kingdom) Ltd v WJ Whittall and Son Ltd*, above n 391, at 345.

393 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*, above n 391, at 36–37.

394 *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1 (PC) at 25 citing *Anns v Merton London Borough Council*, above n 370, at 751–752.

395 *Leigh v Aliakmon Shipping Co Ltd* [1986] AC 785 (HL) at 815 citing *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL) at 240.

396 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 617–618 citing *Governors of the Peabody Donation Fund*, above n 395, at 239–241, *Yuen v Attorney-General of Hong Kong* [1988] AC 175 (PC) at 190–194, *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC) at 709 and *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL) at 60.

[248] This innovation came in company with an exhortation for greater respect for established lines of authority on whether or not a duty arises, with the two-stage (or three-stage) test in *Anns* (and now *Caparo*) reserved for more novel claims.[397] Lord Bridge continued:[398]

> It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.

[249] Lord Oliver made a similar observation: that the duty of care is "inseparable" from the damage claimed, and that it is "not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained".[399] There can I suggest be no argument about the proposition advanced by Lord Bridge and Lord Oliver, at least in general terms, but the live question not really answered by these passages is *where* in the analytical framework of negligence these questions are best asked and answered. On the view I take, most of that work remains for analysis in causation and remoteness, with some modest supplementation of principle.

[250] It is important here to remember that New Zealand has retained the essential two-stage approach in *Anns*.[400] Care therefore needs to be exercised before too readily adopting post-*Anns* English duty analysis.[401] In *The Grange* in 2012, Blanchard J (writing for a majority of this Court comprising also McGrath and William Young JJ) explained that the concern expressed in the *Caparo* line of cases was that *Anns* had given too much emphasis to foreseeability, "but the New Zealand courts have seen the first-stage inquiry as much broader than that, encompassing all facets of the relationship between the particular parties".[402] He went on:

> [156] As to that framework, it seems to us that it must amount to the same thing whether stated as having two stages (one of which has two parts) or as

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397 See *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [21]–[29] per Lady Hale P, Lord Reed and Lord Hodge SCJJ.

398 *Caparo*, above n 396, at 627 drawing upon *Sutherland Shire Council v Heyman*, above n 389, at 487 per Brennan J.

399 At 651, also citing *Sutherland Shire Council v Heyman*, above n 389, at 487 per Brennan J.

400 See generally Todd, above n 389, at [4.2.3].

401 It is notable that this necessary reservation is not adverted to in the primary New Zealand authority embracing *SAAMCO*: *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA). Indeed, that case makes no reference at all to *Anns*, above n 370.

402 *The Grange*, above n 371, at [151].

> three stages. The important insight found in Canadian and New Zealand cases is that when a court is considering foreseeability and proximity, it is concerned with everything bearing upon the relationship between the parties and that, when it moves to whether there are policy features pointing against the existence of a duty of care – that is, whether it is fair, just and reasonable to impose a duty – the court is concerned with externalities – the effect on non-parties and on the structure of the law and on society generally. But, as already remarked, aspects of some matters may require to be considered more than once.

[251] The purpose of the duty inquiry is to provide a preliminary "screening test"—to use Blanchard J's expression in *The Grange*—to restrict rights of action for negligence.[403] All four elements of the negligence framework—duty, breach, causation and remoteness—serve that same purpose. While some overlap is inevitable, it is unnecessary to inflate the first element and subsume the others within it. On the conventional approach in New Zealand, if the relationship is one where the defendant's act might foreseeably cause harm of the sort claimed, and neither proximity nor policy considerations compel limitation of duty, then the defendant owes a duty of care. Further restriction of liability depends on the assessment of breach and the later adjustment of loss through causation and remoteness considerations at the third and fourth stages of the analytical framework.

[252] That is not to say that the form or nature of loss is irrelevant in the duty inquiry. It is not enough to simply draw a straight causal line between the defendant's act and the harm complained of; the *kind* of harm may not be foreseeable, or the imposition of liability for it may be disproportionate in proximity terms, so that the duty inquiry is negated at the first *Anns* stage.[404] Concerns as to an indeterminate extent of liability may also exclude duty at the second *Anns* stage.[405]

[253] But the process involved here is a layered series of filters. Where the case is not a novel one, the duty inquiry ought not be onerous; the focus will instead be upon breach, causation and remoteness of loss. That must be so in the present case: there is nothing inherently novel about a purchaser's claim against a vendor's agent for negligent misstatement on facts material to entry into a contract to purchase.[406]

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403 See at [169].
404 See at [157] and [159].
405 At [159]–[160].
406 See for example *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 (CA), concerning a claim under the Fair Trading Act 1986; and *Downs v Chappell* [1997] 1 WLR 426 (CA).

The fact of agency does not render a misspeaking agent immune from personal liability; it merely gives the agent a potential claim to indemnity from the principal.[407] The only real curiosity in this case is the absence of the vendor as a party.[408]

[254] Further, where the claim *is* novel, another important consideration is that duty is often examined under the indifferent spotlight of a pre-trial strike-out application. In such cases, care needs to be taken not to allow duty to assume an all-embracing functional role better allocated to other parts of the analysis—causation and remoteness in particular, but also breach (which involves consideration of the standard of care expected in the circumstances). That is particularly so where the circumstances establish a prima facie duty: the possibility of reasonably foreseeable loss of the sort claimed (breach, causation and remoteness remaining to be fully evaluated), sufficient proximity and the absence of excluding policy reasons. The exact metes and bounds of liability are better resolved by completing the analysis, rather than bundling everything into the first element.

The scope of duty in SAAMCO

[255] *SAAMCO* was not a "no transaction" case any more than the Routhans' was; rather, it was a "not *that* transaction" case. In other words, the lenders in *SAAMCO* would still have lent money on the property market (which later collapsed)—just not the same amount (because the valuers' negligent conduct impaired the extent of their security). Likewise, the Routhans would still have bought a dairy farm—indeed their counterfactual analysis assumed it—in what became a volatile market for milk solids. In each case, on a simple but-for causation analysis, the defendant was being asked, in part, to assume a loss the plaintiff would have borne absent the breach of duty.[409] As counsel for one of the valuers said in argument in *SAAMCO*: "The defendant is not liable for anything that was unforeseeable, but that is not to say that he is liable for

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407 See the authorities cited in the primary reasons, above n 71.

408 We were advised by counsel that the vendor, Cooks Stud Farms Ltd (Cooks Farms), and its sole director, Mr Cook, were joined as third parties by PGG Wrightson Real Estate Ltd (PGG Wrightson), but that claim was discontinued in June 2021. Ultimately, Mr Cook gave evidence for PGG Wrightson at trial, two months later.

409 In the present proceeding the Routhans initially sought losses attributable to the decline in price in that market. That claim was not pursued before this Court.

everything that was foreseeable".[410] As another valuer's counsel also acknowledged, the limit might equally be imposed via scope of duty (as in *Caparo*) or causation.[411]

[256] The response adopted in *SAAMCO* drew directly on Lord Bridge's speech in *Caparo*. But unlike in *Caparo*, there was no dispute in *SAAMCO* that the valuers owed these lenders a duty of care: as Lord Hoffmann put it, "[t]he real question in this case is the kind of loss in respect of which the duty was owed."[412] *SAAMCO*, it may be noted, was not a strike-out case. Trial had taken place and very substantial damages had been awarded.[413] Another real question that might have been asked was why, as appellants' counsel had acknowledged, causation and remoteness principles should not be used to evaluate and limit the extent of the valuers' liability.

[257] In holding that the law normally limits liability to "those consequences which are attributable to that which made the act wrongful"—there, as here, the consequences of the inaccuracy of the information supplied—Lord Hoffmann resorted to his famous parable of the mountaineer.[414] That involved a direct professional relationship between doctor and patient:[415]

> A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

Unquestionably the doctor owed her patient a duty of care. As Lord Hoffmann acknowledged later,[416] the scope or content of that duty was plain: it was to diagnose the patient's condition in accordance with the professional standards of a reasonably competent doctor in a practice of that nature (the standards for a general practitioner and a consultant orthopaedic surgeon potentially differing).[417]

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410 *SAAMCO*, above n 368, at 196 citing *M'Kew v Holland & Hannen & Cubitts (Scotland) Ltd* 1970 SC (HL) 20 and *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

411 At 197 and 200. As to the interchangeability of scope of duty and remoteness, see James Plunkett *The Duty of Care in Negligence* (Hart Publishing, Oxford, 2018) at 88–89.

412 At 212.

413 See *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 (CA) at 380–385.

414 *SAAMCO*, above n 368, at 213. "Attribution of consequences" sounds like the language of causation.

415 At 213.

416 See below at [260].

417 See also Jane Stapleton "Conceptual Interplay between Elements of the Tort of Negligence" in

[258] That was not, however, the function the parable performed. It had a broader purpose. Causation and remoteness of loss principles will exclude some losses said to flow from a breach of duty. Yet, even in combination, and in their conventional expression, these may prove insufficient and leave defendants unjustly exposed to a liability they should not bear, because the particular risk causing loss is not one they should be taken to have assumed as a matter of law. A further limitation mechanism is needed. Whether this is achieved by enlarging the conventional expression of those elements, or by adding to them, does not really matter.

[259] In the parable, the mountaineer makes a trip to the mountains which he would not have made but for the incorrect diagnosis. Imagine, however, that during the journey his luggage is lost and he is injured by a small landslide. Each of these losses can be said to have been factually caused by the faulty diagnosis (but for the diagnosis the mountaineer would not have been there) and not too remote (accepting for argument's sake that each is reasonably foreseeable). But neither the luggage loss nor the landslide is a manifestation of the risk the doctor assumed responsibility for—namely, the knee giving out and the mountaineer suffering loss consequent on that. The mountaineer, not the doctor, *retained* responsibility for those ordinary risks of travel occurring, just as would be the case if they had occurred to him while he was out and about in his hometown. To put it another way, the mountaineer did not, by consulting the doctor, *transfer* those ordinary risks to her. One might look at this as a matter of causation or remoteness, or just as a risk not assumed by the defendant or transferred to him or her by the plaintiff. But if the latter view is taken, where does that analysis belong?

Lord Hoffmann's retreat

[260] As Lord Hoffmann later said, in modest retreat from his own creation, in *SAAMCO* the scope of the duty of care was, more plausibly, to take reasonable care to get the valuation right—and presumably that of the doctor in the parable was to use reasonable care in diagnosing the state of the knee:[418]

Three Essays on Torts (Oxford University Press, Oxford, 2021) 65 at 96.

418 Leonard Hoffmann "Causation" (2005) 121 LQR 592 at 596 (emphasis added and footnote omitted).

> In [*SAAMCO*], I said that such a restriction followed from the scope of the duty of care in that particular case. Other judges have also spoken about the scope of the duty. Professor Jane Stapleton has pointed out that the language is inappropriate. *The scope of the duty of care is to take reasonable care to get the valuation right*. It has nothing to do with the extent of the consequences for which the valuer is liable. *When one considers what causal relationship is required, one is really speaking about extent of the liability and not about the scope of the duty*. Professor Stapleton is right. I shall try to mend my language in future.

[261] That self-correction was right, I think. Evaluation of the consequences—or damage—for which the defendant is liable is about "extent of liability" (Lord Hoffmann's expression) or "scope of risk" (the usage adopted by Professors James Goudkamp and Donal Nolan in *Winfield and Jolowicz on Tort*).[419] It is a multi-faceted inquiry and does not fall to duty analysis alone to resolve. Some fundamental elements—e.g., whether the duty extends as far as economic loss—may be addressed in duty analysis. But for the most part, the scope of *damage* which the defendant is liable for upon a breach of duty falls to be determined by causation and remoteness principles, not duty.[420]

Causation and remoteness

[262] I touch on these just briefly, and for completeness. Causation is of course usually analysed in two distinct respects: factual causation and legal causation (the former being concerned primarily with identifying a but-for causal link). As the Court of Appeal put it in *Price Waterhouse v Kwan*:[421]

> Plaintiffs in this field must show that the defendant's act or omission constituted a material and substantial cause of their loss. It is not enough that such act or omission simply provided the opportunity for the occurrence of the loss. The concept of materiality denotes that the act or omission must have had a real influence on the occurrence of the loss.

In negligent misstatement cases, continued reliance in fact on the misstatement is essential for factual causation. "Legal causation" then limits factual causation in cases involving third parties (novus actus interveniens), voluntary assumption of risk (which

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419 See James Goudkamp and Donal Nolan *Winfield and Jolowicz on Tort* (20th ed, Thomson Reuters, London, 2020) at [7-071].

420 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [25]. See also Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1239 at 1273–1274.

421 At [28] as cited in Todd, above n 420, at 1275, n 168.

it might be thought has immediate overtones of "assumption of risk" analysis)[422] and contributory negligence.[423] Unreasonable reliance may also constitute a limit on factual causation in negligent misstatement cases where a representation is relied upon in fact, but unreasonably.

[263] Remoteness, on the other hand, is about attribution of liability in the face of an established causal link. It is at once evident that this must overlap with Lord Hoffmann's approach to scope of duty in *SAAMCO*. It is not coincidental then that Professors Goudkamp and Nolan deal with *SAAMCO* under remoteness in *Winfield and Jolowicz on Tort*.[424] Likewise, in the United States the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* suggests that the foreseeability of a risk that has materialised is a matter for the remoteness, not duty, inquiry.[425] One means of determining remoteness of damage (and one with deep jurisprudential roots) is the so-called "risk principle"—that is, the principle that "liability in negligence is generally limited to harm that results from the materialisation of the risks that made the defendant's conduct negligent in the first place".[426] The remoteness inquiry limits liability in that way, obviating the need for the factual duty inquiry to till that soil in advance.[427] Thus, as we have seen, there was no reason to attribute responsibility for the failed expedition to the mountaineer's doctor when the failure did not involve materialisation of a risk arising from the faulty diagnosis. As a matter of remoteness of loss, ordinary travel risks simply remained with the patient.

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422 See above at [259].

423 For a powerful assault on the independent defence of volenti non fit injuria, see Jodi Gardner "Rethinking Risk-Taking: The Death of *Volenti*?" (2023) 82 CLJ 110 at 125–130.

424 Goudkamp and Nolan, above n 419, at [7-073]. Professor Todd, by contrast, deals with it under each of duty, causation and remoteness: Todd, above n 389, at 164; and Todd, above n 420, at 1270 and 1275.

425 American Law Institute *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (online ed) § 7 cmt j.

426 Donal Nolan and James Plunkett "Keeping Negligence Simple" (2022) 138 LQR 175 at 176. Nolan and Plunkett say this principle "is itself an application of a broader principle, namely that tort liability is usually limited to those consequences which are attributable to that which made the defendant's conduct wrongful": at 177. See also *Roe v Minister of Health*, above n 385, at 85 per Denning LJ.

427 Plunkett, above n 411, at 130–131.

[264] That would be so whether the particular loss was reasonably foreseeable or not. Remoteness is not simply a question of foreseeability, though that is an integral element.[428] There is also a policy question, namely:[429]

> … whether the link between the defendant's conduct and the ensuing damage suffered by the plaintiff is such that it is *reasonable as a matter of policy* that the defendant should pay.

As Watkins LJ said in *Lamb v Camden London Borough Council*, while the foreseeability test in *The Wagon Mound (No 1)* would "conclude consideration of the question of remoteness … in the vast majority of cases", in some cases further consideration would be necessary.[430] Even a reasonably foreseeable consequence occasioned by a negligent act might be too remote, he said, where:[431]

> … the very features of an event or act for which damages are claimed themselves suggest that the event or act is not upon any practical view of it remotely in any way connected with the original act of negligence.

[265] For reasons given earlier, causation and remoteness remain the most appropriate places to limit liability based on issues of assumption and attribution of risk in cases not involving a novel duty. And even in novel cases, duty performs more of a screening function than an exacting examination of the assumption of risk of particular harm. If a close analysis of reliance evidence is necessary, it is generally better to postpone analysis of that to causation and remoteness.

Problems with the "scope of duty" principle

[266] The confusion that has developed around the "scope of duty" principle is neatly explained by Professor Nolan in his essay, "Deconstructing the Duty of Care".[432] Professor Nolan begins by acknowledging the two dimensions of the duty of care,

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428 See *SAAMCO*, above n 368, at 212–214.

429 Todd, above n 420, at 1281–1282 (emphasis added). See also *Lamb v Camden London Borough Council* [1981] QB 625 (CA) at 636–637 per Lord Denning MR; and *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) at 397 per Lord Denning MR. Compare *Sutherland Shire Council v Heyman*, above n 389, at 487 per Brennan J, which reaches the same conclusion but expressed in terms of scope of duty.

430 *Lamb v Camden London Borough Council*, above n 429, at 646–647 citing *The Wagon Mound (No 1)*, above n 384.

431 At 647. This clearly sits at the boundary of causation and remoteness: see below at [276].

432 Donal Nolan "Deconstructing the Duty of Care" in *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, Oxford, 2023) 28, originally published at (2013) 129 LQR 559.

which he calls the "factual" and "notional" duty elements—usually referred to in this country as the "proximity" and "policy" inquiries.[433] The first is an essentially factual inquiry, and the second essentially legal. He then explains that disagreement as to the proper emphasis to be placed on each dimension of the duty inquiry has muddied the jurisprudential waters,[434] with two major consequences: first, the expansion of *legal* duty analysis into the *factual* territory traditionally occupied by other conceptual elements of negligence; and secondly (and relatedly), cross-contamination between—and conflation of—hitherto distinct stages of analysis. He elaborates:[435]

> As with the conflation of fault and duty, allowing duty to swallow up remoteness in this way turns an issue of fact into one of law … [T]he conflation of factual duty and notional duty into one overarching duty enquiry can itself bring about the confusion of issues of fact and law, since there is a risk that the legal question of notional duty will be skewed by the foreseeability of the risk to the claimant, even though the two concepts perform completely different functions within the negligence analysis.

[267] He singles out scope of duty analysis in particular, calling it "the unhelpful and pointless reformulation of the remoteness issue", manipulation of which has become "one of the favoured techniques for subsuming inappropriate issues into the notional duty enquiry".[436] Lord Hoffmann's speech in *Jolley v Sutton London Borough Council* provides an example.[437] Initially, he treated scope of duty as essentially synonymous with remoteness, and informed by the reasonable foreseeability of particularised risks.[438] But he then said that although foreseeability "is in end the question of fact", "other factors have to be considered in deciding whether a given probability of injury generates a duty to take steps to eliminate the risk"—factors including the degree of

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433 At 33–34. See above at [244]; and see *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58]; and *The Grange*, above n 371, at [148]–[149] per Blanchard, McGrath and William Young JJ.

434 With some commentators characterising the duty of care as predominantly concerned with the factual element and others conversely emphasising the notional element, "with the result that at times the protagonists in debates about duty seem to be arguing at cross-purposes": Nolan, above n 432, at 34–35.

435 At 52–53.

436 At 52 citing for example *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL) at 75–76 per Lord Slynn and 97 per Lord Hope (where scope of duty was invoked in determining the extent of losses recoverable in a wrongful conception case) and *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427, [2009] Ch 330 at [46]–[48] (where scope of duty was used to exclude the recovery of losses flowing from the breach of a duty to refuse to accept further bets from a problem gambler).

437 *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 (HL). See Robert Williams "Remoteness: Some Unexpected Mischief" (2001) 117 LQR 30 at 33.

438 At 1091. That is itself a problematic proposition: see above at [266].

expense involved in avoiding the risk, which goes to the question of breach.[439] Robert Williams points to Lord Hoffmann's speech as "evidence that the use of this umbrella concept may blur the independence of the three inquiries"—breach, causation and remoteness—and generate confusion as to their (properly) independent but cumulative nature.[440] I entirely agree.

[268] As Professor Nolan and Dr James Plunkett point out in a second essay, "Keeping Negligence Simple", the United Kingdom Supreme Court's reformulation of the elements of negligence in *Meadows v Khan* and *Manchester Building Society v Grant Thornton UK LLP*, discussed in the primary reasons above at [120]–[131], has resulted in the conflation of different questions under the same heading—"scope of liability", for instance, conflating legal causation and remoteness.[441] They continue:[442]

> … the greatest risk to simplicity in negligence is posed by the peculiarly common law device of the "duty of care", which in recent decades has begun to swallow up other elements of the cause of action, with unfortunate results for the clarity, coherence and comprehensibility of the law.

The "risk principle" underlying the mountaineer's knee parable—that liability is limited to consequences attributable to that which made the defendant's conduct wrongful—encompasses remoteness, "which focuses on the foreseeability of the kind of harm suffered by the claimant".[443] After all, say Nolan and Plunkett, "if a particular kind of harm is not foreseeable, then the risk of that harm occurring cannot be one of the risks that made the defendant's conduct negligent".[444] "Scope of duty", as used by Lord Hoffmann and his adherents, unnecessarily gathers up remoteness considerations into framing the duty itself.

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439 At 1091–1092.

440 Williams, above n 437, at 33. McHugh J highlighted that risk in his dissent in *Vairy v Wyong Shire Council* [2005] HCA 62, (2005) 223 CLR 422 at [29], and see at [25]–[26]. See also Colin Liew "Keeping it Spick and *Spandeck*: a Singaporean approach to the duty of care" (2012) 20 TLJ 1 at 10.

441 Nolan and Plunkett, above n 426, at 176. See *Meadows v Khan*, above n 373; and *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783.

442 At 176.

443 At 177.

444 At 177. But see above at [264].

[269] Colin Liew makes a similar case against this reformulation of "scope of duty" in a 2012 essay in the *Torts Law Journal*.[445] He makes two key points. First, it is not damage that gives rise to a duty of care; damage "simply renders breach of that duty actionable, which is quite a different matter".[446] Secondly, "yoking a duty of care to loss or damage" in the manner demanded by Lord Bridge and Lord Oliver in *Caparo*[447] fragments the tort of negligence for different forms of liability.[448] He observed:[449]

> … this approach to duty runs the risk of confusing it with other legal devices better placed to deal with issues of loss, such as the rules on causation and remoteness of damage. Finally, it is conceivable that, in a case with sufficiently extreme facts, a plaintiff may successfully sue a defendant in negligence and recover damages for personal injury, property damage, psychiatric harm and pure economic loss, but to explain the result on the basis that the defendant owes four distinct duties of care in the tort of negligence to the same plaintiff, in respect of exactly the same action, is somewhat bizarre.

[270] Professor Stapleton too has argued for a clearer distinction being drawn between the forward-looking duty inquiry (what a defendant must be careful about)[450] with the backward-looking remoteness inquiry (the defendant's responsibility for specific consequences that have come about).[451] The *SAAMCO* approach conflates those inquiries and confuses the court's key function: determining the risks in relation to which the law should fairly hold the defendant responsible for foreseeable losses caused (in a factual sense) by their negligent conduct.[452] She, too, would see the proper analysis of the paradox posed by the mountaineer's knee parable as an issue of remoteness—but one demonstrating the need to supplement conventional *Wagon Mound* analysis which would otherwise suggest that a combination of but-for causation and reasonable foreseeability would suffice:[453]

> To put it another way, the scope of responsibility for consequences of a breach does not appropriately extend to a consequence if it is the materialisation of a

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445 Liew, above n 440.

446 At 9.

447 See above at [247] discussing *Caparo Industries plc v Dickman*, above n 396.

448 Liew, above n 440, at 10. McHugh J made the same point in *Vairy v Wyong Shire Council*, above n 440, at [26] and [29].

449 At 10 (footnotes omitted).

450 In respect of which the orthodox view is that "the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk": W Page Keeton (ed) *Prosser and Keeton on the Law of Torts* (5th ed, West Publishing, St Paul (Minn), 1984) at 356 as cited in *Vairy v Wyong Shire Council*, above n 440, at [25], n 34 per McHugh J dissenting.

451 Stapleton, above n 417, at 95. Remoteness of course is not wholly retrospective; it also involves a forward-looking inquiry into reasonable foreseeability prior to breach.

452 At 89–92 and 95–97.

453 At 92.

> risk that fell outside the scope of the duty of the particular defendant. Such a consequence is, in the orthodox, albeit opaque, terminology, 'too remote'.

[271] These scholarly analyses demonstrate that liability in negligence cannot be based on simple causation and reasonable foreseeability remoteness only; fairness and justice dictate that there be some *further* limit on liability for loss.[454] That might be done by revising and enlarging causation and remoteness principles, or it might be done by recognising a distinct limit based on the extent of assumption of risk. In my view it is better to recognise that this risk principle operates in addition to purely conventional causation and remoteness analyses, rather than as part of them. This raises a design question: should the additional limitation—based on the extent of assumed risk—be built into duty (Lord Hoffmann's design) or as a final analytical factor following causation and remoteness (Lord Burrows SCJ's design in *Meadows v Khan*, to which I now turn).

Meadows v Khan

[272] The difficulties just discussed have resulted in repeated efforts by the United Kingdom Supreme Court and Privy Council to justify and explain "scope of duty" analysis. These decisions are discussed in the primary reasons above at [115]–[132]. For my purposes it is convenient to focus on *Meadows v Khan*.[455] It was a case, not just a parable, about a doctor. A woman sought a doctor's opinion as to whether she carried the gene for haemophilia. The doctor negligently concluded she did not. The woman became pregnant and gave birth to a son who not only suffered from haemophilia but also had autism. It was accepted that, had the correct advice been given, foetal testing would have been undertaken, the haemophilia condition discovered and the pregnancy terminated. Was the doctor however liable for the additional costs of raising an *autistic* child?

[273] Although the trial Judge, applying a simple but-for approach to causation, concluded the doctor was liable, that conclusion cannot have been correct; the doctor had never been asked to assume the risks of autism at all. Autism was one of the ordinary risks of pregnancy which the mother shouldered and had not transferred to

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454 See at 92.

455 *Meadows v Khan*, above n 373.

the doctor in the consultation. Only the adventitious fact of the wrongful haemophilia diagnosis, and the fact that tests for that condition would have resulted in termination, offered a but-for reasoning path to liability. The Court of Appeal and Supreme Court respectively, and unanimously, reversed the trial verdict—but for divergent reasons.

[274] In the Supreme Court, Lord Hodge and Lord Sales SCJJ (with whom three other members agreed) proposed a new six-part model for analysing scope of duty and related elements (although it was said not to be a comprehensive model):[456]

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

[275] That approach did not meet the approval of the two remaining members of the Court, Lord Leggatt and Lord Burrows SCJJ. They thought it undesirable and unnecessary to engage in a reframing of the conceptual structure of negligence.[457] In a passage I have considerable sympathy for, Lord Burrows SCJ said that he would "prefer to adhere to … a relatively conventional approach" which saw the tort of negligence involving seven main questions:[458]

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456 At [28].
457 At [79] per Lord Burrows SCJ and [96] per Lord Leggatt SCJ.
458 At [79].

(1) Was there a duty of care owed by the defendant to the claimant? (the duty of care question)

(2) Was there a breach of the duty of care? (the breach, or standard of care, question)

(3) Was the damage or loss factually caused by the breach? (the factual causation question)

(4) Was the damage or loss too remote from the breach of duty? (the remoteness question)

(5) Was the damage or loss legally caused by the breach of duty? (the legal causation, or intervening cause, question)

(6) Was the damage or loss within the scope of the duty of care? (the scope of duty question)

(7) Are there any defences? (the defences question)

[276] He then set out a short commentary on the interrelationship of these elements:

> [80] As this approach is relatively conventional, I do not think it is necessary to extend this judgment by explaining each of the seven questions. Suffice it to say that the duty of care concept controls the boundaries of the tort of negligence and problematic areas include pure economic loss, psychiatric illness and omissions; legal causation, as distinct from remoteness, is focusing on whether intervening acts of the claimant, or third parties, or natural events, break the chain of causation (so that the breach is no longer an effective cause); the *SAAMCO* principle as to whether the loss was within the scope of the duty of care falls to be considered as the sixth question; and defences include contributory negligence (which is a partial defence), voluntary acceptance of risk, illegality and limitation of actions. Questions (4)–(6) are closely related because they are all concerned with limitations on the recovery of factually caused loss: although generally regarded as different from each other, the same result may be reached by applying more than one of those three limitations (and, depending on the facts, the order in which one considers them may be largely a matter of convenience). …

[277] That is an analysis with which I largely agree. It is broadly familiar (or "relatively conventional"). It avoids overloading the duty inquiry. Scope of duty (which is, as discussed at length above, really about scope of assumed risk) is interrogated at the sixth stage in that framework, after causation and remoteness, serving as a cross-check. It avoids fragmentation of the tort, and duplication of analysis. It imposes the desired limit on non-assumed, non-attributable risk. And it is consistent with the *Anns*-based approach we continue to take to the duty inquiry in this country.

Scope of assumed risk in this case

[278] The scope of assumed risk in this case is not a difficult inquiry. The Routhans and Mr Daly enjoyed a direct relationship, in which Mr Daly willingly assumed responsibility to check an ostensible vendor's representation on a fact critical to the decision to purchase. The obligations he assumed were (1) to check the fact with the vendor's sole director, Mr Cook, and (2) to use reasonable care in doing so. A nice question might have arisen if he had checked and been fobbed off with a falsehood by Mr Cook. But that nice question does not arise, because Mr Daly did not make a proper check.[459]

[279] It is undeniable that he owed the Routhans a duty of care to perform the fact-checking inquiry with reasonable care, that the inquiry was critical to the purchase decision, and that PGG Wrightson Real Estate Ltd (PGG Wrightson) should be liable for reasonably incurred economic loss resulting from causal reliance on the false information supplied. The information/advice distinction made in *SAAMCO* is immaterial here: the primary questions thrown up by the facts here are (1) for how long the Routhans could reasonably rely on the incorrect information given to them by PGG Wrightson, and (2) whether damages should include revenue losses. The exact metes and bounds of reliance and liability are matters to be assessed principally under causation and remoteness analysis, enhanced (if need be) by supplementary scope of risk analysis in the manner suggested by Lord Burrows SCJ in his sixth inquiry in *Meadows v Khan*.

Extent of liability: the calculation of damages

[280] There is an ill-defined limit in the law of negligence that may apply some sort of temporal restriction on liability. Received wisdom (and authority on remoteness) is that the general *kind* of loss must be foreseeable, but that neither the exact manner of the damage occurring nor its *extent* need be.[460] It is difficult however to articulate any sort of supervening *temporal* limit: after all, continuing economic loss can readily

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459 See above at [32]–[33] and [43] per Glazebrook and Miller JJ.

460 *Hughes v Lord Advocate* [1963] AC 837 (HL); *Taupo Borough Council v Birnie* [1978] 2 NZLR 397 (CA); and *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA) at 371 per Casey J, and see at 354 per Cooke P and 359 per McMullin J.

be characterised as a matter of "extent"—which need not be foreseen. Professor Sarah Green has tried to articulate a temporal limitation in these terms:[461]

> A breach of duty will remain operative in relation to damage which is of a reasonably foreseeable type as long as it occurs within a timeframe considered by the court to be reasonable in the circumstances of the case.

The first part she attributes to *The Wagon Mound (No 1)*;[462] the second is "really just a verbalisation of a principle which is perhaps so obvious that it is rarely stated".[463] In fact, it may be doubted that there is any such obvious and unifying "principle"; rather, a series of different limits or defences may, alone or in combination, bring about that result. Four come to mind.

[281] The first such limit is the need for the negligence to remain operative: in the case of negligent misstatement, for the plaintiff to incur the loss while still reasonably relying on the misstatement.[464] The second limit is the defence of contributory negligence, which involves dividing the attribution of liability between the parties.[465] The third limit is the defence of voluntary assumption of risk: connected to the first, it may involve the transfer of responsibility upon the plaintiff's apprehension of the true state of affairs—or at least within the period of time that is reasonable for that purpose.[466] Finally, the fourth limit is the obligation to mitigate loss—which of course depends on an appreciation of the fact of the misstatement, as the House of Lords made clear in *Smith New Court Securities Ltd v Citibank NA*.[467] These limits overlap, and more than one may be applicable.

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461 Sarah Green *Causation in Negligence* (Hart Publishing, Oxford, 2015) at 54 (emphasis omitted).

462 *The Wagon Mound (No 1)*, above n 384.

463 Green, above n 461, at 54.

464 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) at 486–487 per Lord Reid; and *Caparo Industries plc v Dickman*, above n 396, at 620–621 per Lord Bridge. See also *NRAM Ltd (formerly NRAM plc) v Steel* [2018] UKSC 13, [2018] 1 WLR 1190 at [19], [23] and [38]; and *JEB Fasteners Ltd v Marks, Bloom & Co (a firm)* [1981] 3 All ER 289 (QB) at 296–297; aff'd [1983] 1 All ER 583 (CA).

465 See Contributory Negligence Act 1947, s 3(1).

466 See *Downs v Chappell*, above n 406, at 437; and see generally Stephen Todd "Defences" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1299 at [20.4].

467 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) at 266–267 per Lord Browne-Wilkinson (with whom Lord Keith, Lord Mustill and Lord Slynn largely agreed); and *Downs v Chappell*, above n 406, at 441 and 443.

[282] In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, in a passage relied by the Court of Appeal in the present case, Leggatt J (as he then was) said:[468]

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

In that case he would have concluded, had negligence been established, that the plaintiff could not have sold the shares it had acquired on the defendant's advice "other than with difficulty and a significant loss of value", so it was instead appropriate that loss be assessed at the date of trial, rather than the earlier dates mooted by the defendant.[469]

Pleading

[283] In the present case, PGG Wrightson pleaded the first, second and fourth of these limits.[470] That is, unreasonable reliance, contributory negligence and failure to mitigate.[471] Its wide-ranging pleading included unreasonable reliance and due diligence, failure to ascertain historical milk production information from either the vendor or Westland Co-operative Dairy Company Ltd (Westland Milk), as well as both inept management of the farm and adversely altering production methodology (e.g., by

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468 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [2020] 1 CLC 428 (italics added).

469 At [190].

470 I record here that Mr Taylor KC was not instructed until the appeal to the Court of Appeal.

471 Affirmative limitation defences were also advanced.

reducing livestock count and shifting to once-daily milking).[472] Under the same head it pleaded that:

> Although aware at or before November 2011 that the represented average figure of 103,000kg/ms per annum as an average figure was not accurate, [the Kaniere Family Trust] took no steps to mitigate any loss which it says it suffered arising therefrom …

It said also that the Trust "[c]ontinued to unreasonably operate the Farm causing loss that was an inevitable outcome of its failures referred to above". Under its mitigation pleading it pleaded:

> [94] The Trust failed to mitigate its loss by taking any steps to sell the Farm in or at 2014 when it maintains it discovered the alleged position regarding the Farm's milk production figures (which is denied), but by which time it had been operating the Farm for 3 years.
>
> [95] In any event, such mitigation should have been undertaken by the Trust from the time when it knew or ought to have known of the actual lower production figures for the subject Farm (insofar as they were relied upon) which, on the basis of the information it provided to Rabobank was no later than November 2011.

High Court

[284] As the primary reasons note, the trial Judge made a 20 per cent deduction for contributory negligence, essentially on the basis that that measure of loss of capital investment was premature and much of it should have been postponed "until the farm was able to afford it".[473] The Judge however roundly rejected the argument that the Routhans managed the farm ineptly:[474]

> [227] While I heard a number of subjective opinions about the Routhans' farming experience, in fact, the Routhans were achieving, in some years, average or better than average milk solid production levels from the farm. Their difficulties arose because they did not realise this was a reasonable achievement when they were led to believe that for the last four years, on an orthodox farming system, the farm had produced an average of 103,000 [kg of milk solids (kgMS)]. Furthermore, these creditable production levels were achieved despite losing production because of re-grassing and despite adopting once a day milking at times of stress. It was only once the bank severely constrained their finances that the Routhans' production levels

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472 The latter change having been made briefly in 2011 and then in October 2014 for the balance of the season.

473 *Routhan v PGG Wrightson Real Estate Ltd* [2021] NZHC 3585, (2021) 16 TCLR 274 (Dunningham J) [HC judgment] at [228]–[229]; and see above at [82] and [87] per Glazebrook and Miller JJ.

474 Footnotes omitted.

> dropped markedly below those of an average dairy farmer. All this points to them having good farming skills and the capacity to achieve at least average, if not better than average results, had they not been aiming to achieve results which, as it transpired, were unrealistically high.

Court of Appeal

[285] The Court of Appeal found against the Routhans' claim for post-purchase losses on scope of duty, causation and failure to mitigate grounds.[475] It therefore found it unnecessary to make a deduction for post-purchase contributory negligence. As to causation, the Court said:[476]

> 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.

Submissions

[286] As the primary reasons record, PGG Wrightson vigorously renewed the contributory negligence arguments made in the Courts below.[477] As noted earlier, its pleading was wide-ranging in alleging post-purchase negligence by the Routhans, including in failing to act responsibly in (1) inquiring for itself about production levels and (2) responding to the almost-immediately evident shortfall against representation. In these respects, PGG Wrightson's pleading left little unsaid.[478]

[287] The Routhans endorsed the trial Judge's approach, objecting that the Court of Appeal had conflated risk and contributory negligence, and unreasonably departed from the trial Judge's factual findings.

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475 *PGG Wrightson Real Estate Ltd v Routhan* [2023] NZCA 123, (2023) 24 NZCPR 97 (Gilbert, Mallon and Wylie JJ) [CA judgment] at [115]–[134]; and see above at [90]–[95] per Glazebrook and Miller JJ. Failure to mitigate might logically be seen as another form of causation argument. As to that, see Andrew Burrows *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 84–85.

476 CA judgment, above n 475, at [119], and see at [125]–[126].

477 See above at [230] per Glazebrook and Miller JJ.

478 That is to say, it was comprehensive.

Discussion: continued reliance

[288] At first sight it seems intuitively unlikely that continued reliance upon Mr Daly's representations as to past production remained reasonable once the Routhans had, say, two full seasons' worth of data indicating that actual production was significantly lower than that represented—that is, as at mid-year 2013.

[289] However, that was not the conclusion reached by the trial Judge. The persuasive burden lies, of course, on the Routhans to demonstrate reasonable reliance throughout the period of loss. On the other hand, that burden transfers to PGG Wrightson in the case of its defence of contributory negligence and its plea of failure to mitigate.

[290] The Routhans' continued reliance on PGG Wrightson's misstatement, in the face of first-hand evidence of the farm's comparatively poor performance, must be assessed in the context of what they were trying to achieve. Close attention to the evidence is necessary to evaluate that.

[291] The Routhans believed that the farm had consistently been averaging 103,000 kgMS as a standalone farm with 260 Friesian cows, with half the herd wintered off and supplementary feed being made on the farm. Taking that as a benchmark for future performance, the Routhans believed at the outset (following advice from their financial consultant, Mr Bishop) that they could increase production to 112,000 kgMS through use of the run-off for all-herd winter grazing and additional supplementary feed production, and by increasing the stocking rate to around 300 cows (using a smaller breed, so resulting in near-equivalent liveweight).

[292] On Mr Routhan's evidence, those changes to the farming system were not meant to be major. Nor did the Routhans undertake these steps without competent advice, given they were relatively new to dairying. Initially, stock intensity was to remain largely similar to Mr Cook's system; Mr Lord was to stay on as farm manager; and Mr Routhan told him "you just keep doing whatever you're doing". Mr Cook's heavy Friesians were moved off the farm and the Routhans farmed a mix of smaller Friesians and cross-breeds, increasing the herd from 260 to 270 cows to May 2011 and

then to around 285 the following season.[479] Mr Routhan indicated in his evidence that he did not consider this a major change in the overall system:

> We did so on the understanding that this was only slightly more than had previously been stocked, when good production had been sustained. By weight, our increase was modest. Mr Cook had stocked heavier Friesian cows, while we stocked lighter cross-breeds and some smaller Friesians which were the same weight as the cross-breeds … This justified a higher stocking rate, especially when combined with the run-off.

I accept that those changes were both reasonable and foreseeable.

[293] I also accept that it was both reasonable and foreseeable that the Routhans would attempt to increase the farm's productivity beyond 103,000 kgMS, including by using the run-off. They told Mr Daly at the outset that their plan was to purchase a farm near their run-off to run them together as one farming operation. Indeed, the initial discussions between Mr Daly and the Routhans related to their interest in purchasing the Moynihan farm, which was adjacent to the Routhans' run-off and could therefore be expanded by them.[480] The Moynihan farm had been achieving "almost exactly what the Cook farm was purported to be doing", and Mr Bishop projected production could be increased to 112,000 kgMS if the run-off was utilised.

[294] I do not, therefore, find that the Routhans' initial changes to the farming system, geared as they were toward increasing production beyond the benchmark of 103,000 kgMS, were unreasonable or unforeseeable so as to negative causation or render post-purchase damages too remote. That is especially so given that three experienced farmers gave evidence to the effect that the steps taken by the Routhans were reasonable given what they believed to be true at the time—Mr Bradley who was there at the time, and Messrs Lewis and Glennie as expert witnesses after the fact.

[295] Mr Bishop, who provided advice in respect of the Moynihan farm, said in evidence that it was not reasonable for the Routhans to rely on his projections for that farm in relation to the farm they ultimately purchased from Cooks Farms.[481]

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479 It appears the Routhans ultimately did not graze 300 cows on the farm as anticipated by the second cow lease.

480 This is the farm discussed above at [27] per Glazebrook and Miller JJ.

481 Mr Bishop's attempts to distance himself from the budgets he prepared were rejected by Dunningham J in the High Court: HC judgment, above n 473, at [222].

Under cross-examination he acknowledged his methodology involved calculating expected production per hectare of the main farm property (the milking platform only) by reference to the district average and then "pumping up" that figure to estimate the additional productivity from incorporating a run-off. The addition of the Routhans' run-off (which was 73 ha) was forecast to increase average production for each hectare of the Moynihan farm (105 ha) above the district average of 738 kgMS/ha by 45 per cent, leading to forecast average production of 1,067 kgMS/ha, or 112,000 kgMS in total from a 105-hectare milking platform.

[296] The farm purchased by the Routhans was the same size as the Moynihan farm: 105 ha. It was purchased to be run in combination with the same run-off (the Routhans having been unaware that Mr Cook had himself used other land owned by his company to support the farm). It could therefore be reasonably inferred from Mr Bishop's calculations that the production forecast would be the same for the two farms when factoring in the run-off, given that Mr Cook's purported average production was the same as (in fact slightly higher than) the Moynihan farm's.[482] There does not seem to be any compelling reason why the Routhans should not have relied upon the Moynihan forecast as generally indicating that a similar increase in production could be achieved on Mr Cook's farm with the addition of the run-off as a support block. That is supported by Mr Bradley's opinion that with some changes to the stock, use of the run-off and good grass growth, the extra production needed to get to 112,000 kgMS was "not a big increase per cow".

[297] In any event, the goal of increasing production was short-lived. Mr Routhan said under cross-examination that "almost from day one, we were miles down on production, so I think, we weren't focused on growing production, it was focused on what we were doing wrong". The Routhans did not receive production data from the first half of the 2010/11 season (when Mr Cook was still in control), so only saw incomplete figures reflecting the second half of the season—in which they, unbeknownst to them, actually outperformed Mr Cook's first-half production.

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[482] Mr Bishop's own budgets in fact suggested production with Mr Cook's farm as the milking platform and the Routhans' run-off as a support block would do better than the Moynihan farm with the same run-off.

They saw only their own low production and began trying in earnest to figure out the cause.

[298] The evidence suggests that given the various steps they were taking to improve production, the Routhans believed they could still achieve similar (or even slightly higher) production to the represented figures under Mr Cook's ownership. The possibility that they had been misled was just one of many potential explanations for low production and, as Mr Glennie suggested (and the evidence tends to confirm), appears not to have been the Routhans' instinct. In short, they believed Messrs Cook and Daly, taking the information supposedly supplied by them at face value. Mr Lewis said that farm production was a consequence of inputs, physical attributes and good management. There were several possibilities to explore under each of those heads—and interrelationships between the heads themselves—which might have explained the low production without any suggestion the Routhans had been misled.

[299] A number of experts were consulted. Two came from the PGG Wrightson group: Mr Tibbotts, a field specialist; and Mr Sanders, an extension agronomist. They recommended a series of steps, including soil analysis, field renovation and repasturing. Ravensdown Ltd recommended applying extra fertiliser to the soil to boost grass production. Westland Milk recommended the Routhans consult Mr Bradley, a very experienced and well-respected dairy farmer, which they did. Mr Bradley identified the cows as poor milk producers and likely the main cause of low production. He also recommended more supplementary feed.

[300] The real problems with the farm were interconnected but can as a matter of proof be traced back to four misrepresentations, just one of which—the production levels misstatement—has been established for present purposes to be PGG Wrightson's legal responsibility. The other misrepresentations not attributable to PGG Wrightson concerned the true stocking rate and fertiliser usage levels (which together led the Routhans to damage their own pasture by overstocking) and supplementary feed use. Two points need to be made about them. First, it is not in issue that the actionable misstatement as to production levels was causative of the transaction. In other words, it satisfies the but-for factual causation requirement. The position regarding the others is not known but does not matter. Secondly, the fact

that PGG Wrightson is not legally responsible for those other misrepresentations does not mean it is entitled to use them to erode reliance on the misstatement it is responsible for. It is apparent from the evidence that the problems were complex, and identifying the causes of the divergence from expectation was difficult even for highly experienced farm advisers. If anything, the other issues seem to have deflected attention away from inquiry about the production level representation, a course that seems objectively reasonable in the circumstances.

[301] The same was true in reverse. Knowing that the farm had not previously produced 103,000 kgMS from 260 cows would have directed attention away from the quality of the cows as a potential issue. Mr Bradley's focus on the cows seems to have been a product of his experience with dairy farming and his expectations of production given the inputs and ostensible past performance:

> My focus on the quality of the cows was in large part because the production was down on what was represented. I was authorising significant expenditure on supplementary feed and could not put my finger on the apparent lack of production and why the Farm was not producing to the same levels as Mr Cook. My view then was that this had to have something to do with the cows. We were milking 270 cows that were producing under what I thought they should be. I knew Phil and Julie were having all sorts of trouble getting cow records from Mr Cook under the lease agreements. We did not know the full story about how Mr Cook farmed …

[302] Mr Glennie's expert opinion was that it was reasonable for the Routhans to take each of the steps they took when following expert advice, and to expect that that would fix their production issues. And as he emphasised, each change required significant time before showing results, and if a particular solution did not work then more time would be needed to try something else.

[303] Mr Garters (the independent trustee for the Routhans' family trust until 2019) said under cross-examination that the trustees trusted not only the accuracy of Mr Daly's representations but also the subsequent diagnoses and advice given by experts, and they believed that when those problems were solved they would see an improvement in production:

> Q. But it's an obvious thing to have done to ask [Mr Cook about the production figures]?

A. Well it wasn't that obvious. We believed that what we were buying was correctly represented. If we suspected that it was misrepresented then right then at the start it didn't come across our minds and if we believed it had been misrepresented right then we would have got into it and had a chat to possibly the Cooks.

Q. Surely by the end of the 2012/2013 season when it was clearly not achieving the production that you thought it should you'd be making some serious enquiries about various things including the integrity of the represented figure?

A. We were making enquiries from experts. As I said before one expert came up [and said it] was about the land, the grass and we had to move in and replace the grass. There were different things we were dealing with experts and asking their advice on things because they were the ones that we felt like you know, like the grass if we can get that grass back it'll be fine then the fertiliser there were questions about that but in terms of going to the [vendor] we didn't cross our minds until later on when the, we started to get a bit suspicious when it seemed to [be] very hard to get from Mr Cook the cow details about them.

[304] The same point was put to Mr Routhan in cross-examination:

Q. If the production was of such overwhelming importance to you, can I just ask you again, why you wouldn't have discussed that with Mr Cook and how he got to it?

A. No. Well, actually I will – and I think I have addressed in my brief, Mr Cook had a reputation, I'd have to say not a reputation I think's justified now, but he had a reputation at the time of being a fantastic dairy farmer, and I expected and in fact I respected him greatly then that he was a fantastic dairy farmer. I had asked Mr Daly to get me the production details. My first instruction to Mr Daly was to get them. Mr Daly told me he had got them. He gave me this proposal. He gave me another document. I think Mr Daly, I think about four or five times total, confirmed the production. I was not going to go and quiz Mr Cook with those details. I had them.

[305] Notably, none of the experienced farmers consulted at the time seem to have queried the truthfulness of the representation. Rather, they advised that the low production was attributable to various issues on the farm and prescribed remedies to achieve the expected production. It appears not even Mr Lord, who had been Mr Cook's farm manager, suggested that the figures must have been, or were likely, incorrect. Mr Bradley was asked a question which in itself is revealing:

You were there for two years over three different seasons. [I] can [understand] that Mr Routhan, a relatively inexperienced farmer might not appreciate the significance of the actual results under Mr Cook, but you were an experienced farmer. Why didn't you recommend that he ever obtain the actual results from Westland or even farm management details from Mr Cook?

Mr Bradley said he didn't think it was his place to question Mr Cook.

[306] None of the experts called after the fact could say clearly that the Routhans should have known the figures were wrong before the date of disclosure. Mr Glennie acknowledged investigation of the accuracy of the represented figures was something that, with hindsight, he would have investigated, but that is quite a different matter.

[307] Finally, as the Routhans' main lender, Rabobank had considerable exposure, information and involvement in this enterprise. It is also a specialist agricultural bank. It is therefore significant that it too did not raise the possibility that the past production figures were wrong or require the Routhans to confirm them directly with Mr Cook at any stage, even as the debt grew. The evidence rather shows that Rabobank believed, like the Routhans and their advisers, that the production shortfall was attributable to issues on the farm and that remedial steps would lead to an increase in production. The documentary evidence shows Rabobank was in regular conversations with the Routhans about the problems on the farm and its Christchurch branch manager regularly visited the farm in person. The documents disclose that Rabobank, despite growing concern about the farm's production, did not consider the past production figures might have been wrong (and in fact continued to rely on them in forecasting production) until the misrepresentation was discovered by the Routhans in late 2014. Rather, like the Routhans, the bank continued to be optimistic about the farm's prospects of reaching or even exceeding 100,000 kgMS provided ostensible issues with the cows and pasture were remedied promptly.

[308] I return now to the question as to whether the Routhans had established on the balance of probabilities that they continued reasonably to rely on Mr Daly's misstatement for as long as they allege they did—i.e., until the true production figures were revealed to them in late 2014. Viewed in prospect, every judicial instinct suggested a negative answer to that question was likely. That instinct is, however, confounded by the evidence just reviewed.

[309] That evidence suggests a number of prima facie credible hypotheses having been put forward by expert advisers, whom the Routhans diligently engaged and listened to, which took time to test and explore. When the proposed solutions failed,

time was lost and production worsened. Changes to production methods were implemented, but not unforeseeably. I do not consider the Routhans can be criticised for failing to pursue the misrepresentation when their many advisers and associated interests had not identified that likelihood and were pointing them in other directions.

[310] While enquiring about the production figures clearly would have been a reasonable thing to do, it does not follow that failing to do so was unreasonable. That they did not do so may have been attributable in part to their inexperience, but Mr Daly was aware of that and PGG Wrightson must take their victims as they find them. The Routhans clearly held Mr Cook's farming skills in the highest esteem. As noted earlier, it is evident they believed Messrs Cook and Daly, and took the information supposedly supplied by them at face value.

[311] This is, therefore, that unusual case where a genuine belief in the truth of information supplied was not in fact punctured by adverse trading conditions following settlement. At the end of the day, PGG Wrightson's argument here comes down to the unsatisfactory proposition that its lack of veracity should have been identified earlier. It wasn't, and a satisfactory explanation has been given. I repeat: PGG Wrightson must take the Routhans as they found them.

[312] The same analysis, in particular the responsible steps taken by the Routhans to obtain expert assistance, effectively excludes any effective argument that—as was pleaded—the Routhans were contributorily negligent in failing to ascertain the true position regarding pre-purchase production levels.[483] There are concurrent findings that the Routhans were not contributorily negligent in their management of the farm, which need not be revisited here.

Discussion: permissible heads of loss

[313] The function of compensatory damages in tort is to put the Routhans in the position they would have been in if the misstatement had not been made by PGG Wrightson. The evidence clearly suggests that position was this: (1) they would have been spared ownership of Mr Cook's farm, and (2) they would have bought

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[483] See above at [283].

another dairy farm instead. The trial Judge rejected the counterfactual dairying enterprise advanced by the Routhans as too speculative.[484] Be that as it may, the inevitability of the Routhans' acquisition of another dairy farm is why their initial claim for losses caused by declining milk prices was always a hopeless one. That risk could no more be attributed to PGG Wrightson than the loss of the mountaineer's luggage to the negligent doctor.[485]

[314] Fulfilment of transactional expectations is not tort's function. In *Harvey Corp Ltd v Barker*, the vendors and their agent both misrepresented that the entrance gates to a property were on the land being transferred, whereas in fact they lay on a paper road belonging to the local council.[486] The house was worth no less than the purchasers had paid, but the costs of relocating the gates and associated works totalled some $55,000. The vendors, who were sued in contract, were liable for the $55,000, as they were bound to make good the bargain. The agent, sued under the Fair Trading Act 1986, had no such obligation. Writing for the Court of Appeal, Blanchard J said:[487]

> The proper question in a claim against Harveys [the agent] under s 43 [of the Fair Trading Act] is whether the Barkers [the purchasers] are worse off as a result of the making of the representation – by changing their position in reliance on it – not whether they have been unable to realise a benefit because of the failure of the vendors to convey a property without the defect complained of.

The same is generally also true in tort.[488] In *Harvey* there was simply no impairment of value as a result of the misrepresentation.

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484 HC judgment, above n 473, at [193].

485 See above at [259]. The same was true of the misled lenders in the *SAAMCO* appeals: they were committed to lending in a volatile property market, and the only risk attributable to the valuers was the direct impairment of the lenders' security caused by the overstatement of value.

486 *Harvey Corp Ltd v Barker*, above n 406, at [14].

487 At [14].

488 As Blanchard J noted at [19]. See also *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA).

[315] The Court of Appeal contrasted the situation had the purchasers been able to prove, in each case in reliance on the misrepresentation, either:

(a) over-expenditure on purchase—either because they paid more than they could recoup on sale or because they could have persuaded the vendors to drop their price;[489]

(b) loss of an alternative bargain—that is, that the inducement to purchase the property in question deprived them of the opportunity to purchase an alternative property for below market value;[490] or

(c) subsequent wasted expenditure—e.g., redeveloping the entrance in the mistaken belief it was within the legal boundary.[491]

[316] Finally, tort damages in a case like the present one involve a degree of impression, rather than precision. The ultimate question is "whether the particular damage claimed is sufficiently linked to the breach … to merit recovery in all the circumstances".[492] As Tipping J said in *Chase v de Groot*: "Assessment of damages is essentially a question of fact. Any rules or principles constitute guidance only. The object is to be fair to both sides."[493] And as Richardson J said for the Court in *Newmans Coach Lines Ltd v Robertshawe*:[494]

> It is a matter of determining a fair figure which will in a broad and general way and after allowing for contingencies provide reasonable compensation to the particular plaintiff for the particular loss he has suffered …

Overpayment for Farm 258

[317] I concur with the reasoning of Glazebrook and Miller JJ, calculating damages under this head at $480,500.[495]

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489 At [14] and [18].

490 At [17]. The Court said that "in order to show loss, they would … have had to show that they would have obtained that other property below its market value, for otherwise their purchase of the [current] property at (slightly below) market value would not have left them worse off".

491 At [14].

492 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41 per Cooke P.

493 *Chase v de Groot* [1994] 1 NZLR 613 (HC) at 627.

494 *Newmans Coach Lines Ltd v Robertshawe* [1984] 1 NZLR 53 (CA) at 57.

495 See above at [178]–[184].

[318] At trial, the Judge had awarded damages for lost equity from the forced sale of the farm in 2020.[496] In *Downs v Chappell*, Hobhouse LJ (with whom Roch and Butler-Sloss LJJ agreed) said that where an item purchased as the result of a misrepresentation could have been sold immediately after purchase for the price paid for it, but by the time the misrepresentation was discovered its value had fallen for some reason associated with the misrepresentation, the appropriate measure of damages could be the difference between the purchase price and the value at the time of discovery of the misrepresentation (rather than the difference between purchase price and value at the time of purchase).[497] The same approach was taken in this country in *McElroy Milne v Commercial Electronics Ltd*.[498]

[319] In *Downs v Chappell*, the Court of Appeal of England and Wales also found that the plaintiffs could have sold their shop shortly after discovering its profitability had been misrepresented, but chose not to, later selling at a significantly lower price:[499]

> Even accepting that they acted reasonably, the fact remains that it was their choice, freely made, and they cannot hold the defendants responsible if the choice has turned out to have been commercially unwise. They were no longer acting under the influence of the defendants' representations. The causative effect of the defendants' faults was exhausted; the plaintiffs' right to claim damages from them in respect of those faults had likewise crystallised. It is a matter of causation.

[320] Likewise in this case, the delays in selling the property following discovery of the true past production figures were attributable to the Routhans, not PGG. It follows that on the *Downs v Chappell* approach, damages for lost equity would be calculated as the difference between the price paid by the Routhans in 2010 and the value of the farm in 2015–2016, when they had the true production figures and could have sold, rather than by reference to the sale price of the farm in 2020, when they were forced to sell. Various valuations as at 2015–2016 were entered into evidence, ranging from $2.24 million to $3.15 million. Rabobank thought the higher valuations were unrealistic but considered something in the range of $2.24 million to $2.7 million was reasonable.

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496 HC judgment, above n 473, at [195]–[196].
497 *Downs v Chappell*, above n 406, at 441 citing *Naughton v O'Callaghan* [1990] 3 All ER 191 (QB).
498 *McElroy Milne v Commercial Electronics Ltd*, above n 492, at 44 per Cooke P and 52 per McKay J.
499 *Downs v Chappell*, above n 406, at 437.

[321] That aligns with Mr Hancock's time-of-breach October 2010 valuation of $2.32 million (with the Westland Milk shares included). The $480,500 overpayment figure is therefore within the range of damages that would be awarded on the *Downs v Chappell* (or *McElroy Milne*) approach as the difference between the price paid and the value after the misrepresentation was discovered (being a range of $100,000–$560,000 based on the more realistic valuations).

Revenue losses

[322] I concur with Glazebrook and Miller JJ that revenue losses were sufficiently pleaded.[500] I also concur in the conclusion that none of the revenue losses are recoverable from PGG Wrightson.[501] I reach that view for two reasons.

[323] First, allowing such losses would award an expectation measure of loss that is not available in tort against the agent, although it might have been available in contract against the vendor.[502] As we have seen, the question in tort is whether this loss derives from the Routhans' reliance on Mr Daly's representation.[503] It is not apparent to me how the lost expectation as to production levels fits that criterion at all.

[324] Secondly, it involves a measure of double-counting. The first head of damages for overpayment, $480,500, restores the Routhans to a position as if they had instead paid the market price for a farm capable of an average efficient production of 84,000 kgMS per season—that being Mr Hancock's valuation methodology. In fact, the average production level for the four seasons 2010/11 to 2013/14—immediately prior to discovery of the misstatement—was close to that figure, at 83,206 kgMS per season.[504] But the more important point is this: the $480,500 capital damages sum, based on a lesser sustainable efficient production level, is itself a proxy for (or

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500 See above at [194]–[203].

501 See above at [204]–[207] per Glazebrook and Miller JJ.

502 We do not of course know why the vendor or Mr Cook were not sued by the Routhans. They, after all, were the primary beneficiaries of the Routhans' overpayment. It did not necessarily follow that Mr Daly's lack of agency authority at the time of the first two of the three representations he made as to production levels excused the principal of responsibility based on apparent authority, particularly when the agency agreement was then backdated to precede all three of them: see above at [41] and [45] per Glazebrook and Miller JJ. See generally *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA); and *ING Re (UK) Ltd v R&V Versicherung AG* [2006] EWHC 1544 (Comm), [2006] 2 All ER (Comm) 870.

503 See above at [262] and [279].

504 See CA judgment, above n 475, at [5].

capitalisation of) the difference in production levels.[505] It is unnecessary to then also award damages for revenue losses when that loss is effectively recouped by the first head. The Routhans were entitled to one or the other—and, in tort, only the first from the agent—but not both.

[325] An analogy, while imperfect, may help cement the point: if a stockbroker misstates the dividend history of a parcel of unlisted shares, and the client who acquires them sues the broker in tort for negligence, damages will be difference in the value of the shares, calculated at the time when the error is apprehended (and the shares are re-sold).[506] But the client is not entitled to also claim the expected additional dividends foregone. That amount is simply reflected in the share value. To award both amounts double-counts and is not fair to both sides, to use Tipping J's expression.[507]

Avoidable (wasted) expenditure

[326] I concur with the primary reasons' treatment of this head of loss.[508] It is reliance-based and consequential on the misstatement. I agree with the sums allowed for additional fertiliser and re-pasturing.

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505 The estimated annual shortfall of 19,000 kgMS multiplied by the milk price at the time of purchase ($6.45/kgMS) equates almost exactly to the $480,500 sum when extrapolated across the four years between purchase of the farm and discovery of the misrepresentation.

506 Assuming there was a loss rather than a gain. See above at [318] discussing *Downs v Chappell*, above n 406.

507 See above at [316].

508 See above at [208]–[228] per Glazebrook and Miller JJ.

WINKELMANN CJ AND ELLEN FRANCE J
(Given by Winkelmann CJ)

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Introduction

[327] This appeal and cross-appeal concern the correct measure of loss to be awarded in a negligent misstatement and Fair Trading Act 1986 case.[509] At the level of principle, the issue is whether and how the principles set out in the House of Lords decision *South Australia Asset Management Corp v York Montague Ltd* (*SAAMCO*), as clarified and refined in later English cases, apply in New Zealand.[510]

[328] We agree with Glazebrook and Miller JJ that, in cases of negligence, a focus upon the scope of the duty assumed or to be imposed of the type described by Lord Hoffmann in *SAAMCO* is orthodox in New Zealand law.[511] The exact scope of the duty of care is critical to determining not just whether the duty has been breached, but also the kinds of loss for which the plaintiff is entitled to compensation. It is critical also in determining issues of causation — factual and legal causation, and

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509 *Routhan v PGG Wrightson Real Estate Ltd* [2021] NZHC 3585, (2021) 16 TCLR 274 (Dunningham J) [HC judgment] at [117] and [196]; and *PGG Wrightson Real Estate Ltd v Routhan* [2023] NZCA 123, (2023) 24 NZCPR 97 (Gilbert, Mallon and Wylie JJ) [CA judgment].

510 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) [*SAAMCO*]; *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599; *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783 [*MBS v Grant Thornton*]; and *Meadows v Khan* [2021] UKSC 21, [2022] AC 852.

511 Above at [139].

contributory negligence.[512] The scope of duty is therefore an inevitable part of the inquiry for the court. It must not be overlooked, however, that the questions of duty (both scope and breach), causation and remoteness "run continually into one another".[513] As Cooke P said in *McElroy Milne v Commercial Electronics Ltd*:[514]

> … the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

[329] We are further of the view that a rigid distinction between "information" and "advice" cases does not form part of New Zealand law. As Lord Sumption SCJ observed in *Hughes-Holland v BPE Solicitors*, "information" and "advice" are descriptively inadequate labels for the types of information that are conveyed, typically in professional relationships, and relied upon.[515] Nevertheless, analysis of the nature of the information gathering and providing task entailed in the role the defendant agrees to perform will be of high, usually decisive, significance in determining the scope of the duty — as it is in this case. The notion of a spectrum, ranging from the passing on of information through to the provision of advice, seems to us helpful in that analysis.[516]

[330] Glazebrook and Miller JJ also discuss what has come to be referred to as the *SAAMCO* cap or *SAAMCO* counterfactual, in which the court asks whether the plaintiff would have suffered the same loss if the information had been true. In *SAAMCO* the issue was whether valuers, who had each negligently overvalued a property for a lender, were liable not only for loss directly attributable to the overvaluation, but also for loss attributable to a fall in the market — the latter on the basis that the lender would not have lent on the true valuation (a "no transaction" case).[517] The counterfactual addressed in that case was the loss the lenders would have suffered in the transactions if the valuations had been accurate.

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512 We agree with Glazebrook and Miller JJ's discussion of the relationship between these elements, noting that relevant considerations may be analysed with reference to scope of the duty, to causal nexus between wrong and loss, and to remoteness of damage: above at [149] citing *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 682–683 per Richardson P, Gault, Henry and Blanchard JJ.

513 *Lamb v Camden London Borough Council* [1981] QB 625 (CA) at 634 per Lord Denning MR.

514 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41.

515 *Hughes-Holland v BPE Solicitors*, above n 510, at [39]–[44].

516 At [44].

517 *SAAMCO*, above n 510, at 210.

[331] In our view the *SAAMCO* cap is also a useful analytical framework. As has been explained in *Hughes-Holland* and *Manchester Building Society v Grant Thornton UK LLP*, the cap is a tool for giving effect to the distinction between loss flowing from the fact that as a result of the defendant's negligence the information was wrong (loss falling within the scope of the duty) and loss flowing from the decision to enter into the transaction at all (a "but-for" measure).[518] It thereby assists in identifying whether factually caused loss is within the scope of the duty of care.[519]

[332] We note, as Glazebrook and Miller JJ acknowledge, Lord Hoffmann himself rejected the notion of a cap, saying that he did not wish to exclude the possibility that other loss may flow from a valuation being wrong.[520] As Lord Burrows SCJ observed in *Manchester Building Society*, whilst the cap or counterfactual can operate as a useful analytical tool or cross-check it does not replace the decision that needs to be made as to the scope of the duty of care.[521] Importantly, where the scope of the duty of care is broad — such as in the case of an adviser who advises on the decision to enter into a complex transaction — the counterfactual is unlikely to provide a useful or reliable analytical tool.

[333] The Routhans' appeal and the PGG Wrightson Real Estate Ltd (PGG) cross-appeal concern the application of these principles to this case.[522] In this area we take a different view from that of Glazebrook, Kós and Miller JJ. We disagree as to the scope of duty as formulated by Glazebrook and Miller JJ on the facts of this case.[523] We also disagree with Glazebrook, Kós and Miller JJ as to the losses that are properly attributable to the breach of duty.

[334] As necessary context for this discussion we first provide a brief sketch of the relevant facts as we see them, and the decisions in the lower courts before outlining and addressing the arguments and issues arising on the appeal and cross-appeal.

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518 *Hughes-Holland v BPE Solicitors*, above n 510, at [45]–[46]; and as discussed in *MBS v Grant Thornton*, above n 510, at [23]–[27] per Lord Hodge DP and Lord Sales SCJ.

519 *Hughes-Holland v BPE Solicitors*, above n 510, at [46]; and *MBS v Grant Thornton*, above n 510, at [210] per Lord Burrows SCJ.

520 *SAAMCO*, above n 510, at 219–220. See above n 144.

521 *MBS v Grant Thornton*, above n 510, at [196]–[203].

522 The plaintiff is the Routhans' family trust — we adopt Glazebrook and Miller JJ's approach of referring to the Routhans, who are trustees of that trust, as if they are the plaintiffs.

523 See below n 555.

Background to this appeal

[335] The losses claimed by the Routhans are losses connected with the purchase of a farm, together with losses associated with the operation of their farming business, largely on that farm, between 2010 and 2020.

[336] The Routhans purchased farming land (together with the house and farm buildings on the land), Farm 258, from the vendor Cooks Stud Farms Ltd (Cooks Farms). They did so in reliance on a negligent misstatement as to its history of producing milk solids, a representation made by a PGG real estate agent, Mr Daly.[524]

[337] Mr Daly had been assisting the Routhans with locating and buying an appropriate block of farm land. It was in that context that Mr Daly agreed to approach the sole director of Cooks Farms, Mr Cook, confirm with him the price at which he would sell that farm, and check with him whether the farm's average annual production over the last three seasons had remained stable at an average of 103,000 kg of milk solids (kgMS). It is now not at issue that Mr Cook did not give the latter confirmation. In the High Court, the finding was that Mr Daly mistakenly believed he had.[525] Accordingly, after the meeting, Mr Daly represented to the Routhans that production remained stable at that level — a representation understood to have been passed on from Mr Cook. After completion of the latest year of milk production, the rolling three-season average for Farm 258 was in fact 98,729 kgMS. The representation that the rolling three-season average remained stable at 103,000 kgMS was then repeated by Mr Daly in a proposal he prepared for the Routhans to present to their bank (the PGG proposal) and later in the particulars of sale in the agreement for sale and purchase for the land. As a consequence the Routhans proceeded with their purchase on the basis of an incorrect understanding as to an aspect of Farm 258's production history.

[338] Following the purchase of Farm 258 the Routhans struggled to achieve anything like productivity of 103,000 kgMS, although they invested heavily to increase production over several years. At the same time, the conditions for the

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524 HC judgment, above n 509, at [108].
525 At [32] and [128]–[130].

business deteriorated. The market for milk solids entered a prolonged slump, and the value of farm properties (including Farm 258 and the Routhans' pre-existing run-off, which they used in the farming operation) collapsed.

[339] In late 2014 the Routhans learned that the rolling three-season average for production of milk solids had not remained stable as had been represented to them. Instead, when the latest year of production was accounted for, average annual milk solid production had fallen sufficiently to indicate instability in the level of production.

[340] Notwithstanding their discovery of the misrepresentation, the Routhans persisted with the business until ultimately, with the business failing, the Routhans were forced to sell both the run-off and Farm 258. Both properties sold in 2020.

High Court judgment

[341] Having found that Mr Cook had not confirmed to Mr Daly that production remained stable at an average annual production of 103,000 kgMS, the High Court Judge found that Mr Daly's statement to Mr Routhan as to productivity was a negligent misstatement, and was also misleading and deceptive conduct for the purposes of the Fair Trading Act.[526] However she dismissed the Routhans' claim against PGG for deceit arising from the same conduct.[527] Each of these findings as to liability were confirmed on appeal by the Court of Appeal and are not the subject of challenge before us.[528]

[342] The High Court Judge rejected an argument that a disclaimer PGG relied upon (which stated that PGG was not responsible for the accuracy and completeness of information provided) protected PGG from liability for this misstatement.[529] She found that the disclaimer would only operate in that way where Mr Daly was simply passing on information and with no reason to doubt its accuracy.[530] This was

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526 At [116]–[117] and [139].
527 At [128]–[130].
528 CA judgment, above n 509, at [87] and [99]; and *Routhan v PGG Wrightson Real Estate Ltd* [2023] NZSC 127 (Glazebrook, O'Regan and Kós JJ).
529 HC judgment, above n 509, at [115]. See discussion below at [359] and [364]–[367].
530 At [115].

not the case in respect of the 103,000 kgMS figure. The Court of Appeal confirmed this finding.[531]

[343] The High Court Judge found that had the misstatement not been made, and had the Routhans been told the correct information, they would not have purchased the property but instead would have purchased another farm.[532] Again this finding was confirmed by the Court of Appeal and is not challenged before us.[533]

[344] In the High Court the Routhans sought compensatory damages to put them in the position they would have been in had the breach not occurred.[534] They claimed $3,184,000 in damages made up as follows:[535]

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

(b) the loss of $680,000 invested in capital developments on Farm 258 to lift its production; and

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

For the purposes of calculation (c) they identified a particular property that had been on the market at the relevant time, in the same region.[536] They calculated their financial position if they had bought this other property. If they had done so they would have been able to sell the run-off property, reducing bank debt and therefore saving on interest.

[345] The High Court Judge rejected the "alternative farm" aspect of the claim.[537] She found that the suggestion the Routhans would have, but for the representations,

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531 CA judgment, above n 509, at [88].
532 HC judgment, above n 509, at [192].
533 CA judgment, above n 509, at [106].
534 HC judgment, above n 509, at [143].
535 At [189].
536 At [144]. The Routhans proposed the alternative of 212 Municipal Road.
537 At [193].

saved $1,062,000 in interest was simply too speculative to be taken into account.[538] Instead she allowed recovery of the loss on resale of the two properties, and of money expended to upgrade the pasture and farm facilities — items (a) and (b).[539] She accepted that PGG's breach of duty was a material and substantial cause of these losses in that they would not have been suffered had the Routhans not gone ahead with the farm purchase.[540] She then reduced the award by 20 per cent reflecting the Trust's contribution to its own losses, finding there was some merit to the criticism that they unreasonably undertook some of the capital expenditure.[541] She awarded the Routhans $1,697,600 in damages.[542]

[346] PGG had contended that the calculation of loss should be based solely on the difference in value of the farm as represented as against the value of the farm with the true rolling three-season average — they calculated this at only $50,000.[543]

[347] PGG appealed the findings of liability and quantum to the Court of Appeal.[544] The Routhans cross-appealed, pursuing a finding of deceit and challenging the finding of contributory negligence.[545] However they did not appeal the Judge's assessment of damages payable.[546]

Court of Appeal judgment

[348] The Court of Appeal allowed PGG's appeal in respect of quantum, dismissing all other grounds of appeal and the cross-appeal.[547] It found that PGG had assumed responsibility to supply accurate information in respect of the purchase of Farm 258, but had not assumed responsibility in connection with advising the Routhans on whether to enter into the agreement.[548] PGG was therefore responsible only for the consequences of having supplied the incorrect information for that purchase.[549]

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538 At [195].
539 At [196].
540 At [190].
541 At [228]–[229].
542 At [230].
543 At [8] and [164].
544 CA judgment, above n 509, at [20].
545 At [22]–[23].
546 At [24].
547 At [153]–[155].
548 At [115]–[116].
549 At [115]–[127].

The Court of Appeal accepted the High Court's finding that the Routhans would not have purchased Farm 258 but for the misrepresentation.[550] Nevertheless the Court of Appeal found PGG to be responsible only for the overpayment for Farm 258. It disallowed claims for the other downstream consequences for the Routhans of trading over the next 10 years, and for the additional losses on the run-off and Farm 258 on the forced sale.[551] The Court said that these losses fell outside of the scope of duty and were losses that PGG could not have reasonably foreseen.

[349] Even then, the Court considered that the entirety of any overpayment for the land was not attributable to the erroneous information supplied by PGG.[552] There were other failures, for which PGG was not responsible, but which contributed to the overpayment. These included the Routhans' failure to enquire about the farm's average efficient production level or how the vendor had achieved the historically high production levels he did in fact achieve. The Court therefore reduced the overpayment amount from $480,500 to $300,000.[553]

Appeal and cross-appeal in this Court

[350] Before this Court, the Routhans challenge the Court of Appeal's finding as to the quantum of loss recoverable. They seek to retain the level of award in the High Court, but present different arguments to those presented in the High Court and Court of Appeal to justify that award.[554]

[351] PGG cross-appeals, claiming the Court of Appeal's award based on an overpayment of $480,500 was flawed. PGG says the correct way to assess any difference in value of the property arising from the misrepresentation is to identify the gap in value between the farm's value with the represented average production, and its value based on the actual historical three-season rolling average production.

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550 At [106].
551 At [116]–[118].
552 At [144].
553 At [143]–[148].
554 See above at [102] and [177] per Glazebrook and Miller JJ. We doubt that given the pleading, evidence produced, High Court findings and nature of the matters appealed to the Court of Appeal, the Routhans should have been able to reformulate the basis of their damages claim to the extent they did in this Court. We also note that those reformulated damages claims seek to recover what are in substance expectation losses — an approach to calculation the Routhans disclaimed in the High Court: HC judgment, above n 509, at [145].

It relies on the evidence of one of its experts, Mr Hines, who quantifies the difference in value at $50,000.

Second ground of appeal: conduct of the business

[352] It is most convenient to address the second aspect of the appeal first — that is the part of the appeal which relates to losses flowing from the conduct of the business.

The scope of duty

[353] We differ from Glazebrook and Miller JJ as to how the scope of duty should be formulated.[555] It is necessary to set out some detail in respect of the dealings between the Routhans and Mr Daly to explain our reasons for this.

[354] When, in late 2009, Mr Daly began assisting the Routhans with their search for a dairy farm in the Kokatahi/Kowhitirangi Valley, the Routhans already owned land — the run-off block — in the area.

[355] An early offer to purchase a different dairy farm as a going concern with the herd was unsuccessful because, it seems, of the intervention of another real estate agent from another real estate agency, CRT Real Estate Ltd (CRT). Nevertheless, CRT helpfully provided Mr Routhan with brochures for other dairy farms for sale in the area. The Routhans were interested in two of these, a farm named Casa Finca and Farm 258, the latter being Mr Cook's property. The Routhans gave the brochure for Farm 258 (CRT brochure) to Mr Daly.

[356] The brochure for Farm 258 had basic information as to the method of farming Mr Cook had employed on the farm. It stated that the farm had produced an average of 103,000 kgMS for the last three seasons from approximately 260 cows on a grass-based system with half the herd wintered off each year. The brochure also

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555 We acknowledge that Kós J rejects the scope of duty principle because he considers that the extent of assumed risk, if it is relevant, is most useful as a backward-looking cross-check located within, or following, causation and remoteness analysis in the negligence framework. It seems to us that this methodological distinction makes no material difference to Kós J's analysis as he reaches the same outcome as Glazebrook and Miller JJ. We therefore refer to the scope of duty formulated by Glazebrook and Miller JJ in the following analysis, but note that the points made apply equally to Kós J's reasons.

represented that fertiliser had been applied "[a]s per recommendation", and attached a recommended fertiliser plan, prepared by Ravensdown Ltd. The brochure was prepared before the end of the 2009/2010 dairy season so that the statement related to the 2006/07, 2007/08 and 2008/09 seasons.

[357] Mr Routhan asked, and Mr Daly agreed, to check the price and production levels for both of the two farms, Farm 258 and Casa Finca. (It is of some significance that until shortly after the agreement for sale and purchase of Farm 258 became unconditional, the proposal the Routhans were contemplating was to purchase both Farm 258 and Casa Finca, to farm together with the run-off block.) In respect of Farm 258 this task relevantly required Mr Daly to obtain confirmation from Mr Cook as to whether the statement in the CRT brochure about average production remained true, following completion of the 2009/2010 season.

[358] Mr Daly wrongly confirmed to the Routhans that the rolling three-season production average for Farm 258 remained unchanged. Mr Routhan then asked Mr Daly to prepare a proposal document for the bank for both Farm 258 and Casa Finca (PGG proposal). In completing this proposal, Mr Daly copied over material from the CRT brochure about the farming method Mr Cook had used on Farm 258. However, he updated it to add the following additional information:

(a) In a section entitled "supplements" he included the statement "[a]pprox half herd wintered off and 115 bales baleage made on".

(b) He updated the fertiliser representation contained in the CRT brochure to the most recent farming year, confirming that the farm "follows recommended programme" for fertiliser and that the Ravensdown recommended fertiliser plan for 2009/2010 season, the one attached to the CRT brochure, had been followed.

[359] The PGG proposal contained the following disclaimer:

> Please note: PGG Wrightson Real Estate Limited is acting solely as the selling agent for the vendor, and is not responsible for the accuracy and completeness of information supplied by the vendor either directly or via PGG Wrightson Real Estate Limited, whether contained in an information memorandum or

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

[360] On 19 October 2010 an agreement for sale and purchase of Farm 258 was signed. While it was in the form of an agreement for the sale and purchase of land there can be no doubt that Mr Daly knew the land in question was farm land, which Mr Cook had farmed, and which the Routhans intended to farm.

[361] In the High Court, counsel argued that there were a number of factual errors in the material included in the proposal Mr Daly completed for the bank which, while not pleaded as misleading conduct for which Mr Daly was responsible, provided necessary context for the misrepresentation as to the rolling three-season average.[556] It was argued that contrary to the CRT brochure and the PGG proposal, Farm 258 had not been run as a standalone farm but rather as part of Mr Cook's broader farming operation.[557] It was also argued that, contrary to these documents, the stocking rate was lower than the 260 cows represented, more than half the herd had in fact been wintered off, more dry feed was used than represented, and more nitrogen was used than recommended by the Ravensdown plan.[558] The High Court Judge accepted that although not pleaded, these were misleading statements forming the context in which the misleading statement as to production levels was given and so could not be ignored.[559]

[362] Before us, these additional misrepresentations were argued to be of importance in informing the scope of duty. It is on this basis that the Routhans formulate the duty assumed by Mr Daly such as to encompass responsibility for the misrepresentations as to farming method. They argue that Mr Daly knew that Farm 258 was being sold for the conduct of a farming business — it was after all a farm and the agreement for sale and purchase provided for the payment of goods and services tax by the purchaser.

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556 HC judgment, above n 509, at [132].
557 At [132(a)].
558 At [132(b)–(e)].
559 At [140].

Mr Daly also knew that representations had been made as to how the business on the farm had been conducted in the past. Mr Kalderimis puts the matter as follows: the representations as to farming method, combined with the representation as to milk production, conveyed that Farm 258 produced superlative returns from a low input system that the Routhans could replicate. The risk that Mr Daly assumed must reflect the risk that this was not so. It is argued that disclosing the declining average would have sparked a chain of enquiry about what was causing it, revealing other contextual misrepresentations about the farming system underpinning the production.[560]

[363] This formulation of the duty, which imposes on Mr Daly responsibility for risk associated with a represented farming method, is not supported by the pleading. The pleading limits the alleged misleading conduct and misrepresentation to the representation that the rolling three-season average remained stable at 103,000 kgMS.

[364] Following the hearing of the appeal, Mr Taylor KC filed a memorandum for PGG noting that in this Court these additional allegations of misrepresentation gained a focus they did not have in the Courts below, because they are now used to justify various claims associated with future trading. He argues that this shift in case is unfair because a defendant is entitled to know the case against it and should not be placed in the position of having to defend material changes in the nature of the claim and the calculation of damages before a final appeal court. He makes the point that had the argument been made this way in the High Court, PGG would have argued that the disclaimer in the PGG proposal applied so as to exclude liability in respect of these other non-negligent representations in the PGG proposal, which were simply conveying information provided and confirmed by Mr Cook.

[365] Mr Taylor's points are well made. It seems to us there is unfairness in this aspect of how the Routhans' case has evolved. There are also strong arguments that the disclaimer does indeed apply to prevent liability attaching to PGG based on these other unpleaded misrepresentations, because they were not misrepresentations attributable to PGG. The High Court analysed the disclaimer as follows:[561]

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560 See at [175].
561 At [115].

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

[366] The Court of Appeal affirmed the High Court on this point.[562] Neither Court was required to address whether these unpleaded misrepresentations might fall within the scope of the disclaimer. It seems to us it is arguable that the unpleaded misrepresentations were information obtained from Mr Cook and passed through Mr Daly to the Routhans, and so would fall within the intended scope of the disclaimer.

[367] We cannot express a final view on this because we have not heard full argument on it. This situation has arisen because of the shifts in the Routhans' case. We consider however that this is an obstacle to majority's approach to the appeal. This is because the scope of the duty defined by Glazebrook and Miller JJ reflects Mr Kalderimis's submissions, linking the misrepresentation as to average production to the misrepresentation as to farming method.[563] Glazebrook and Miller JJ conclude it was critical context that Mr Daly knew that the Routhans would be operating a farming business which incorporated Farm 258, and also critical that it had been represented that the 103,000 kgMS had been produced using the farming system represented in the CRT brochure, information largely confirmed in the PGG proposal. It is in that context that Glazebrook and Miller JJ find that the scope of the duty should be defined by reference to the risk against which the Routhans were seeking to protect themselves — that Farm 258 would not continue to produce at an average of 103,000 kgMS under the same grass-based system as Mr Cook had supposedly used. And it is on this basis that Glazebrook and Miller JJ find that the scope of PGG's duty extends not only to the price paid for Farm 258 but also to the capacity to produce a

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562 CA judgment, above n 509, at [88].

563 Above at [172]. See also above n 555.

rolling average of 103,000 kgMS under the farming system described in the CRT brochure.[564]

[368] We consider that the scope of the duty Mr Daly assumed, or is reasonably to be taken to have assumed, is of a considerably narrower scope, connected only to risk associated with the price to be paid for Farm 258. Mr Daly's engagement with the Routhans in respect of Farm 258 was only in respect of the proposed purchase of the farm land. Although he was not paid by them, and although he was ultimately Cooks Farms' agent on the sale and purchase of the land in question, he did assume responsibility to perform certain tasks for the Routhans. But these tasks were focused on the purchase of farming land to be used in a larger farming business. The agreement for sale and purchase was for land, not an agreement for sale and purchase of the business. The fact that the sale and purchase of farm land is agreed between the parties to attract liability for goods and services tax (at a zero rate) cannot alter what was bought and sold.

[369] While Mr Daly assisted with the purchase, as the Court of Appeal observed, he did not advise the Routhans in connection with their decision to purchase.[565] The historical productivity information he provided was relevant to the decision to enter into the agreement for sale and purchase, but so were other matters — including the figures in each individual year (we note that averaging figures can conceal a lot), information as to how that production was obtained, the price, how the price was to be funded by the purchaser (their level of borrowing for example), and the purchaser's ability to farm that particular farm. It is significant that Mr Daly knew the Routhans had an expert to run the numbers on the proposed business. It was Mr Bishop, a farming financial consultant, who was engaged by the Routhans to create a financial model for a business encompassing Farm 258, Casa Finca and the run-off property.

[370] It is also relevant that to Mr Daly's knowledge, the Routhans were entering into the purchase on the basis that they would farm the land alongside two other blocks of land — their own run-off block, and the other farm they were intending to purchase, Casa Finca. This was a relatively complex farming proposition, compared to simply

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564 Above at [208].
565 CA judgment, above n 509, at [116].

farming Farm 258 alongside the run-off block. It required an expert to run the numbers. Mr Bishop's evidence was that in creating the financial model that was presented to the bank by the Routhans, he relied on district information, rather than the information confirmed by Mr Daly.[566]

[371] It is true that Mr Daly was asked to, and did, complete a proposal document in knowledge that it was to be passed to the bank, but the only information included in that document he assumed responsibility to verify was the average production information. Mr Routhan did not ask Mr Daly to check the representations Mr Cook had made as to how he had farmed Farm 258 to achieve the production.

[372] There was, as noted above, additional inaccuracy added through the proposal document completed by Mr Daly. In the High Court the Judge accepted that any additional information as to the farming method was obtained by Mr Daly from Mr Cook.[567] There is no suggestion therefore that Mr Daly was in any way responsible for that information or for any inaccuracy in it, or that at any time he had assumed responsibility for its accuracy. This no doubt explains the absence of any allegation in the pleading that Mr Daly was responsible for misstatements as to the farming model utilised by Mr Cook.

[373] The treatment of those other misstatements in formulating the duty is the critical point of difference between us and Glazebrook and Miller JJ. On our view, the existence and effect of these misstatements about how the business was run tend to make our point that Mr Daly did not assume, and cannot be taken to have assumed, risk in connection with the business. As Mr Taylor submitted, these other misstatements were independently operating causes of loss, for which Mr Daly should not (indeed cannot, in the absence of pleading) be held responsible. The duty as argued for by Mr Kalderimis, and as formulated by Glazebrook and Miller JJ, in substance and form, imposes upon Mr Daly a duty to protect the Routhans from the risk that other misrepresentations have been made that bear upon the purchase, even though he

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566 That information was the subject of criticism in cross-examination, as it in fact provided a higher average production figure than 103,000 kgMS. That was due to the fact that Mr Bishop included all land, not just productive land, in his calculations.

567 HC judgment, above n 509, at [18] and [115].

had not assumed responsibility for the accuracy of those statements, nor even had good reason to doubt their accuracy.

[374] There are obvious parallels with Lord Hoffmann's parable of the mountaineer with the misdiagnosed knee, in *SAAMCO*, or with holding negligent valuers liable for post-purchase falls in the property market.[568] Mr Daly's misrepresentation is said to have been a missed opportunity for the other misrepresentations to be discovered. Lord Hoffmann's parable of course was intended to establish why it is wrong that such loss be recoverable.

[375] It is moreover hard to see why it should be PGG who assumes this risk rather than the Routhans. The Routhans after all had the means to check how Farm 258 had been farmed, simply by asking Mr Cook questions in connection with that, for example when driving over the farm with him. Mr Daly was not asked to make those inquiries and nor could he have understood he should have done so.

[376] Glazebrook and Miller JJ's formulation of the duty also imposes on Mr Daly the risk of any deviation in future production from a steady state of 103,000 kgMS using the represented farming method. However Mr Daly was not asked to, and did not, advise on future productivity or farming methods. There is no suggestion that Mr Daly was asked or offered advice on the likelihood of future production, or that he would have understood that the Routhans would reasonably rely upon him for that. He was not asked to inspect Farm 258 on behalf of the Routhans. He was not asked to inspect the pasture. When the Routhans visited Farm 258 to look at the farming operation, they did that with Mr Cook, leaving Mr Daly waiting elsewhere on the property. In short, Mr Daly was no more than the real estate agent assisting with the purchase of Farm 258. As noted earlier, it must be accepted that the property he assisted with the purchase of was a farm. But Mr Daly was not engaged by the Routhans to enable them to assess or manage risk associated with the prospective farming business, and is not therefore responsible for their decisions to proceed with the business, how to conduct the business, or the consequences of those steps.

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568 *SAAMCO*, above n 510, at 213.

[377] In short, risks associated with the ongoing farming of Farm 258 (whether alone, or in accordance with the plan at the time to farm three blocks of land) cannot reasonably be amongst those Mr Daly assumed when he agreed to check on the rolling three-season average for productivity.

Causation

[378] This takes us to the issue of causation. The causation issues that arise are inevitably closely linked, and overlap with the scope of duty analysis set out above. Losses recoverable for the breach are limited by the scope of the duty Mr Daly assumed — in this case, as the Court of Appeal found, these relate to the purchase of the property and not the operation of the farm.[569] This is an answer to this aspect of the appeal — given the scope of that duty, the Routhans could not reasonably rely upon the representation as to average production as a basis for the business decisions they made in connection with the farm and, it follows, to recover post-purchase losses.

[379] There are also however a number of additional difficulties for the Routhans as to causation in relation to post-purchase losses. The relevant question when assessing causation in negligence is whether there is a "material and substantial" causal link between the breach of duty and the damage.[570] For the purposes of the Fair Trading Act, the focus is 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.[571] In this case that link or nexus is missing with respect to post-purchase losses. In agreement with the Court of Appeal, we consider that all that the proven allegation did was create an opportunity for the losses that flowed — losses materially and substantially caused by misrepresentations for which PGG is not responsible, and by the Routhans' own decisions in connection with the purchase, and farming of the land.[572] We say this for the following four reasons, each of them closely related to scope of duty.

[380] First, on the Routhans' own account, the primary and substantial cause of their loss was the misrepresentation as to the farming method used to achieve high

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569 CA judgment, above n 509, at [144].
570 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28].
571 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [29] citing *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 401 per Richardson J.
572 CA judgment, above n 509, at [126].

production levels. As Mr Taylor submits, all that buying a farm on the basis of an average production of 103,000 kgMS tells you is that the farm is capable of producing that level of milk solids. Mr Lewis, the Routhans' expert witness, likewise said that production figures are just a start — behind them lies the farming inputs and farming policy utilised to achieve that production, including the type and number of stock, the state and extent of the pasture, inputs into the pasture, and the availability of other feeding sites away from the milking platform to enable the pasture to rejuvenate.

[381] Here the Routhans went into the transaction on the basis of a misunderstanding, not created by PGG, as to the inputs into those production figures. As noted above, in terms of causation, PGG's misrepresentation simply provided the opportunity for the occurrence of their loss — in the sense that it created a missed opportunity to detect these other, causally potent misrepresentations.[573] To employ the *SAAMCO* counterfactual, if the representations as to productivity had been true it is likely that some trading losses associated with Farm 258 would still have been suffered because they were actually caused by the fact that the production to that point had been achieved by a different means to that represented in the CRT brochure. In fact the volatility in production figures was already apparent in the three seasons that produced the 103,000 kgMS average represented in the CRT brochure (2006/2007, 2007/2008 and 2008/2009). These three seasons had figures of 106,280 kgMS, 107,921 kgMS and 97,930 kgMS respectively. The drop-off in the last of those seasons was in fact more significant, in percentage terms, than the drop-off in 2009/2010, the year implicated in the misrepresentation (from 97,930 kgMS to 90,337 kgMS).

[382] Second, if PGG were somehow culpably implicated in these other misrepresentations, as the duty formulated by Glazebrook and Miller JJ assumes, it is significant that the Routhans did not use the farming method they claim had been represented to them. The evidence was that they used a different breed of cattle (not the Friesians Mr Cook had a strong preference for), and in greater number. The farming results achieved are no doubt due in part to those decisions. For this reason, there is a significant factual issue, not tested in the High Court — because of how the claim was run in that Court — as to what the outcomes on the farm would

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573 At [126].

have been if it had been farmed in accordance with the representations in the CRT brochure, repeated in the proposal. While it may not have reached an average of 103,000 kgMS, it may well have achieved more than the Routhans were able to achieve. This is entering the realms of speculation because the High Court Judge did not make any findings in relation to this, given the basis upon which she decided damages.

[383] Third, and as the Court of Appeal observed, almost immediately upon taking possession, the Routhans became aware that their farming venture was achieving well below what they understood to be the historical performance.[574] They nevertheless made the decision to retain Farm 258 and to take the various steps described to increase production. They engaged experts and took their advice. In the High Court this was addressed as an issue of contributory negligence, but we prefer the Court of Appeal's analysis, differing from the High Court, that it is an issue of reliance.[575] It is difficult to construct a case that the Routhans' conduct in persisting with the farm was in reliance upon the representations as to historical production. They were farming the property, and well able to assess its productivity. They engaged experts who could help them with this.

[384] Fourth, (a closely related point) as the Court of Appeal found, the business outcomes for the Routhans were the consequence of multiple business decisions taken by them, which were not reasonably foreseeable by Mr Daly. As noted, Farm 258 was farmed differently to how Mr Daly could have foreseen — it was farmed only with the run-off block, and not also with Casa Finca. It was also farmed differently to how it had been by Mr Cook. The Routhans used a different farm manager and took pasture out of productive use for re-grassing. There were numerous decisions taken that impacted upon the trading results, such as the decision to terminate the second cow lease, or the timing and nature of the decisions to improve pasture performance. The eventful and complex management history of this farming business is such that it cannot be said that the financial consequences that flowed from them were reasonably foreseeable by Mr Daly when he provided historical average production figures for a single block of farming land. An allied point, made by the Court of Appeal, is that the

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574 At [59].

575 HC judgment, above n 509, at [219]–[229]; and CA judgment, above n 509, at [119] and [124].

production information supplied by PGG pre-purchase was not sought for the purpose of making any of these investment decisions years later.[576] PGG could not reasonably anticipate that its advice would be relied on for this purpose.

The majority's reasons

[385] As noted above, we formulate the scope of duty more narrowly than Glazebrook and Miller JJ, and so would not allow damages for losses flowing out of the conduct of the business. We note that Kós J's methodological differences with Glazebrook and Miller JJ do not result in any difference in outcome.[577]

[386] The majority allows recovery of wasted expenditure to improve the farm — $150,000 for the cost of re-pasturing and $150,000 for the cost of additional fertiliser.[578] It concludes that the wasted expenditure was caused in fact by the misrepresentation because it was a "no transaction" case.[579] The majority finds that it was reasonably foreseeable that the Routhans would incur this additional expenditure due to production not being 103,000 kgMS per annum. The majority does not allow recovery for the costs of additional supplementary feed, the costs associated with the termination of the second cow lease, or long-term capital investments not recovered in the forced sale.

[387] We do not consider that damages for wasted expenditure should be awarded by this Court. The proposition that underpins this award is that the representation was Farm 258 would produce 103,000 kgMS year-on-year. But Mr Daly's representations were not as to future production, rather as to past production. It is not reasonable to convert this into a future warranty, as the majority have done. No such representation was sought or made. It would be surprising, to say the least, were any farmer (let alone a real estate agent) prepared to give such a warranty — evidence was given at trial about the extent of natural variability that occurs in any farming operation due to weather, farming method and farm management. Future expenditure in an effort to achieve 103,000 kgMS year-on-year was outside the scope of PGG's duty.

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576 CA judgment, above n 509, at [124].
577 See above n 555.
578 Above at [209]–[212] per Glazebrook and Miller JJ.
579 Although Kós J above at [255] uses the expression "not *that* transaction", we are of the view that this distinction is not material to the analysis he then applies.

First ground of appeal and cross-appeal: diminution in value of Farm 258

[388] This brings us to the appeal and cross-appeal in respect of the award directed to the diminution in value of Farm 258 attributable to the misrepresentation.

[389] The High Court awarded the losses caused by the forced sale of both Farm 258 and the run-off in 2020, which amounted to $603,000 and $839,000 respectively.[580]

[390] The Court of Appeal concluded that the losses caused by the forced sale of the properties in 2020 fell outside the scope of PGG's duty because they were the consequence of decisions made by the Routhans post-purchase.[581] The Court found however that loss of value in Farm 258 attributable to the misrepresentation should be recoverable.[582] It addressed the evidence before it from the Routhans' valuer, Mr Hancock, who assessed that loss at $480,500, basing his valuation for a fair market value for the property at the time of purchase on the average efficient production of the farm which he assessed in the vicinity of 84,000 kgMS.[583] The Court of Appeal noted the evidence of PGG's valuer, Mr Hines, who gave evidence that while Mr Hancock's approach was the preferred valuation methodology, he had been instructed to value Farm 258 on two alternative bases at the date of purchase — an assumed production of the represented rolling three-season average, and a 97,000 kgMS rolling three-season average.[584] On that basis he found that the farm was worth more than the price paid for it by the Routhans, and would only have been worth $50,000 more if the represented rolling average were true.

[391] While accepting that Mr Hancock's valuation used the preferred methodology, the Court of Appeal nevertheless considered that the approach advanced by Mr Hines isolated the relatively minor significance to value of the misrepresentation proved as

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580 HC judgment, above n 509, at [189(a)]. This calculation was undertaken by the Routhans' witness, Mr Glennie. He took the purchase price of Farm 258 in 2010 ($2,800,000), subtracted its sale price in December 2020 ($1,500,000), and subtracted the expected market decline of a comparable property over that period ($697,000), to quantify loss at $603,000. For the run-off, Mr Glennie took the expected sale price if sold in 2010 ($1,600,000) and subtracted the actual sale price in December 2020 ($761,000), to quantify loss at $839,000.

581 CA judgment, above n 509, at [125].

582 At [144]–[148].

583 At [135]–[137].

584 At [138].

against PGG — placing that at $50,000.[585] Having reviewed the evidence the Court of Appeal noted that it left recoverable damages falling somewhere between zero and $480,500.[586]

[392] The Court was satisfied that the farm was not, as Mr Hines had suggested, worth more than the Routhans paid for it in 2010, noting it had not sold earlier at a higher figure notwithstanding a marketing campaign.[587] It also rejected the $50,000 value, given that this took no account of the significant decline in production the previous year.[588] But it also saw difficulty with Mr Hancock's figure because, in light of Mr Hines' evidence, the entirety of the payment above market value could not be attributed to the erroneous information supplied by PGG.[589] Mr Hancock's valuation was based on the average efficient production level for the farm, but PGG was not asked to assess the average efficient production level. Nor did the Routhans make inquiry of Mr Cook about that, or indeed, how the historically high production was obtained. Accordingly, PGG was not responsible to these failures which also contributed to the overpayment.

[393] It therefore reduced the $480,500 figure to $300,000 stating that while there was no exact science in the figure, it was:[590]

> … 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.

[394] The Court was satisfied that was a figure proportionate to PGG's contribution to the Routhans' loss and provided a fair and reasonable outcome, doing justice between the parties.[591]

[395] In this Court, each party rehearses the arguments made in the Court of Appeal and addressed in its reasons. The Routhans seek to recover $480,500 on the basis of

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585 At [140].
586 At [141].
587 At [142].
588 At [143].
589 At [144].
590 At [145].
591 At [148].

Mr Hancock's evidence, an argument which follows from their formulation of the scope of duty that PGG assumed. They submit that the significance of the misrepresentation to value was far more than the lesser production value — it would have sparked a chain of enquiry that would have revealed the significant degree to which the farming system had been misrepresented by Mr Daly.

[396] The Court of Appeal rejected the figure of $480,500 on the basis that it represented over-recovery for the Routhans. It had a proper basis to do so. That figure assumed that the misrepresentation for which PGG was responsible was the only contributor to the reduction in true value. But there were other contributors, as the Court of Appeal found — the Routhans' failure to enquire about the average efficient production level for the farm, and their failure to enquire of Mr Cook the farming methods he employed to achieve such productivity.[592] We agree with the Court of Appeal that the principled approach is to award the loss attributable to the misrepresentation. We therefore agree with the Court of Appeal's assessment that $480,500 is not the appropriate figure to award for loss arising from the purchase of Farm 258.

[397] In support of its cross-appeal PGG says that the Court of Appeal was wrong to adopt the methodology that it did — that the correct way to assess any difference in value of the property arising from the misrepresentation is to identify the gap in value between the farm's value with the represented average production, and its value based on the actual historical three-season rolling average production. PGG submits that was Mr Hines' unchallenged evidence and the Court should have accepted it. Instead, PGG says, the Court of Appeal undertook its own calculation, with inadequate evidence, and on the mistaken basis that 90,000 kgMS was the figure that PGG should have supplied to the Routhans. But the latter was the production value for the preceding year. The correct three-season rolling average should have been used — which was 98,729 kgMS. If that figure had been utilised in the Court of Appeal's calculation, PGG says, the difference comes down to only $90,758.

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592 At [144].

[398] In our view the Court of Appeal had a proper basis for rejecting the evidence of Mr Hines as to valuation — which was his concession that, instructed as he was, he had not utilised the preferred method for valuation. We also see nothing in the fact that the Court of Appeal selected the past year's production rather than the correct rolling average. This is an issue of a fair valuation methodology and, given a declining level of production concealed by the average, the most recent year's production seems the fairest value to use in this assessment. The balance of PGG's criticism proceeds on the mistaken basis that the Court of Appeal was attempting a scientific calculation. But the Court of Appeal made clear that it was not attempting a scientific exercise, rather one aimed at achieving a figure which seemed proportionate to PGG's contribution to the loss, and which produced a fair and reasonable outcome doing justice to each party.[593] It seems to us this is what it achieved.

[399] We would therefore have rejected the appeal on this ground, and the cross-appeal.

Result

[400] For these reasons we would have dismissed the appeal and the cross-appeal, confirming the judgment of the Court of Appeal.

Solicitors:
Luke Cunningham Clere, Wellington for Appellants
Parker Cowan Lawyers, Queenstown for Respondent

[593] At [145] and [148].