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

SC 45/2023

BETWEEN	**PHILIP WILLIAM ROUTHAN and JULIE VERONICA ROUTHAN (as trustees for the KANIERE FAMILY TRUST)** Appellants
AND	**PGG WRIGHTSON REAL ESTATE LIMITED** Respondent

SUBMISSIONS FOR THE APPELLANTS

17 November 2023

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Counsel for the appellants certifies that this submission contains no suppressed information and is suitable for publication.

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May it please the Court—

I. INTRODUCTION AND SUMMARY

1. This appeal concerns the correct calculation of loss in a tort and Fair Trading Act claim. Specifically, whether the compensable loss from a real estate agent's misrepresentation inducing a farm purchase should be greatly reduced by reference to the *SAAMCO* principle,[1] even though the full loss was effectively caused by – and, indeed, exactly the kind of loss one would expect to result from – the agent's breach of duty and would not have occurred had the information been correct.

2. A specialist rural real estate agent is approached by potential purchasers of a Hokitika farm. The purchasers, a husband and wife acting through their family trust, want to be sure about the farm economics before committing their $1.5m equity and borrowing $2.0m from their bank. A brochure prepared by a previous agent suggests the farm's average historic milk production – the key financial metric – is superlative.

3. The purchasers ask the agent to check if the farm is still for sale and to verify the production figure. The agent confirms he has the listing and that the superlative production average remains accurate following the latest season. Suitably encouraged, the purchasers ask the agent to prepare a prospectus for provision to their bank. The agent does so, again confirming the production information.

4. But the prospectus is an unauthorised desktop job. The agent has not obtained the listing or verified the information with the vendor, who does not know the prospectus has been prepared, let alone been provided to the purchaser. Just before the sale is due to be agreed, the agent seeks the listing. But the vendor declines to confirm the production figure. The agent does not raise the alarm, but instead repeats the unverified information, knowing it is being relied on by the

[1] As set out in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) (*SAAMCO*) and subsequent cases.

purchasers and their bank. The sale proceeds and the agent collects his commission.

5. The unverified information significantly overstates true production. Production is actually plummeting. And even the achieved production is based on unorthodox and expensive farming methods, which are also misrepresented in the prospectus. What appears to be an outstanding farm is in fact barely ordinary. Needless to say, the plaintiffs' planning and gearing assumes otherwise.

6. It takes years for the truth to emerge. In the meantime, the plaintiffs strive to obtain the represented production levels, scrutinising the quality of their cows, re-pasturing, and refining their farming technique. Nothing works. Revenue is substantially below budget. Expenses mount. Interest payments become oppressive. The bank, which also budgeted on high production levels, becomes restive. The farm is subjected to strict financial monitoring and control, and, through that process, eventually sold. All the plaintiffs' equity is lost.

7. The compensatory principle is to restore the plaintiffs to the position they would have been in but for the defendant's breach. Here, that is the *status quo ante*: the plaintiffs would not have purchased the farm but for the misrepresentation and would likely have purchased a different one. Either way, they would not have lost their equity.

8. So why did the Court of Appeal award damages at just one-fifth of the lost equity? The answer is said to lie in the *SAAMCO* principle.[2] But it does not, for three reasons.

9. First, the *SAAMCO* principle is an expression of the 'risk principle': a defendant is liable only for losses caused by risks the defendant's duty was imposed to protect against.[3] The same idea, in different ways, informs the doctrines of intervening cause, remoteness, mitigation and

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2 *PGG Wrightson Real Estate Ltd v Routhan* [2023] NZCA 123 (*CA*) at [107]–[150].

3 D Nolan & J Plunkett "Keeping Negligence Simple" (2022) 138 LQR 175 (*Nolan & Plunkett*) at 176–177.

contributory negligence. But the risk principle does not operate here to reduce damages. Farm purchases are business purchases, and milk production data is the key determinant of revenue. While specialist rural real estate agents are not business advisers, they are *the* source of verified information on which the purchase proceeds. A purchaser being landed with an uneconomic farm through relying on revenue information that is carelessly not verified is a risk that falls squarely within an agent's moral and legal responsibility.

10. The *SAAMCO* principle is sometimes said to involve a 'cap', limiting liability for an incorrect valuation to the amount of the resulting security shortfall, calculated as false valuation less true valuation as at the transaction date. But that heuristic – borrowed from contractual breach of warranty damages – must be treated with caution, especially beyond security shortfall cases. What matters is the risk principle itself. In real life, the consequences to a plaintiff of information being wrong can extend far beyond difference in value at the date of transaction.

11. Here, the consequence of the information being wrong was that the plaintiffs entered a loss-making venture from which it took years to extricate themselves. Applying the risk principle, responsibility for the ordinary economic consequences of providing unverified revenue information for a going concern purchase should follow. Paring down tort and FTA damages to match breach of warranty damages calculated at the transaction date is unprincipled and unnecessary.

12. Were the position otherwise, real estate agents who sell businesses would get an unjustified free pass. Negligence and FTA law does not usually hand out free passes. Think of the oil spill in *The Wagon Mound No 2* or the causal analysis in *Red Eagle*.[4] Unlike valuers or doctors, the

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[4] *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 (PC) (*The Wagon Mound No 2*), a judgment described by Lord Cooke as *"one of Lord Reid's greatest judgments"* ((1978) 37(2) CLJ 288 at 293). Lord Reid said at 643C *"the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer of the Wagon Mound would have known that there was a real risk of the oil on the water catching fire in some way"*. See also *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 (*Red Eagle*) at [29] per Blanchard J.

commercial incentives of real estate agents are aligned with the vendor. The agent's duty is to provide only verified information. They should not be encouraged to take shortcuts – here, the breach of duty was egregious – and should be liable for the foreseeable consequences of carelessly failing to verify information where their misrepresentation remains undiscovered and continues in an ordinary way to influence the purchaser's fortunes.

13. Second, even if a '*SAAMCO* counterfactual' were applied as a cross-check, as in the most recent UK Supreme Court cases, that confirms the plaintiffs should be awarded their lost equity. The plaintiffs would not have lost their equity if they had purchased an alternative farm, or if they had purchased the existing farm but with the represented production being correct. They did not lose their equity for exogenous reasons, such as declining milk prices, rising interest rates or a property market crash. They lost it because they were misled into purchasing a farm on an uneconomic basis. The misrepresentation had a continuing effect in effectively causing the losses claimed.

14. Third, the object of damages is to do justice. In *Altimarloch*, a majority of this Court confirmed that contract damages should be calculated on a fair and practical basis to properly compensate the injured party, not by rigid application of the so-called 'normal measure'.[5] That is why damages of $1.0m rather than $400,000 were awarded. By symmetrical reasoning, the tort and FTA damages sought here cannot be justly calculated according to the so-called 'normal measure' of diminution of value at the date of purchase, as the undiscovered misrepresentation operated to cause loss for many years after that.

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[5] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 (*Altimarloch*) at [23] per Elias CJ, [156] per Tipping J and [188]–[189] per McGrath J regarding there being no absolute rules for damages. The majority awarded cost of cure damages, significantly above the normal measure: at [66] per Blanchard J, [168]–[172] per Tipping J and [193]–[194] per McGrath J.

II. KEY FACTS

15. The Routhans became interested in Farm 258 in 2010 after being provided with a brochure (*the CRT Brochure*), which stated the farm had been "*[a]veraging 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*".[6] The production average caught Mr Routhan's attention.[7] He approached Mr Daly, an experienced rural real estate agent with PGG, and asked him to contact the vendor, Mr Cook, about a possible sale and to obtain details about production and price.[8]

16. The misrepresentation first occurred on 7 September when Mr Daly visited Mr Routhan and told him he had secured the listing and that Mr Cook had confirmed there was no change to average production after the latest season.[9] But Mr Daly had not obtained the listing, Mr Cook had not confirmed production, and year-on-year results were plummeting, causing the three-year average to drop to 98,729 kgMS.[10]

17. Mr Routhan asked Mr Daly for a written proposal to take to his bank.[11] The bespoke prospectus Mr Daly then prepared (*the Routhan Prospectus*) repeated the misrepresentation that Farm 258's production was "*[a]verage last 3 years 103,000 kg/ms from 260 cows*".[12] To match the production figure, Mr Daly updated the Westland shares number from 95,000 to 103,000.[13] Mr Daly prepared the Routhan Prospectus

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6 *Routhan v PGG Wrightson Real Estate Ltd* [2021] NZHC 3585 (*HC*) at [12]; CRT Brochure **[301.0227]**; and Routhan BOE at [17]–[19] **[201.0004]**. Milk production is measured in kilograms of milk solids (*kgMS*).

7 Routhan BOE at [20] **[201.0005]**. Annual production is a key metric in assessing a dairy farm: HC at [14]; Glennie BOE at [12]–[15] **[201.0070]**; Lewis BOE at [42]–[44] **[201.0041]** and Reply BOE at [56]–[57] **[202.0564]**; and Denley BOE at [21] **[201.0123]**.

8 HC at [14]; and Routhan BOE at [23]–[25] **[201.0005]**.

9 HC at [17], [24], [30]–[31] and [128]; and CA at [39].

10 HC at [26], [31], [54]–[55] and [116]; and CA at [5], [38] and [44]. See also Cook NOE 505 (2–33), 506 (1–10), 507 (26–30) and 509 (17–32) **[204.1125]**.

11 Daly NOE 375 (18–24) **[203.0995]**; and Routhan BOE [41]–[44] **[201.0008]**.

12 Routhan Prospectus **[305.2914]**.

13 Daly NOE 378 (23–35) **[203.0998]**. Westland Milk Products requires one share per kgMS.

without an agency agreement or even the vendor's knowledge[14] – a serious departure from acceptable industry practice.[15]

18. In the context of a previous three-season rolling average of 103,000 kgMS, the true production average indicated a "*significant drop*" in the most recent year, which would have "*set alarm bells ringing*".[16] The farm had produced 90,337 kgMS in the most recent season and was on track to produce only 85,000 kgMS in the current season.[17]

19. Disclosing the decline would have sparked a chain of enquiry about what was causing it, revealing other contextual misrepresentations about the farm system underpinning production.[18] The Routhan Prospectus stated production had been achieved through a standalone farming system involving 260 cows, with half the herd wintered off, 115 bales of baleage made on the farm, and fertiliser use following the recommended fertiliser programme. This conveyed that Farm 258 produced superlative returns from a low input system the Routhans could replicate.[19]

20. But it was all a mirage.[20] Farm 258 had not been run standalone but with seven other farms, with cows rotated between them.[21] The stocking rate was much lower than 260 cows,[22] and younger and low producing cows were kept off farm, replaced by mature cows to increase production.[23] More dry feed was used than 115 bales made on farm, with significant supplementary feed brought in.[24] Significantly more nitrogen was applied than the recommend program of 147

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14 Daly NOE 375 (26), 376 (11–19) and 389 (3–14) **[203.0995]**.
15 Denley BOE at [25]–[28] **[201.0124]**; and Crews BOE at [18](a), [36] and [39] **[201.0092]**.
16 HC at [174]–[176]; Glennie BOE at [28] **[201.0073]**; and Lewis BOE at [42] **[201.0041]**.
17 HC at [2]; Westland records **[304.2286]**; and Glennie Reply BOE at [3](b) and [15]–[20] **[202.0585]**.
18 HC at [175]; and Savage NOE 726–727 **[204.1346]**.
19 Routhan BOE at [38] **[201.0007]**; and Routhan Reply BOE at [8], [88] and [116] **[202.0515]**.
20 The Court of Appeal noted these representations were not pleaded. Their falsity largely emerged during trial: CA at [56] and [106]. Their relevance is not as freestanding misrepresentations, but to causation, responsibility and loss.
21 Namely, a run-off block at Lake Arthur and farms at Griffin Creek (or Taito), Butlers (which consisted of four farms), and 212 Municipal Road: Cook NOE 496, 500–501, 515–518 and 520 **[204.1116]**.
22 The exact stocking rate remains unclear: Joint Expert Report at [4] **[202.0611]**. But livestock records indicate a long-term average of 220 cows on the farm: LIC data **[301.0017]**; Glennie Reply BOE at [23]–[27] **[202.0590]**; and Lewis Reply BOE at [85]–[92] **[202.0569]**.
23 Glennie Reply BOE at [28] **[202.0592]**; and Lewis Reply BOE at [92] **[202.0571]**.
24 Joint Expert Report at [6] **[202.0611]**.

kgN/Ha: around 400 kgN/Ha was typically applied[25] – a level that is unsustainable, expensive, and unusual.[26] In sum, production was both far lower than represented and sustained only by an unusual system the Routhans could not replicate.[27] This was not a "*rockstar*"[28] farm at all.

21. A month later, when Mr Daly sought to belatedly secure an agency agreement, Mr Cook declined to confirm production.[29] Mr Daly knew the Routhans and their bank were relying on the production figure,[30] but he did not disclose that Cook had demurred. Instead, he backdated the agency agreement and falsely confirmed that the "*Rural Information Sheet*" (an integral part of the agreement) had been completed.[31]

22. Mr Daly's manager repeated the erroneous production figure in a particulars checklist, confirming that a signed agency agreement was attached, even though the Rural Information Sheet was missing.[32] On 18 October, this document was provided to Mr Routhan, who took comfort from repetition of the production figure.[33] The next day the SPA was signed and dated.[34] The purchase settled on 20 December 2010 and Mr Daly collected his commission.

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25 Cook NOE 529 (25) **[204.1149]**. This figure was recorded in the 2009 Property Advisory Ltd valuation **[301.0395]** and is consistent with records disclosed by Mr Cook, and Mr Glennie's calculations that the grass grown in the outlier seasons of 2006/07 and 2007/08 would have required somewhere in the region of 350kgN/ha: **[301.0226]**; Glennie BOE at [21]–[24] **[201.0072]**; and Glennie Reply BOE at [37]–[39] **[202.0593]** and Appendix B **[202.0602]**. See generally Glennie NOE 255–257 **[203.0875]**.

26 Lewis Reply BOE [95]–[99] **[202.0550]**; Glennie Reply BOE at [44] **[202.0595]**; and Bradley NOE 177 (3–8) **[203.0797]**.

27 The 103,000 figure conveyed what the experts described as a stable long-term average, status quo, or sustainable year production: see, eg, Lewis Reply BOE at [59] **[202.0564]**.

28 HC at [1]; Routhan BOE at [45] **[201.0007]**; and Cook BOE at [24] **[202.0346]**.

29 Daly NOE 392 (10) **[203.1012]**; and Cook NOE 509 (19) **[204.1129]**.

30 See **[310.5195]** (17 September 2010) and **[302.1068]** (23 September 2010). In both, note the repetition of Mr Daly's "*sort after location*". See further Daly NOE 370 (14–16), 371 (8–11), 372 (7–10) and 393 (9–12) **[203.0990]**.

31 The Rural Information Sheet contained space for details about production and other aspects of the farm system, and for the vendor to certify key information, like production, as "*true and correct*": see Daly NOE 382–383 **[203.1002]**; Cook NOE 507 (10–20) **[204.1127]**. See the sample sheet at **[302.0860]**. Mr Daly knew the Rural Information Sheet was an integral part of the agency agreement: Daly NOE 387 (2–8) **[203.1007]**. Daly had been trained on this sheet: PGG's interrogatory answers at [14.2] **[305.2745]**. Mr Daly accepted he had attended this session: Daly NOE 396 **[203.1016]**.

32 Particulars of real estate form **[302.1089]**.

33 Routhan BOE at [64]–[65] **[201.0011]**. See also CA at [47].

34 HC at [33].

23. It soon became clear the Routhans were not achieving production at the levels they understood Farm 258 should be producing.[35] Not knowing the truth, they blamed themselves, sought out professional advice and undertook substantial operating and capital expenditure to achieve the represented production.[36] When that did not work, they turned to the cows.[37] It was only in late 2014, in an arbitration with Mr Cook about the leased herd, that they learned the truth about historic production.[38]

24. But the die had already been cast. Costs, calibrated to expected production levels, were spiralling and bank pressure mounted. The Routhans worked with their bank to minimise losses. Ultimately, they were forced to sell Farm 258 and a separate run-off property they owned. They had gone into the transaction with net equity of almost $1.6m,[39] but were left around $3.4m in the red.[40] A long-held dream of running a family dairy farm had turned into a disaster. The Routhans, now in their 60s, are left without property or savings.

III. JUDGMENTS BELOW

High Court

25. Liability in negligence and under the FTA was, but for rejected technical disclaimer and limitation arguments, not seriously contested at trial. In finding a duty of care, the Judge held Mr Daly "*knew the information on production would be relied on and acted on without further inquiry and that it was material to the Trust's decision to purchase*",[41] and that the

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35 Routhan BOE at [77]–[78] **[201.0013]**; and Routhan NOE 130 (23) **[203.0750]**.
36 Routhan BOE at [80]–[97] **[201.0014]**.
37 Routhan BOE at [104]–[106] **[201.0019]**.
38 Routhan BOE at [107] and [117]–[124] **[201.0019]**. In late 2015, and then in 2019, Mr Daly confessed he had misrepresented Farm 258: Routhan BOE at [117]–[121] and [125]–[126] **[201.0021]**. But it was only at trial that the full extent of the farm system misrepresentations came out.
39 HC at [10]; and Joint Expert Report at [22] **[202.0617]**. The net equity comprised the net proceeds of the sale of the Routhans' home in Wellington and three other properties ($750,000; Routhan BOE at [9] **[201.0003]**) and their equity in the run-off ($820,000; Routhan BOE at [73] **[201.0013]** and Hancock BOE at [54] **[201.0143]**). In addition to the bank lending, the Routhans also received $1.5m of 'quasi equity' funding from a wealthy friend, Tony Timpson: HC at [37], [39] and [180]–[181]; and Routhan BOE at [74]–[75] **[201.0013]**. See also Rabobank's document terming the Timpson funding "*quasi equity*" at **[304.1937]**.
40 Glennie BOE at [46] **[201.0077]**.
41 HC at [104]–[106].

Routhans in fact relied on the advice.[42] The Judge considered PGG's arguments raised here by reference to *SAAMCO* to really be matters of causation and contributory negligence.[43]

26. In assessing causation, the Judge found both that: (a) the Routhans would not have purchased the farm had the misrepresentation not been made;[44] and (b) there were no intervening factors causing the Routhans' loss unrelated to PGG's actions such as to break the chain of causation between misrepresentation and loss.[45]

27. The Judge "*readily dismissed*" PGG's argument, advanced by reference to *SAAMCO,* that the loss should be limited to diminution in value.[46] The recoverable losses were those "*suffered by committing to this farm purchase*", which her Honour considered to include lost equity in the farm and run-off property through the forced sale ($1,442,000) and the loss of investment in capital improvements on the Farm post purchase ($680,000).[47] Damages were awarded based on the sum of those losses, with a 20 percent reduction for contributory negligence for some of the capital expenditure (leading to damages of $1,697,600 in total).[48]

Court of Appeal

28. The Court of Appeal agreed that the Routhans would not have proceeded with the purchase had they known the truth.[49] But it reduced damages significantly to $300,000 plus interest, relying on

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42 HC at [108]–[110].

43 HC at [171] and [190], applying *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28], in which the Court of Appeal held "*[p]laintiffs 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*".

44 HC at [175].

45 HC at [178]–[187]. Note in particular at [187], where the Court held that from when "*the Routhans realised they had not bought the farm which had been represented to them, they already had, effectively, no equity in the property and had lost their capital investment in it.*"

46 HC at [190]–[192].

47 HC at [189] and [195]. Interest costs of $1,062,000 were held to not be recoverable.

48 HC at [228]–[230]. See also CA at [7]. The Judge considered that some of the Routhans' capital expenditure, notably excluding resowing the pasture, was not directly linked to lifting production.

49 CA at [106].

SAAMCO to find that PGG had assumed responsibility for some but not all of the losses considered recoverable by the High Court.

29. The Court reasoned that PGG's duty of care was to guard against the risk that "*the Trust would pay too much for the Farm*".[50] It had "*assumed a responsibility to provide accurate information and is liable for the consequences of negligently supplying incorrect information*", not to "*advise the Trust on whether to enter into the agreement*". It was therefore "*not liable for all the consequences resulting from the Trust's decision to purchase the Farm*". On that basis, the Court concluded that the Routhans' lost equity and wasted capital expenditure fell outside the scope of PGG's duty.[51]

30. Instead, the Court confined recoverable loss to the difference between the price paid and Farm 258's actual value (the so-called 'normal measure'),[52] as at the date of transaction.[53] For this, the Court utilised the Routhans' valuer's figure of $480,500, but discounted it to $300,000, noting there was "*no exact science*" to its approach.[54]

IV. REVISITING AND APPLYING *SAAMCO*

31. It can be hard to assess a case that has become part of its own legend, with the mountaineer's famous knee aptly described by Lord Sumption as one of the most celebrated legal parables of modern times.[55]

32. That difficulty is compounded by two factors. First, the problem addressed in *SAAMCO* is part of the old chestnut of 'legal' causation: how does the law ensure a defendant is not held liable for all losses that follow from its breach in a 'but for' sense, but only those for which it

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50 CA at [115]–[116].
51 CA at [117]–[118].
52 CA at [128].
53 CA at [134] and [141]. Justice Gilbert had reasoned in similar ways in previous cases, both as judge and counsel: see *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 at [72]–[78]; and *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA) at [11].
54 CA at [145].
55 *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599 (*Hughes-Holland*) at [1].

should be legally responsible?[56] Second, *SAAMCO* has given to the world both a parable and a methodology. The two do not, however, always align. Between the wisdom of the parable and the convenience of a methodology, the court must always be alive to doing justice in an individual case.

33. That tension is why *SAAMCO* has both endured and evolved over the past 25 years. Different courts seeking to apply it have used subtly different reasoning and justified different outcomes. In some cases, the approach has been more austere. In others, it has been more balanced. In revisiting and applying *SAAMCO*, its principle must be affirmed, but its methodology must be approached with caution and judgement.

SAAMCO: three cases of negligent overvaluation

34. *SAAMCO* comprised three quantum appeals by valuers, each of whom had negligently overvalued property to be used as security for lending. A complicating fact was a collapse in the property market, which significantly increased losses. The figures were broadly as follows:[57]

Case	Loan (A)	Neg. value (B)	True value (C)	Over-valuation (B – C)	Sale value (D)	Market fall (C – D)	Loss per CA (A – D)	Loss per HL (A – D), capped by (B – C)
York Montague	11	15	5	10	2.5	2.5	8.5	8.5
Kuwait	1.75	2.5	1.85	0.65	0.95	0.90	0.8	0.65
Nykredit	2.45	3.5	2	1.5	0.35	1.65	2.1	1.5

35. Justice Phillips in the High Court identified the principle that the valuers should not be liable to compensate the banks for a fall in the market to which they would have been exposed anyway (limiting loss to A – C, so as to excise C – D).[58] The Court of Appeal held that the full loss was recoverable (A – D).[59] The House of Lords affirmed Phillips J's principle,

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[56] Compare, eg, attempts to address the same problem by distinguishing between 'opportunity' and 'cause' in *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 (CA) at 333–335 and 359; *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA) at 1374–1375; and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28]. See also *Hughes-Holland* at [20].

[57] Excluding the effects of interest and repayments.

[58] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 (HC & CA) at 805–807 and 816. But note there were several first instance decisions, with varying results: at 836–837.

[59] *SAAMCO* at 210D.

but concluded that recoverable loss was limited to the extent of the overvaluation (A – D, capped by B – C).[60] In so reasoning, the House of Lords applied two concepts: (a) the risk principle; and (b) a calculation now known as the '*SAAMCO* cap'.

The risk principle

36. A tortfeasor should only be liable for the "*kind of loss*" its duty was intended to guard against;[61] that is, loss sufficiently caused by realisation of a risk captured by the duty.[62] Professor Nolan calls this the risk principle.[63] The UK Supreme Court has termed it the 'scope of duty' principle.[64] Lord Sumption claimed the principle differs from causation "*as that expression is usually understood in the law*",[65] but that is to not say it requires no causal analysis. Whatever name it is given, the principle, as Lord Hoffmann acknowledged,[66] involves causal judgement to excise loss that the defendant was not responsible to prevent.[67] That is why Phillips J and Lord Hoffmann shared the same objective, despite taking different approaches.[68] The Court of Appeal's error, by contrast, was to hold the valuers liable for all the risks of the transaction, including the full market collapse.[69]

37. The authors of *Burrows, Finn and Todd* similarly describe the risk principle as *SAAMCO*'s basis: "*Decisions in New Zealand, consistently with the approach taken in SAAMCO, similarly determine whether a negligent defendant is liable in law for a full transaction loss by asking*

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60 *SAAMCO* at 210D–E, 213D, 214B–F and 222B–E.

61 *SAAMCO* at 211H, 212D–H, 213C, 214B and 218A; *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound No. 1)* [1961] AC 388 (PC) at 426; and *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (*BNZ*) at 683 per Gault J.

62 *SAAMCO* at 214B. See further A Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) (*Burrows Remedies*) at 120 and J Stapleton *Three Essays on Torts* (Oxford University Press, 2021) at 92 and 98; and T Honoré "Responsibility for Harm to Others: A Brief Survey" at 9 and 11–12 and A Burrows "Lord Hoffmann and Remoteness in Contract" at 265–266, both in P Davies and J Pila (Eds) *The Jurisprudence of Lord Hoffmann* (Bloomsbury, Oxford, 2015).

63 Nolan & Plunkett at 176–177.

64 *Meadows v Khan* [2021] UKSC 21, [2022] AC 852 (*Meadows*) at [36]–[41]. Lord Hoffmann himself rejected that label: L Hoffmann "Causation" (2005) 121 LQR 592 (*Hoffmann LQR*) at 596.

65 *Hughes-Holland* at [36].

66 Hoffmann LQR at 596–597.

67 In *Meadows*, this is termed the "*duty nexus question*": [28] and [47]–[50].

68 *Hughes-Holland* at [27].

69 *SAAMCO* at 210D–E and 212H–213C.

whether the consequences were of a kind which were within the risk created by the defendant's breach of duty".[70] So too *Todd on Torts*.[71]

38. The risk principle is not a new idea, even though it took some time for its significance to be fully appreciated.[72] Lord Hoffmann's mountaineer example has lived on precisely because it so neatly captures the principle in fable form.[73] The innovation in *SAAMCO* was not the principle itself, but its use as a matter of quantification to partition a single economic loss.[74] This kind of partitioning will not always be appropriate. In some cases, such as *SAAMCO* itself, it makes sense. In others, such as *Aneco*,[75] it does not. In search of the dividing line, Lord Hoffmann sought to distinguish between: (a) a duty to provide information; and (b) a duty to advise.[76] Lord Sumption in *Hughes-Holland* doubted this distinction, due to the descriptive inadequacy of the labels, which are neither distinct nor mutually exclusive.[77] His Lordship nevertheless tried to press the labels into service in a more general way, with controversial results.[78]

39. The UK Supreme Court has now disavowed the labels altogether, because the two activities shade into each other in practice (both "*involve the giving of advice*").[79] The work of trying to discern for what

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70 S Todd and M Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at 858. See also at 861: "*the nature of the inquiry can best be understood in terms of the risk or risks posed by the defendant's activity*".

71 S Todd (Gen Ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 1273 and 1275–1276.

72 *Hughes-Holland* at [21]. See also Nolan & Plunkett at 176–177; *Roe v Minister of Health* [1954] 2 QB 66 (CA) at 85 per Denning LJ; and *Meadows* at [33]. In *Caparo*, for example, an auditor's duty in preparing accounts for a company's statutory audit did not extend to investment decisions made by shareholders or potential shareholders: *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 627C–D, 629B and 654D, relied on in *SAAMCO* at 211H–212F.

73 *SAAMCO* at 213D to 214B.

74 *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783 (*Manchester*) at [84] per Lord Leggatt. See also *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) at 209G; and *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All ER (Comm) 929 (*Aneco*) at [11]–[12].

75 *Aneco* at [3], [20] and [40]–[43]. See also *Hughes-Holland* at [43]–[44].

76 *SAAMCO* at 214C–F; and *Meadows* at [41].

77 *Hughes-Holland* at [39].

78 *Hughes-Holland* at [40]–[42]. In that case, a plaintiff's damages for being negligently induced into entering a transaction (by misstatements relating to a different, hypothetical, transaction) were capped by reference to what would have likely happened had the hypothetical transaction proceeded. For commentary, see D McLauchlan "Some Damages Dilemmas in Private Law" (2021) 52 VUWLR 875 at 876 and 885–886 and *Burrows Remedies* at 117 and 125.

79 *Manchester* at [4], [18]–[22] and [92].

risks a defendant should be held liable is a substantive enquiry that cannot be reduced to a nostrum. This is the key finding of *Manchester*, in which Grant Thornton was held liable for the full loss even though its duty was to provide technical information (as to the viability of using hedge accounting) and not financial wisdom or commercial advice.[80]

40. The same essential approach was taken by the Supreme Court of Canada, in holding that the true effect of the *SAAMCO* principle is that it "*denies liability where an alternate cause that is unrelated to the defendant's negligence is the true source of the plaintiff's injury*".[81] Deloitte was thus liable for the consequences of a negligent audit because it was taken as having assumed responsibility for injuries flowing from impaired shareholder scrutiny that were substantively related to its negligent audit.[82] Similarly, in Singapore, Hong Kong and Australia, robust causal analyses have been used to give effect to the risk principle.[83] So too in the *American Restatement (Second and Third) of Torts*.[84] That is also the approach taken to assessing FTA damages.[85]

The *SAAMCO* cap: really an example of counterfactual analysis

41. It is important not to allow a formula or methodology to cause one to lose sight of the principle itself. Lord Cooke's penetrating insights on

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80 See, eg, *Manchester* at [28] and [34]. Providing important information will not in all cases be sufficient. A substantive risk principle analysis must be undertaken: see *Manchester* at [94] and *Hughes-Holland* at [41].

81 *Deloitte & Touche v Livent Inc* 2017 SCC 63, [2017] 2 SCR 855 at [90].

82 At [88]–[89]

83 *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] SGCA 41; *Wishing Star Ltd v Jurong Town Corp* [2008] SGCA 17; *Chu v Lau & Co* [2006] HKCA 155; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25, (1999) 199 CLR 413. See too D McLauchlan and C Rickett "SAAMCO in the High Court of Australia" (2000) 116 LQR 1.

84 *Restatement (Second) of Torts* § 281 (August 2023 Update) at comment (f): "*Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable*"; and *Restatement (Third) of Torts: Phys. & Emot. Harm* § 29 (August 2023 Update) at the statement of the rule: "*An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious*".

85 *Red Eagle* at [29] per Blanchard J: "*The language of s 43 has been said to require a 'common law practical or common-sense concept of causation' … Put another way, was the defendant's breach the effective cause or an effective cause? Richardson J in Goldsbro spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter…*". See also *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459 at [27].

this point, from 50 years ago, remain sound.[86] For this reason, the *SAAMCO* cap[87] – by which "*the loss attributable to the negligence which caused the valuation to be wrong could not exceed what the lender could have claimed if the valuer had warranted that it was right*"[88] – has not fared as well as the underlying principle to which it sought to give effect.

42. In *SAAMCO*, the appearance of a cap was the result of trying to apply the risk principle to the negligent valuations by measuring the relative causal potency of the overstated valuations through a 'normal warranty measure' analysis, and using the result as a kind of ceiling on recoverable damages. Lord Hoffmann acknowledged the oddity of starting with the wrong measure of damages (the whole loss) and then trying to correct the measure by imposing a cap.[89] The object, as Phillips J had appreciated, is to seek to isolate what element of the total loss is attributable to the inaccuracy of the information supplied.[90] Lord Sumption termed the *SAAMCO* cap a tool of analysis;[91] Lord Hoffmann described it as an "*alternative theory*":[92]

> This theory will ordinarily produce the same result as a requirement that loss should be the consequence of the valuation being wrong... But I would not wish to exclude the possibility that other kinds of loss may flow from the valuation being wrong.... The appearance of a cap is actually the result of the plaintiff having to satisfy two separate requirements: first, to prove that he has suffered loss, and, secondly, to establish that the loss fell within the scope of the duty he was owed.

43. Academic criticism of the *SAAMCO* cap – including by Lord Burrows, and Professors Stapleton and McLauchlan[93] – is well-known and, with respect, well-founded. It is anomalous to hold that the extent of tortious liability (the reliance interest) should be restricted to the normal measure for breach of warranty damages (an expectation

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86 R Cooke "Remoteness of Damages and Judicial Discretion" (1978) 37(2) CLJ 288 at 288 and 296–298. Lord Cooke observed at 297 that "*[t]he search for the definitive has certainly not been unfruitful; but it has also shown that the goal is illusory*".

87 *Burrows, Finn and Todd* at 856; *Hughes-Holland* at [32] and [46]; and *Manchester* at [101] and [125].

88 *Hughes-Holland* at [30].

89 *SAAMCO* at 220A. Especially when the cap itself comes from the domain of contract law.

90 *SAAMCO* at 216E.

91 *Hughes-Holland* at [45].

92 *SAAMCO* at 219H–220A.

93 D McLauchlan "A Damages Dilemma" (1997) 13 JCL 1 at 11–12 and 25–31; J Stapleton "Negligent valuers and falls in the property market" (1997) 113 LQR 1 at 3–5; and *Burrows Remedies* at 117–127.

interest), when it is trite that the two have different objectives, and the normal measure is not invariably used even to calculate contractual damages.[94] Professor Stapleton's critique remains sound: "*what makes the valuation wrongful is that it is careless, not that it is not true*".[95]

44. Unlike the risk principle, the *SAAMCO* cap methodology has not generally been applied beyond cases of insufficient security.[96] In *Manchester* and *Meadows*, the *SAAMCO* cap was relegated to an example of counterfactual analysis, which may or may not be helpful in a particular case.[97] New Zealand courts have endorsed the risk principle, but not, until the Court of Appeal's judgment below, applied *SAAMCO* as imposing a free-standing cap on reliance damages.[98] Leading decisions from other jurisdictions reinforce the point.[99]

V. *SAAMCO* IN THIS COURT

Risk principle is sound and should be affirmed

45. This Court should endorse the risk principle, and hence the moral of the parable, acknowledging that the essential insight can often also be grasped by other overlapping lenses of tort law.[100] The Court should not, however, endorse the now-discredited advice/information

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94 *Burrows Remedies* at 121.

95 J Stapleton "Negligent valuers and falls in the property market" (1997) 113 LQR 1 at 3.

96 Such as *SAAMCO* itself and *Lowenburg, Harris & Co v Wolley* (1895) 25 SCR 51, the "*exceptional*" Canadian case cited by Lord Hoffmann at 217E. See now *Manchester* at [125] per Lord Leggatt: "*If by the SAAMCO cap [the appellant] had merely meant the particular method adopted in SAAMCO to quantify the loss caused by the overvaluation of the security, I would agree that … the SAAMCO cap is a blunt instrument which is not suitable to be applied more widely*". See also at [26] per Lord Hodge and Lord Sales. Compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA), where the Court of Appeal held that the contractual liability of a solicitor who negligently failed to procure a guarantee was not limited to the difference in value at the date of breach, but instead extending to all reasonably foreseeable consequences, including a fall in the market before selling. As Lord Hoffmann said in *SAAMCO* at 219D of *McElroy Milne*, the solicitor "*was therefore responsible for the consequences of his error, which was producing a situation in which the client had a lease which was not guaranteed. All the reasonably foreseeable consequences of that situation were therefore within the scope of the duty of care*".

97 *Manchester* at [23]–[27] per Lord Hodge and Lord Sales, at [105]–[106] and [130]–[132] per Lord Leggatt and at [192]–[203] per Lord Burrows. See also *Meadows* at [53]–[54] per Lord Hodge and Lord Sales (effectively confining the *SAAMCO* cap to negligent valuation cases).

98 *BNZ* at 682–686 per Gault J and 688 per Tipping J; *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [27]–[28]; *Scott v Wilson* (2004) 21 NZTC 18,939 (CA) (*Scott v Wilson*) at [74] per William Young J; and *Sherwin Chan & Walshe Ltd (in liq) v Jones* [2012] NZCA 474, [2013] 1 NZLR 166 at [36]–[41].

99 See above, n 86.

100 Such as remoteness, intervening cause, mitigation and contributory negligence. See generally *Hughes-Holland* at [20]; *Burrows Remedies* at 83 and 120; and Hoffmann LQR 596–598.

distinction. In determining if a loss falls within the risk a duty is imposed to prevent, the Court should have regard to the duty's purpose, judged on an objective basis by reference to the reason why the advice is being given.[101] This is essentially a common-sense enquiry by reference to the factual (including statutory) matrix.[102]

Risk principle can, at best, be cross-checked with counterfactual analysis

46. By contrast, this Court should not, at least outside of insufficient security cases, endorse a mechanical liability cap. At best, a counterfactual in which the misrepresentation is assumed to be true may be used as a cross-check to ensure that proper effect is being given to the risk principle. Even then, it will only serve that purpose in some cases.

47. Lord Hoffmann mused that it "*would seem paradoxical that the liability of a person who warranted the accuracy of the information should be less than that of a person who gave no such warranty but failed to take reasonable care*".[103] But as Professors Stapleton and McLauchlan and Lord Burrows have explained, different results can legitimately flow from the different damages measures.[104] The compensatory object, as applied in tort, might in some cases lead to greater recovery than contract. In other cases it will not.[105]

48. A cap is a crude methodology, which may not reflect fair compensation. Because it focuses wholly on the added benefit from the represented facts, a cap does not, for example, account for wasted expenditure or

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101 *Manchester* at [13], [17] and [27] per Lord Hodge and Lord Sales and [196] per Lord Burrows.

102 *SAAMCO* at 212C–F: "*The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could have reasonably thought he was undertaking*". See also *Scott v Wilson* at [73] and [77].

103 *SAAMCO* at 213H–214A.

104 J Stapleton "Negligent valuers and falls in the property market" (1997) 113 LQR 1 at 4–5; D McLauchlan "A Damages Dilemma" (1997) 13 JCL 1 at 24–26; and *Burrows Remedies* at 121–122.

105 As Elias CJ observed, "*[i]n most cases recovery on the contractual measure will be more extensive but, in cases where the plaintiff has made a bad bargain, the loss flowing from reliance on the misrepresentation in tort may lead to greater recovery*": *Altimarloch* at [23]. See also D McLauchlan "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6(3) Otago Law Review 370 at 375.

payments reasonably made in reliance on the misrepresentation.[106] Nor does it compensate for foregone profits where the effect of the misrepresentation was to prevent such profits from being earned.[107]

49. Nor are expectation damages themselves so limited. In order to effect justice, expectation damages can stretch to different dates, times, and events.[108] It would be anomalous if loss were more pragmatically and fairly assessed in contract than in tort or FTA cases – especially where the reason for imposing a notional cap in tort or FTA cases is said to lie in principles of contractual damages.

50. A cap also usually over-complicates matters. In many cases, a qualitative assessment of the causal connection (by comparing the factual causes at play to the risks the duty was intended to guard against) will suffice.[109] A mountaineering injury either resulted from an unfit knee or from an avalanche.[110] If more is needed, the Court should confine its role to performing a practical cross-check to confirm that the risk principle is being observed. This should not be turned into a mechanical[111] or over-elaborate[112] exercise.

VI. *SAAMCO* ANALYSIS DOES NOT DIMINISH ROUTHANS' LOSS

51. The key question is: what was the scope of PGG's duty, as a specialist rural real estate agent facilitating going concern farm sales? It was to provide only verified information to purchasers. That duty, reinforced by

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106 *Manchester* at [3] and [130]–[132] and [201]–[202]. See further the examples outlined in H Evans "Solicitors and the scope of duty in the Supreme Court" (2017) 33(3) PN 193 at 200–205.

107 *Burrows Remedies* at 124.

108 *Altimarloch*. See paragraphs [75]–[76] below. See also A Dyson and A Kramer "There is no 'Breach Date Rule': Mitigation, Difference in Value and Date of Assessment" (2014) 130 LQR 259 at 271–277.

109 *Meadows* at [53]–[54] and [63] per Lord Hodge and Lord Sales and [95] per Lord Leggatt; and *Manchester* at [26]–[27] per Lord Hodge and Lord Sales, [132] and [149] per Lord Leggatt, and [192]–[196] per Lord Burrows.

110 Or, as in *Meadows*, treatment costs either resulted from a disorder on which the doctor was consulted, or they resulted from an unrelated disorder: at [68] per Lord Hodge and Lord Sales and [95] per Lord Leggatt.

111 *Manchester* at [105] per Lord Leggatt and [198]–[203] per Lord Burrows.

112 *Meadows* at [54], citing *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL) at 207G.

statute,[113] exists because, as PGG knew,[114] the information will be relied on by the purchaser to calculate expected revenue for the business.

52. If, as Lord Hoffmann suggests, we measure the scope of the duty by the kind of loss for which PGG could reasonably be taken to have assumed responsibility, and for which the Routhans could reasonably expect PGG to be liable, the answer is clear. PGG should be liable for foreseeable loss effectively caused by a purchaser's reliance on carelessly supplied unverified information, though not for loss caused by extraneous events. That is, the duty extends to the knee being good for mountaineering but does not warrant against avalanches.

53. The case is thus similar to *Manchester*. Indeed, it is worse, as agents, paid on commission, are incentivised to achieve high sales prices. The law should encourage care in this kind of case, as interwoven self-interest increases the risk of overstatement. Professionals do not usually stand to gain by getting information wrong, which is one reason for the law creating what are effectively special rules to constrain their liability.[115]

54. Both overpayment at the time of sale and the fact that the business may be uneconomic without the represented production are foreseeable risks and within the reason why verified information is sought. It was the risk of such loss that made it fair to impose a duty on PGG to begin with. New Zealand dairy farms are sold as going concerns,[116] as PGG's information verification process and policy acknowledged.[117] The sale and purchase agreement – which PGG prepared – stated the sale was of a "*going concern*" and contained several clauses giving effect to the business

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[113] Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, rr 6.4 and 6.5 (in force at the time but since replaced); and Real Estate Agents Act 2008, s 3(1). The PGG policy manual at **[302.0911]**, **[302.0922]–[302.0923]** and **[302.0947]** acknowledged information verification via the agency agreement guarded against misrepresentations. See also *Soft Technology JR Ltd v Jones Lang Lasalle Ltd* [2022] NZCA 353 at [53], [59] and [64] on the importance of agency agreements.

[114] HC at [25], [106]–[110], [139] and [221]; CA at [41]; and Daly NOE 356 (16–18), 375 (18–25) and 393 (5–27) **[203.0976]**.

[115] See *Meadows* at [71]; and *Burrows Remedies* at 122 ("*it appears that the motivation behind SAAMCO was to protect professionals*") and 126.

[116] Crews Report at [19], [44] and [65] **[201.0098]**; and Denley BOE at [21] **[201.0123]**.

[117] The Rural Information Sheet required agents to collect and verify business information: **[302.0860]**. See also PGG's policy at **[302.0911]**, **[302.0922]**, **[302.0923]**, **[302.0947]**, **[302.0959]** and **[302.0960]**.

sale.[118] But Mr Daly did not use the prescribed PGG form, which would have required verified collection of business information, including milk production.[119] Production data is a key element of revenue which, in turn, is a key element of being able to service debt and stay in the black.[120]

55. The risks that unfolded here were intrinsic to the reasons why the Routhans sought verified information from PGG. PGG knew its information was being relied on for going concern revenue calculations. Mr Routhan told Mr Daly they needed confirmed production figures in writing for the bank.[121] The risks of not verifying that information, and keeping silent about its lack of reliability, are obvious. If historic revenue data is overstated, the business model may not work, which would cause trading losses. That in turn would affect the ability to repay borrowings, which would spiral into further costs and losses. Effects would reverberate for years to come. All of that happened here. PGG did not assume responsibility for all the risks of the business. But it was responsible for risks flowing from its information being unverified.[122] Those risks included the Routhans' lost equity.

Court of Appeal's analysis was misconceived

56. There was no avalanche here. The Court of Appeal's reasoning in seeking to manufacture one is, with respect, convoluted and

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[118] Sale and purchase agreement at cl 32 **[302.1104]**. See also at cls 19 (farming until settlement), 20 (inclusion of farm buildings and plant), 24 (sale of dairy shares), 25 (conditional on purchaser obtaining milk supply contract), 27 (warranty regarding plant and equipment meeting dairy company requirements), 28 (transfer of employment contract) and 29 (lease of cows from vendor).

[119] Denley BOE at [29]–[32] and [54]–[60] **[201.0125]**; and Crews Report at [63]–[65] **[201.0107]**. The PGG form that should have been used is at **[302.0860]**.

[120] HC at [14]; Glennie BOE at [12]–[15] **[201.0070]**; Lewis BOE at [42]–[44] **[201.0041]** and Reply BOE at [56]–[57] **[202.0564]**; Denley BOE at [21] **[201.0123]**; and Crews Report at [19] **[201.0098]**.

[121] HC at [25], [106]–[110], [139] and [221]; CA at [41]; and Daly NOE 356 (16–18), 375 (18–25) and 393 (5–27) **[203.0976]**.

[122] The Routhans were "*entitled to rely, and did rely, on the correctness of the information it was given by PGG*": CA at [94]. Doing so, they took reasonable steps, including incurring costs, to address apparent underperformance: CA at [93]–[94].

unconvincing. This is the risk of seeking to apply an over-elaborate *SAAMCO* analysis insufficiently grounded in the risk principle.[123]

57. The Court of Appeal correctly identified the risk of overpayment as part of what PGG's duty was meant to guard against,[124] but erred in failing to recognise any broader risk. It effectively engrafted onto PGG's interaction with the Routhans a disclaimer – the information can be relied on, but only in deciding what price to pay. Beyond this, there is no liability – even if it was reasonable to rely on the representation in structuring the business model and even if the misrepresentation remained hidden for several years while the purchaser continues to rely on it. There is no principled reason for such a zone of exoneration. In fact, it is irreconcilable with the risk principle.

58. The Court failed to engage with the risk of starting a new business based on artificially high revenue expectations. There was no analysis of the effect of not receiving the expected production on the business model, despite the Court recognising elsewhere that production information was relevant to the farm's expected return.[125] Instead, the Court approached the question as binary. The choice was between making PGG "*liable for all the consequences resulting from the Trust's decision to purchase the Farm*"[126] and "*all [the] losses associated with the farming venture*",[127] or using the 'normal measure' at the date of the transaction as a kind of *SAAMCO* cap.[128]

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[123] The Court of Appeal in *Manchester* made the same error, as observed on appeal at [26]: "*the more one moves from the comparatively straightforward type of situation in the valuer cases, as illustrated by SAAMCO, the greater scope there may be for abstruse and highly debatable arguments to be deployed about how the counterfactual world should be conceived ... but the fact is that a distinguished constitution of the Court of Appeal fell into error because of them. Again, it seems to us that the better approach is to focus more directly on the purpose for which the defendant gave the advice in question*".

[124] CA at [115].

[125] CA at [115].

[126] CA at [116].

[127] CA at [32].

[128] CA at [115]. In applying the latter, the Court of Appeal's analysis approached the "*more radical*" theory which Lord Sumption had unsuccessfully argued for as counsel in *SAAMCO* (at 220B–C). In the table in paragraph 34, above, loss would be assessed as A – C on that basis. As Lord Hoffmann explained at 220C, "*[t]he trouble is that it throws out not only the bathwater of the extraneous and coincidental but also the baby of the subsequent events which were the very thing against which the lender relied upon the valuation to protect himself*".

59. The Court further placed the risk of futile expenditure outside of PGG's duty because it considered "*PGG had no input into any of these decisions and its advice was not sought or reasonably relied on for these purposes*".[129] It focused on whether PGG had direct and specific input on subsequent steps, noting PGG was not asked about terminating the cow lease or re-grassing the pasture.[130] But that is the wrong question to ask. It does not matter whether PGG specifically advised on the expenses or the business. What matters is whether there was a sufficient causal connection between the loss suffered and the foreseeable risk of PGG getting the production information wrong.[131]

60. The Court of Appeal erred finally in then limiting recoverable damages to only 62 per cent of the difference in value, or $300,000.[132] While the Court said there was "*no exact science in this figure*",[133] it offered two independent justifications for the reduction. Both are wrong.

61. First, the Court wrongly reduced the damages based on the notion that other matters, like the Routhans' omission to ask Mr Cook about his farming methods or the farm's average production, also contributed to the overpayment.[134] Any such causal contribution, however, is beside the point. The enquiry is about whether the full extent of the overpayment represented the realisation of a risk that PGG's duty was meant to guard against, which it did. The $480,500 difference in value is completely explicable by the overstatement of production. Once that is established, it does not matter whether other connected factors also contributed. For example, in the *York Montague* appeal in *SAAMCO*, the entire loss was recoverable notwithstanding the market collapse.[135]

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129 CA at [119].
130 CA at [119]–[121].
131 See *SAAMCO* at 219A, where Lord Hoffmann referred to the principle that "*a plaintiff's reasonable attempt to cope with the consequences of the defendant's breach of duty does not negative the causal connection between that breach of duty and the ultimate loss*".
132 CA at [145]–[148].
133 CA at [145].
134 CA at [144].
135 *SAAMCO* at 222B.

62. The position would have been different if some discrete aspect of the overpayment could have been linked solely to the failure to ask further questions. But that was not so. Instead, the Court conflated the risk principle with a contributory negligence analysis. Even then, it is factually unsound. The High Court, accepting the Routhans' expert evidence, held that the Routhans *had* completed adequate due diligence before the purchase.[136] They were entitled to rely on PGG's representations.[137] The Court of Appeal also did not appreciate that the questions it considered ought to have been asked – about efficient production levels and the farming system – were already answered by the Routhan Prospectus.[138] That, in effect, communicated that the efficient production, with usual farming inputs, was 103,000 kgMS.

63. Second, the Court of Appeal conducted a flawed analysis based on comparing the purchase price (ie, value at 103,000 kgMS) and the value of a hypothetical version of Farm 258 with average efficient production at 90,000 kgMS.[139] There was no basis for such a comparison. The Court was wrong to use 90,000 kgMS as "*the figure PGG ought to have supplied*".[140] The figure PGG ought to have supplied was the true average at 98,730 kgMS,[141] which in turn would have not only revealed the most recent year's production at around 90,000 kgMS, but also the fact that production was plummeting year-on-year. The most recent year was on track for only 85,000 kgMS.[142]

Claim is, in any event, within *SAAMCO* counterfactual analysis

64. The Court of Appeal sought to justify its conclusions by pointing to falling milk prices.[143] But that is a red herring. So too changing interest rates,

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136 HC at [221]; and Lewis Reply BOE at [73]–[76] **[202.0566]**.

137 See *Rutherford v Attorney-General* [1976] 1 NZLR 403 (HC) at 413 per Cooke J (as he then was), relating to reliance on a Ministry of Transport certificate of fitness for a heavy truck without also procuring private certification; and *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879 at [53] per William Young P (as he then was).

138 See [17]–[19], above.

139 CA at [147].

140 CA at [147].

141 HC at [55]; and CA at [4].

142 HC at [2]; Westland records **[304.2286]**; and Glennie Reply BOE at [3](b) and [15]–[20] **[202.0589]**.

143 CA at [116] and [125].

the Routhans' capital expenditure, and the property market. Taking all of these things into account, the Routhans would still have lost their incoming net equity. Of the total loss of $5.0m, the Routhans seek to recover the funds they went in with, being $1.58m, plus interest. PGG's breach of duty, and not any extraneous factor, caused the Routhans to lose these incoming funds, which would not have been lost had the information been true. A *SAAMCO* counterfactual analysis,[144] used as a cross-check, confirms this common-sense conclusion.

65. First, assuming Farm 258 produced 103,000 kgMS with a normal farming system, the Routhans would have achieved that average production. The "*Routhans brought a considerable breadth of relevant experience to the farming operation*" and they "*sought out advice from what appeared to be suitable sources*".[145] Despite the distracting work to fix phantom problems, the Routhans achieved average efficient production in the first few years and beat the district averages (on which PGG's expert relied).[146] Production only reduced once financial constraints flowing from the misrepresentation stopped them from farming properly.[147]

66. Second, with average production at 103,000 kgMS, the Routhans would have been better off by some $2.2m as at FYE 2019 (or $1.6m as at 31 December 2015):

    a. Farm 258 would have been worth at least what the Routhans paid for it. So, they would have been better off by $480,500 straight away[148] (or $630,500 based on PGG's valuation evidence which valued the farm at $150,000 above the purchase price).[149]

    b. Revenue would also have been significantly higher, notwithstanding the decline in milk prices. The Routhans missed

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144 Keeping everything constant, save for assuming the misrepresentation to be true: *Meadows* at [53].
145 HC at [225]; Glennie BOE at [86] **[201.0083]**; Lewis Reply BOE at [109] **[202.0573]**; and Bradley BOE at [3] and generally **[201.0031]**
146 HC at [226].
147 HC at [227].
148 CA at [136]; Hancock BOE at [51]–[53] **[201.0142]**; and valuation **[201.0148]**. See further n 168 below.
149 CA at [138]; and Hines Valuation **[305.2767]**.

out on at least $500,000 in revenue as at 31 December 2015, and $1.18m from FYE 2012 to FYE 2019:[150]

	Actual production	Actual milk revenue	Revenue at 103	Shortfall	Accumulated shortfall
YE12	80,118	$ 585,251.00	$ 622,120.00	$ 36,869.00	$ 36,869.00
YE13	79,046	$ 399,099.00	$ 653,020.00	$ 253,921.00	$ 290,790.00
YE14	88,503	$ 751,654.00	$ 779,710.00	$ 28,056.00	$ 318,846.00
YE15	64,674	$ 346,632.00	$ 509,850.00	$ 163,218.00	$ 482,064.00
YE16	78,992	$ 297,188.00	$ 372,860.00	$ 75,672.00	$ 557,736.00
YE17	69,001	$ 299,320.00	$ 533,540.00	$ 234,220.00	$ 791,956.00
YE18	87,486	$ 480,117.00	$ 630,360.00	$ 150,243.00	$ 942,199.00
YE19	66,950	$ 365,951.00	$ 603,580.00	$ 237,629.00	**$ 1,179,828.00**

67. But that is not all, as the *SAAMCO* counterfactual does not account for futile expenditure. At least $570,000 should be added separately:

    a. The Routhans, acting on professional advice, concluded that the lower-than-expected production was caused by inferior cows.[151] They terminated the cow lease. That led to costs of $269,166,[152] directly as a result of chasing the represented production.

    b. The Routhans, also on advice – including from a PGG company – sought to improve the pasture through various steps amounting to approximately $300,000.[153] These included fertiliser and re-grassing costs, and supplemental feed required in the meantime. Both Courts below accepted these steps were reasonably taken *to address the production shortfall*.[154]

68. This analysis amply supports the trial Judge's overall quantum.[155] The figure could be higher still, as it does not account for spiralling interest costs caused by lower-than-expected revenue and wasted expenditure.[156]

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150 Per Lewis evidence. Actual milk revenue at **[201.0060]** and hypothetical 103,000 kgMS milk revenue at **[202.0580]**. Note also that this does not include FYE2011.

151 CA at [59]–[60].

152 HC at [48–[49]; and CA at [61].

153 Routhan BOE at [86]–[88] and [97](c) and (d) **[201.0014]**. See PGG agronomist letter **[303.1481]**.

154 HC at [48]–[51] and [228]–[230]; and CA at [63]–[64]. Although the Judge found that some of the Routhans' other expenditure may not have been necessary, that expenditure did not cause the farm to fail. In the context of the $5.0m accumulated deficit the Routhans experienced (Glennie BOE at [46] **[201.0077.**), they would still well and truly have lost their equity, even without any of that expenditure (which itself likely increased the value of the property).

155 Even if the methodology is not identical: see HC at [196].

156 Lewis BOE at [62] **[201.0045]**; and Glennie BOE at [42]–[43], [52]–[53] and [71] **[201.0076]**.

VII. MEASURE OF LOSS

Basic measure of loss

69. A *SAAMCO* analysis does not, therefore, constrain the proper damages analysis. The remaining issue, then, is whether it is right to calculate the Routhans' loss by the diminution in value at date of purchase formula, or more broadly. The latter is the correct approach.

70. Lord Cooke's 1978 article is again instructive. Lord Cooke explains that the basic purpose or principle in both contract and tort is to place the plaintiff, as far as money can do it, in as good a situation as if her rights had not been violated by the defendant.[157] The different damages measures result from applying this same principle in two different ways: in contract, to restore the lost bargain; in tort and under the FTA, to restore the *status quo ante*.

71. The object of tort and FTA damages is to put the Routhans in the position they would have been in had the wrong not occurred.[158] The calculation that best serves that object is a question of fact; any so-called rules constitute guidance only.[159] The "*key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff*".[160] The courts are used to dealing with factual complexities and will do "*what is practically just between the parties*" to restore the claimant "*to the position he, she or it would now*

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[157] R Cooke "Remoteness of Damages and Judicial Discretion" (1978) 37(2) CLJ 288 at 297.

[158] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) (*Cox*) at 19 and 25; and *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (CA) at [100]. The same measure is generally applied under the Fair Trading Act, albeit damages is "*in the end ... a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act*": *Red Eagle* at [31]. *SAAMCO* did not change the measure: see 217G–218G ("*The calculation of loss must of course involve comparing what the plaintiff has lost as a result of making the loan with what his position would have been if he had not made it*"). See also *Manchester* at [12]; and *Meadows* at [52]. While Lord Hoffmann did not endorse 'no transaction'/'successful transaction' terminology, that was only because he considered that "*[e]very transaction induced by a negligent valuation is a "no-transaction" case in the sense that ex hypothesi the transaction which actually happened would not have happened*": at 218E–F. Nonetheless, the distinction has a "*certain pragmatic truth*" when it comes to calculating loss (*SAAMCO* at 218C–D), because it assists in correctly orienting understanding of the factual position in the counterfactual scenario. See also *Duthie v Roose* [2017] NZSC 152, [2018] 1 NZLR 355 at [55]–[56], where this Court cautioned that these terms must be "*used carefully and in a way which is closely focused on the occurrence of loss*".

[159] *Altimarloch* at [23]–[24] per Elias CJ and [156] per Tipping J.

[160] Ibid, at [156] per Tipping J.

obtain had the transaction not occurred".[161] This "*involve[s] comparing what the plaintiff has lost as a result of making the loan with what his position would have been if he had not made it*".[162]

Routhans' loss encompasses at least their net equity

72. The correct counterfactual is the position the Routhans would have been in had they purchased another farm.[163] If they had done so, they would have retained their net equity position. As matters actually unfolded, PGG's misrepresentations caused them to lose at least their incoming net equity of $1.58m[164] by 31 December 2015:

    a. The Routhans lost $480,500 straight away by overpaying for Farm 258.[165] In the counterfactual, they would have paid the market price for an alternative farm, so no loss would have resulted.

    b. By 30 June 2014, the Routhans lost $498,056 from the accumulated negative trading result of Farm 258,[166] making their total loss $978,556. The experts agreed the accumulated result at this date with the alternative farm would have been positive, ie the Routhans would not have lost money.[167] Nor had there been any decline in property prices.[168]

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[161] *Wyzenbeek v Australasian Marine Imports Pty Ltd)* [2019] FCAFC 167, (2019) 373 ALR 79 at [108]. In *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA) (*Esso*) at 820–821, Denning LJ distinguished loss of bargain damages and explained that, in tort, the claimant is "*only to be compensated for having been induced to enter into a contract which turned out to be disastrous for him ... You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract: and contrast it with his position as it is now as a result of entering into it*".

[162] *SAAMCO* at 217G–H.

[163] Both Courts below held that the Routhans would not have purchased Farm 258 had they not been misled by PGG (HC at [174]–[176]; and CA at [106]). PGG's application to cross-appeal on that point was declined by this Court (Leave Judgment at [3]). The High Court further accepted that the Routhans would have purchased another farm, though not the precise farm identified at trial (HC at [192]–[193]) and that they would not have lost their equity with an alternative farm (HC at [195]).

[164] See HC at [10]; Joint Expert Report at [22] **[202.0617]**; and Glennie BOE at [46] **[201.0077]**.

[165] CA at [136]–[141]; Hancock BOE at [51]–[53] **[201.0142]**; and Hancock Valuation **[201.0148]**. Mr Hancock valued Farm 258 as worth $2,319,500 inclusive of dairy company shares (or $2,165,000 exclusive) at the time of purchase, which is $480,500 below the purchase price of $2,800,000. The Court of Appeal then reduced that to $300,000 based on *SAAMCO*: CA at [145]–[148].

[166] Lewis BOE at **[201.0050]**, **[201.0051]** and **[201.0060]**. Note the financial years for a dairy farm align with the dairy seasons, for a year end of 30 June.

[167] Joint Expert Report at [32] **[202.0620]**; Lewis Reply BOE at [27]–[31] **[202.0556]** and calculation **[202.0579]**; and McAra calculation at **[202.0501]**. But foregone profits are not claimed here.

[168] CA at [134]; Hines BOE at [8] **[202.0511]**; and Hines valuation at **[305.2767]** and **[305.2777]**.

c. By 31 December 2015, the Routhans lost another $600,000, completely erasing their incoming net equity of $1.58m.[169] Again, the experts agreed that the Routhans would not have lost money with the alternative farm.[170] This was, again, before any observable property price decline.[171]

73. The Routhan's lost equity of $1.58m is a fraction of the total business loss – a decline of $5m, with the business ending $3.5m in the red.[172] PGG is responsible for at least that lost equity.

74. The Court of Appeal, however, applied what it termed the "*normal measure*": the difference between the price paid and market value at the date of the transaction.[173] Here, that was $480,500[174] (which, as set out above, was incorrectly reduced still further).

75. But the normal measure, which awkwardly straddles both contract and tort law for misrepresentation cases inducing contracts,[175] is merely a starting point. It will not always do justice. In a contract case, the normal measure is a proxy for the lost bargain because the price paid is assumed to be equivalent to the 'as represented' value. On this basis, if the plaintiff is paid the difference between price and value, it can sell the defective goods and purchase the contracted goods instead. This was not, however, the case in *Altimarloch*, so the normal measure was not

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169 The Routhans lost another $286,038 trading by 30 June 2015 and the remainder of their equity ($320,444) was by 31 December 2015 (middle of FYE 30 June 2016): Lewis BOE at **[201.0050]**, **[201.0051]** and **[201.0060]**.

170 See n 170, above.

171 In June 2016, Rabobank recorded Farm 258's fair market value as $2.7m **[303.1876]**. PGG's valuer, Mr Hines, advised Rabobank in October 2015 that Farm 258 was worth $3m: **[304.1948]**. Rabobank had obtained a valuation in July 2015 at $2.24m, **[304.1887]**, but in April 2016 recorded that "*considering Peter Hines values also, the account at this stage is not deemed to be exposed to loss*" **[304.1948]** and in February 2017, adopted a considered valuation of $2.6m **[304.2120]**. In May 2016, Mr Daly appraised Farm 258 at $3.15m **[304.1958]**. The Routhans would also have made modest profits with the alternative farm (Joint Expert Report at [32] **[202.0620]**; Lewis Reply BOE at [27]–[31] **[202.0556]** and **[202.0579]**; and McAra **[202.0501]**), as well as likely benefitted from capital improvements (eg, Glennie BOE at [81] **[201.0082]**).

172 Glennie BOE at [46] **[201.0077]**.

173 CA at [115] and [128].

174 See n 168, above.

175 J Edelman, S Colton and J Varuhas *McGregor on Damages* (21st ed, Sweet and Maxwell, London, 2020) at [4-002]–[4-004], [24-001], [34-014]–[34-015], [34-054]–[34-060], [49-028] and [49-062].

used.[176] One must, as Tipping J observed, recognise the justice of individual cases.[177]

76. The approach of departing from the normal measure where necessary to do justice is required, no less, in tort and FTA cases. It is *"unhelpful and dangerous"*[178] to label the normal measure as a rule. Doing so means *"inevitably the wrong question is asked: namely is the 'rule' ... satisfied rather than asking the more fundamental questions — what are the facts, do those facts establish a compensable loss and if so, what was its true measure?"*[179] As Hobhouse LJ (as he then was) recognised in *Downs v Chappell*, this is particularly so for business purchases, for which "*the diminution in value test will normally be inappropriate*".[180]

77. In a tort case, the normal measure is a proxy for the *status quo ante* only if one assumes that the misrepresentation was immediately discovered and the flawed asset immediately sold so that the only harm was the price difference between the two notional sales. For this reason, as Lord Hoffmann said in *SAAMCO*,[181] the normal measure does not work where the misrepresentation is hidden and has ongoing effects. That is why the focus in *Esso* and *Downs* is on achieving just compensation; not, as framed by the Court of Appeal, to shift the date for assessing

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[176] In *Altimarloch*, the value of the property as represented (with water rights) was $2.95m, the purchase price was $2.675m and the actual value (without the rights) was $2.55m: at [32], [62], [80] and [155]. The 'normal' expectation measure was $400,000. But this Court upheld cost of cure damages of around $1m (awarded in both Courts below).

[177] *Altimarloch* at [106] (*"The essential question is what, if any, loss the purchaser suffered from entering into that contract. It would be artificial and contrary to authority to focus solely on the state of affairs existing when the contract was entered into or settled. The real issue is whether the contract was ultimately a loss-making one for the purchaser. That obviously has to be looked at more broadly"*.)

[178] *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, (2014) 309 ALR 445 (*ABN AMRO Bank NV*) at [969].

[179] *ABN AMRO Bank NV* at [969]. See also *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388 at [31].

[180] *Downs v Chappell* [1997] 1 WLR 426 (CA) at 443.

[181] *SAAMCO* at 221.

damages.[182] In *Esso*, recoverable loss included the initial capital, ongoing operating losses and loss of the alternative use of the funds.[183]

78. Here, the misrepresentation infected the whole purchase, causing loss far beyond the initial difference in value. The Routhans, who did not learn of the misrepresentation until late 2014,[184] could not be expected to sell the farm straight away. As both Courts below held, the Routhans acted reasonably in targeting other potential causes for the less-than-represented production,[185] informed by professional advice.[186] Their incoming net equity was expended on these different, recoverable, matters. The Routhans should, at least, recover their incoming funds which PGG's misrepresentation effectively caused them to lose.

VIII. ORDERS SOUGHT

79. The Routhans respectfully seek orders:

    a. allowing the appeal and awarding damages of at least $1.58m;

    b. awarding interest on that sum at the prescribed statutory rates in two tranches (from 20 December 2010 on the difference in value of $480,500 and from 31 December 2015 on the balance); and

    c. awarding them standard costs in this Court, quashing the Court of Appeal costs judgment and awarding them costs in that Court.[187]

Dated 17 November 2023

D R Kalderimis / T Nelson / O T H Neas
Counsel for the Appellants

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[182] CA at [129]–[132]; *Esso* at 820–821; and *Downs v Chappell* [1997] 1 WLR 426 (CA) at 439–443 (often labeled a deceit case, but the same damages were awarded against the accountants for negligent misrepresentation). See also *East v Maurer* [1991] 1 WLR 461 (CA) at 466–467 and *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 448 (CA) at 498–500. On the overlap between calculating damages for negligent and fraudulent misrepresentations, see *McGregor on Damages* at [49-002]–[49-005], [49-028], [49-055], [49-062] and [49-069].

[183] *Esso* at 822.

[184] HC at [54] and [105]; CA at [62] and [91]; and Routhan BOE at [107] **[201.0019]**.

[185] HC at [75], [105] and [219]; and CA at [93]–[94].

[186] Resulting in reasonable expenditure on extra fertiliser, supplementary feed, milk powder-based substitutes, and over-sowing the pasture: CA at [93]–[94].

[187] On a complex appeal, band B basis (which the Court of Appeal applied in awarding PGG costs).

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4. *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599
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7. *BNZ v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA)
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9. *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617 (PC)
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11. *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492
12. *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA)
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15. *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726

Other cases

16. *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65, (2014) 309 ALR 445
17. *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 (CA)
18. *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL)
19. *Chu v Lau & Co* [2006] HKCA 155
20. *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA)
21. *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 448 (CA)

22. *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA)

23. *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA)

24. *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459

25. *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25, (1999) 199 CLR 413

26. *Lowenburg, Harris & Co v Wolley* (1895) 25 SCR 51

27. *Murphy v Overton Investments Pty Ltd* [2004] HCA 3, (2004) 216 CLR 388

28. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388 (PC)

29. *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] SGCA 41

30. *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190 (HL)

31. *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288

32. *Rutherford v Attorney-General* [1976] 1 NZLR 403 (HC)

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

34. *Scott v Wilson* (2004) 21 NZTC 18,939 (CA)

35. *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879

36. *Wishing Star Ltd v Jurong Town Corp* [2008] SGCA 17

37. *Wyzenbeek v Australasian Marine Imports Pty Ltd)* [2019] FCAFC 167, (2019) 373 ALR 79

Texts and commentary

38. A Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) (extracts)

39. Sir Robin Cooke "Remoteness of Damages and Judicial Discretion" (1978) 37(2) CLJ 288

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42. J Edelman, S Colton and J Varuhas *McGregor on Damages* (21st ed, Sweet and Maxwell, London, 2020) (extracts)

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45. D McLauchlan "A Damages Dilemma" (1997) 13 JCL 1

46. D McLauchlan "Damages for Misrepresentations" (1987) 6(3) Otago Law Review 370

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48. D McLauchlan and & C Rickett "SAAMCO in the High Court of Australia" (2000) 116 LQR 1

49. D Nolan and J Plunkett "Keeping Negligence Simple" (2022) 138 LQR 175

50. *Restatement (Second) of Torts* (August 2023 Update) (extracts)

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