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

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

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

Appellants/Cross-respondent

AND: **PGG WRIGHTSON REAL ESTATE LIMITED**

Respondent/Cross-appellant

RESPONDENT'S SYNOPSIS OF REPLY SUBMISSIONS OPPOSING APPEAL
Dated: 8 December 2023

Next Event: Hearing 11-12 March 2024

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

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MAY IT PLEASE THE COURT:

Introduction and summary of arguments

[1] These submissions are filed in response to the Appellants' submissions dated 17 November 2023.

[2] The "SAAMCO" principle is well established. It is aimed at ensuring that a wrongdoer is only legally responsible for losses that are properly attributable to the act or omission that constitutes the wrong. The principle is not new but was clearly articulated by Lord Hoffmann in the SAAMCO[1] line of cases and has been further considered and articulated by the UK Supreme Court in *Hughes-Holland v BPE* Solicitors *and another* [2] and, more recently, in *Manchester Building Society v Grant Thornton UK LLP*[3] and *Meadows v Khan*[4].

[3] Where, as in this case, a person is under a duty to provide accurate information or advice for the purpose of someone else deciding upon a course of action (in this case whether to enter into purchase of a farm) the person is not generally regarded as responsible for all the consequences of the person entering into the transaction. The underlying policy of the SAAMCO principle is that a duty of care which imposes on such a person responsibility for all losses which would have occurred, even if the information which he gave the party had been correct, is not "*fair and reasonable as between the parties.*"[5]

[4] The UK Supreme Court in *Manchester Building* and *Khan* emphasised the importance, when applying the SAAMCO principle,

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[1] *South Australia Asset Management Corporation v York Montague Limited* [1997] AC 191.
[2] *Hughes-Holland v BPE Solicitors and another* [2017] UKSC 21.
[3] *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20.
[4] *Meadows v Khan* [2021] 4 All ER 65.
[5] See paragraphs [22] to [31] below.

of focussing on the purpose for which the information or advice was given (and therefore the scope of the duty) in determining whether there is a sufficient causal nexus between the claimed losses and the scope of the duty. The Court in those cases recognised that the "*information*" and "*advice*" categories identified by Lord Hoffmann lie on a spectrum and that the focus of the enquiry should therefore be on the purpose for which the information or advice was provided.[6]

[5] The inaccurate historical information which was negligently provided by the Respondent (**PGG**) to the Appellants, the Kaniere Family Trust, (**the Trust**), was for the purpose of informing the decision by the Trust whether to enter into the purchase of the subject farm (**the farm**). Historical production was one of a number of factors which were relevant to the decision whether to purchase the farm and, if so, on what terms.

[6] PGG was not, in providing the information, providing advice to the Trust as to whether to purchase the farm or the risks involved in carrying on the farm business. The provision of the historical information by PGG in this case was, on any view, at the "*information*" end of the spectrum identified by Lord Hoffmann and recognised by the UKSC in *Hughes-Holland* and *Manchester Building.*

[7] The SAAMCO principle clearly applies in this case. PGG is not responsible for the consequences of decisions made by the Trust in the course of operating the business over a period of 10 years. PGG can only be liable for any loss suffered by the Trust when entering into the transaction.

[8] The normal measure of loss in respect of a misrepresentation of fact, which is relied upon when entering into a transaction, is diminution

[6] See paragraphs [25] to [28] below.

in value of the property or asset purchased that is attributable to the information being wrong. That normal measure of loss both identifies any losses which are properly attributable to the information being wrong and quantifies any such loss by reference to any over-payment by the purchaser attributable to that diminution in value.

[9] PGG respectfully endorses the analysis and reasoning of the Court of Appeal at paragraphs 115 to 126 of its judgment. The Court of Appeal correctly applied the SAAMCO principle. It was correct to conclude that the losses caused by the forced sale of the properties owned by the Trust were the consequence of investment decisions made by the Trust post-purchase, and taking on increasingly high levels of debt, leaving it vulnerable to the dramatic fall in milk prices which occurred in 2014.

[10] Those losses are outside the scope of PGG's duty. The historical production information was not provided for the purpose of informing decisions by the Trust to invest in various capital expenditure and improvements on the properties (the farm and a separate run off property) owned by the Trust. Nor did PGG have any input into those decisions or the decision to fund that expenditure by incurring over $1.2 million in further debt (in addition to the fully debt funded purchase price of the property of $2.8 million). That is particularly so in circumstances where the Trust knew, within 3 months of purchase of the property, that production levels were significantly below the 3-year average production levels represented by PGG.

[11] Provision of the 3-year average historical information by PGG was not a representation that the Trust could, or would, achieve the same levels of production as the vendor had been able to achieve. Nor was it a representation that the historical production was achieved by the vendor on a "*stand-alone*" basis or using "*normal*" farming inputs

and systems. If, as the Appellants appear to assert, the Trust assumed (without making any enquiry) that the vendor had achieved the relatively high levels of production using a "*stand-alone*" farming system and "*normal*" inputs, that assumption is not an assumption for which PGG is responsible.

[12] For the reasons articulated by the Court of Appeal, and discussed below, it is submitted that there is no sufficient causal connection between the losses now claimed by the Appellants and the scope of the duty imposed on PGG when providing the historical production information.

[13] The Appellants' case appears to be based on a simplistic "*but-for*" based on there being *"no transaction"*. That analysis is only relevant to establishing factual causation. As recognised by the House of Lords in *SAAMCO* and subsequent decisions that simple "*but-for*" analysis (except in cases of fraud) provides no answer to the question of what losses fall within the scope of the defendant's duty and are losses for which the defendant is legally responsible.

[14] The Appellants' attempt to relitigate the deceit cause of action (for which leave to appeal was declined), by asserting that PGG's negligence in this case was egregious and that it stood to gain from the transaction going ahead because it was remunerated on a commission basis, is both unprincipled and exaggerated.[7]

[15] There is no principled reason why the well-established fraud exception should be extended to negligent misrepresentation depending on whether the negligence is "*egregious*" or ordinary negligence. Nor was gross, or "*egregious*", negligence pleaded. The negligence in this case could not plausibly justify application of the principles applicable to the measure of damages in cases of fraud.

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[7] See for example *Smith New Court Securities Ltd v Citibank N.A.* [1997] A.C. 254.

Background facts

[16] Mr and Mrs Routhan had no experience of owning or operating a dairy farm. Mrs Routhan came from a farming family but had never managed a farm or engaged in farming. Mr Routhan had no experience of farming at all.[8] They engaged the services of a farm consultant, Ross Bishop, prior to purchase. Mr Bishop prepared a combined budget forecast in respect of both the subject farm and another farm, *Casa Finca,* which the Trust had contracted to purchase. He estimated production from the two farms of 245,000 kg/MS.[9]

[17] Mr Bishop's forecasts[10] were based on his assessment of average efficient production for farms in the area. He took no account of the historical production of the farm when preparing his budget.[11] The purchase of *Casa Finca* did not proceed. No revised budget based on forecast production from the farm was prepared.[12]

[18] The purchase of the farm was initiated by the Trust, based on its review of a CRT brochure[13]. The CRT brochure was prepared by a different real estate agent, not PGG, which had been approved by the vendor. At the time the CRT brochure was produced (season ending May 2009) the 3-year average was accurately stated as 103,000kg/MS. The farm, using farm inputs, management and resources available to the vendor, had produced as much as 107,000kg/MS in the 2007 season.[14]

[19] The description of PGG's negligence as "*egregious*" is an exaggeration. Mr Daly did not pluck a production figure out of the

[8] HC at para [42], NOE Philip Routhan 203.0622 page 21 lines 5-19, page 56 lines 22-23, page 63 lines 16-19.
[9] CoA para [40].
[10] [302.1033], [302.1040] and [302.1049].
[11] BOE Bishop [202.0361] paragraph [10], NOE Bishop page 411 line 12-17 [203.1026].
[12] CoA para [50]; HC para [223].
[13] [301.0227].
[14] CoA para [5].

air. He questioned the vendor as to whether the 103,000kg/MS average was correct and was given an equivocal answer[15]. PGG negligently failed to confirm the correctness of the 103,000 kg/MS average for the immediately preceding 3 seasons.

[20] The correct average production for the immediately preceding 3 seasons was 98,729 kg/MS. The difference of approximately 4.1 % was within the range of fluctuation in production which is normal in that area of the West Coast.[16]

[21] There is no evidence to suggest that any business model in respect of the farm (as opposed to mere repetition of the historical average production figure in correspondence with the bank[17]) was produced and considered, either by the bank or the Trust. Nor were there any substantive calculations or estimates by the bank based on historic production.

The "SAAMCO" Principle

[22] The (so-called) SAAMCO principle is aimed at ensuring that a wrongdoer is only legally responsible for losses that are properly attributable to the act or omission that constitutes the wrong. In this case the wrong was the negligent provision of inaccurate 3-year average historical production figures as one factor of relevance to the Trust's decision whether to purchase the farm.

[23] The SAAMCO principle[18] was articulated by Lord Hoffman as being that:

> *"a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all*

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[15] BOE Daly [201.0277] at [19].
[16] BOE McAra at [14] [202.0448].
[17] See [302.1070], [303.1542], [303.1696], [303.1871]' in fact various Rabobank analytical documents make no reference to the historic production figures at all [302.1080], [303.1297], [303.1401], [304.1886].
[18] *South Australia Asset Management Corporation v York Montague Limited* [1997] AC 191 at 210-218.

> *the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave the party had been correct is not in my view fair and reasonable as between the parties.”*[19]

[24] The principle has been further considered and articulated by Lord Sumption in *Hughes-Holland v BPE Solicitors and another*[20] and, more recently, in the UK Supreme Court decisions of *Meadows v Khan*[21] and *Manchester Building Society v Grant Thornton UK LLP*.[22]

[25] Although the distinction between “*information*” and “*advice*” cases is clear, the UK Supreme Court, in the subsequent decisions in *Hughes-Holland*, *Meadows* and *Manchester Building,* has recognised that the information/advice categories lie on a spectrum and that there are difficulties in some cases in identifying within which category the particular facts of the case fall.[23]

[26] In *Manchester Building* the UK Supreme Court stated that the information/advice distinction was “*too rigid*” and that “*the whole varied range of cases constitutes a spectrum.*”[24] The Court went on to state that:

> *“At one extreme will be pure “advice” cases, in which on analysis the adviser has assumed responsibility for every aspect of a transaction in prospect for his client. At another extreme will be cases where the professional adviser contributes only a small part of the material on which the client relies in deciding how to act. In some cases (such as those involving valuers) it is readily possible to say that the purpose of the advice given is limited and that the adviser has assumed responsibility under a duty the scope of which*

[19] *SAAMCO* at p 214D.
[20] *Hughes-Holland v BPE Solicitors and another* [2017] UKSC 21.
[21] *Meadows v Khan* [2021] 4 All ER 65.
[22] *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20.
[23] *Hughes-Holland* at [44] and the discussion at [40] to [44].
[24] Per Lord Sumption in *Manchester Building* at [18].

> *is delimited by that purpose, which Lord Hoffmann called an "information" case."*[25]

[27] The Supreme Court concluded in *Manchester Building* that:

> *"…rather than starting with the distinction between "advice" and "information" cases and trying to shoe-horn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant:…Ascribing a case to one or other of these categories seems to us to be a conclusion to be drawn as a result of examination of that prior question."*[26]

[28] The Supreme Court in *Manchester Building* recognised and confirmed that, in an information case, the adviser contributes a limited part of the material to be relied upon but "*the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client*."[27] The Court expressly endorsed the analysis by Lord Sumption in *Hughes-Holland* (at paragraph 41) that in such a case "*the defendant's legal responsibility does not extend to the decision itself*". Thus the defendant "*is liable only for the financial consequences of* [the information] *being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater*".[28]

[29] The Supreme Court in *Manchester Building* confirmed that the counterfactual test articulated by Lord Hoffmann in *SAAMCO,* remained a useful tool or "*cross-check*" 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 [i.e. the loss falling within the scope of the defendant's duty] and (ii) loss flowing from the*

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[25] *Manchester Building* at [19].
[26] *Manchester Building* at [19].
[27] *Manchester Building* at [21].
[28] *Manchester Building* at [21].

> *decision to enter into the transaction at all [ie by application of a simple "but for" test]".*[29]

[30] The underlying policy of the SAAMCO principle is to ensure a fair and reasonable allocation of responsibility for losses suffered by the claimant as a result of entering into a transaction where a defendant provided information or advice. A duty of care which imposes responsibility for losses which would have occurred even if the information he gave had been correct is not "*fair and reasonable as between the parties*".[30]

Application of the SAAMCO Principle to the facts of this case

[31] PGG negligently provided inaccurate information as to the average production of milk solids from the farm over the previous 3-year period. PGG represented that the 3-year average production was 103,000 kg/MS. The correct 3-year average production was 98,729kg/MS: a difference of approximately 4.1%.

[32] The inaccurate information was provided by PGG as part of a brochure (**the Proposal**)[31] based on information contained in a previous sales brochure (**the CRT brochure**)[32] prepared by a different real estate agent from the year before. Although the information in the brochure was checked with, and confirmed by, the vendor (including information about the inputs into farm system) the vendor indicated that he needed to confirm the historical production average for the immediately preceding 3-year period.

[33] PGG negligently failed to obtain confirmation that the 103,000 kg/MS average production contained in the CRT brochure and subsequently the Proposal, was still correct. In fact it was not. The

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[29] *Manchester Building* at [4], [5], [23] and [195-203].
[30] *SAAMCO* at p. 214 and see the discussion by Lord Burrows in *Manchester Building* at [179] and [190] to [192].
[31] 305.2914.
[32] 301.0227.

correct average production figure for the previous three seasons was 98,729 kg/MS.

[34] The inaccurate 3-year average production is the only inaccurate information for which PGG has any legal responsibility. It was the only pleaded breach of duty by PGG. PGG has no responsibility for other alleged inaccuracies in the Proposal.

[35] The 3-year average milk solid production was only one aspect of various information provided in the CRT brochure and the Proposal which was relevant to a person interested in purchasing the farm. As stated by Mr Hines, PGG's valuation expert, in his report dated 2 September 2020[33], historical production figures on their own are only one of a number of factors which need to be taken into account when purchasing a farm property. There are numerous other factors (including the farming system, availability of support blocks, supplemental feed and the quality of the actual farm management) which also need to be taken into account.

[36] Mr Savage, farm expert witness for PGG, referred to the following components as being "*key*" to the determination as to whether to buy a farm, the effective area of the farm, the extent of supplements used, the area of feed and crops, how or whether dairy support farms are used, the amount of nitrogen used, whether heifers were grazed on the farm, the percentage of heifers reared, whether cows were sent off-farm for winter grazing, management structure and type and disease status of cows.[34]

[37] Mr Hancock, who gave expert valuation evidence for the Trust, based his valuation on "*average efficient*" production[36](which Mr Hines agreed is the preferred approach to valuation of farm

[33] CVL valuation report dated 2 September 2020 [305.2764 at 2769 and 2770].
[34] BOE Savage at[18] [202.0387].
[36] BOE Hancock [201.0135] at [52] and Appendix D.

properties).[37] The Trust's pre purchase budget schedules, prepared by the Trust's farm consultant Mr Bishop, were also based on his assessment of average production.[38] No pre-purchase valuation report was sought by the Trust, or indeed its bank, prior to purchase.

[38] PGG had no involvement in providing advice to the purchaser as to the merits of the purchase of the farm or the assessment of risks involved in purchasing and operating the farm. Responsibility for those risks rested squarely on the purchaser. PGG has no legal responsibility for any losses suffered by the purchaser as a consequence of those risks.

[39] The obvious and only purpose of the provision of the historical production information was for it to be taken into account by the prospective purchaser in making its own assessment as to whether to purchase the farm. In providing that information, PGG was clearly not providing advice as to the merits of the purchase decision, let alone the ability of the purchaser to replicate the historic levels of production achieved by the vendor.

[40] This case is patently within the "*information*" category of cases identified in *SAAMCO* and discussed in *Hughes-Holland* and *Manchester Building*. The scope of the duty was clearly limited to the provision of accurate information as to historic production as one factor a prospective purchaser could reasonably take into account when making its assessment of whether to purchase the property. PGG's duty is limited accordingly.

[41] PGG is not responsible for losses suffered by the Trust as a result of actions taken by it in the course of managing and operating the farm over a period of ten years. PGG had no input into those decisions and assumed no responsibility, when providing the historical production

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[37] CVL report dated 20 September [305.2764] at 2769.
[38] Bishop NoE page 411 lines 5-10 [203.1026].

information, for any losses suffered as a consequence of the Trust's investment and operational decisions in the course of farming the property.[39]

[42] It is irrelevant to the enquiry as to what losses, if any, PGG is legally responsible for that this case is a "*no transaction*" case (in the sense that the purchasers would not have purchased the property had they been given accurate information). As noted by Lord Hoffmann in *SAAMCO*, and as further explained by Lord Sumption in *Hughes-Holland*, the fact that the claimant would not have entered into the transaction had it been given correct advice or information is irrelevant to the enquiry as to what losses, if any, the defendant is legally responsible for as a consequence of the plaintiff entering into the transaction.[40]

[43] As noted by Lord Sumption in *Hughes-Holland*:

> *"…the fact that the material contributed by the defendant is known to be critical to the claimant's decision whether to enter into the transaction does not itself turn it into an "advice" case. Otherwise all "no transaction" cases would give rise to liability for the entire foreseeable loss flowing from the transaction, which is the very proposition rejected in SAAMCO."*[41]

[44] As stated by Lord Nicholls of Birkenhead in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*[42], an information provider such as a defendant valuer:

> *"…is not liable for all the consequences which flow from the lender entering into the transaction. He is not even liable for all the foreseeable consequences. He is not liable for consequences which would have arisen even if the advice had been correct. He is not liable for these because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer".*

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[39] CoA at [119] and [125].
[40] *SAAMCO* at p. 218C, *Hughes-Holland* at [31].
[41] *Hughes-Holland* at [41].
[42] *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 at [1631].

[45] Applying those principles to the claimed losses in this case, the scope of the duty is confined to any losses suffered as a result of the information being wrong when entering into the transaction. The information was not provided for the purpose of informing decisions by the purchaser as to management and operation of the farm. Nor was it provided for the purpose of informing decisions made by the Trust to invest in major capital improvements and to fund those improvements with further debt.

[46] Given that limited scope of the duty in providing the information to the Trust any loss for which PGG is responsible can only be the amount of any over-payment for the farm by the plaintiffs which is properly attributable to the information being wrong.

The normal measure of loss

[47] The normal measure of loss (whether in tort or under the FTA) in claims based on a misrepresentation of fact when entering into a transaction, is the difference between the value of the transaction had the information been correct and the actual value of the transaction based on the (incorrect) information provided[43] (**the diminution in value test**).That this was the appropriate and normal measure of loss in this case was recognised by the Court of Appeal[44].

[48] The normal measure of loss, in cases involving provision of inaccurate information for the purposes of a property or business transaction, properly reflects and engages the SAAMCO principle that the provider of the information should only be legally responsible for the consequences of the information being wrong. Applying the diminution in value test correctly identifies any loss which is properly attributable to the information being wrong. It is

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[43] See *Cox and Coxon Limited v Leipst* [1990] 2 NZLR 15, *Roberts v Jules Consultancy Limited and others* [2021] NZCA 303, *Shabor v Graham* [2021] NZCA 448, and *Harvey Corporation v Barker* [2022] 2 NZLR 213 (CA).
[44] CoA at [128].

wrong to characterise the damages assessed in this way as a "*cap*" or some kind of artificial "*limit*" on the damages recoverable from the provider of the inaccurate information.

[49] The Appellants have not proved any loss which is properly attributable to the information supplied by PGG being wrong. In particular, it has provided no evidence that the price paid by the Trust for the farm was more than the value of the farm as a consequence of the information being wrong.

[50] The Trust has sought to recover losses suffered by it as a result of decisions made and actions taken by it following the purchase of the property. PGG has no legal responsibility for any such losses.

Losses claimed are not losses for which PGG is legally responsible

[51] The amount of loss claimed by the Trust at the High Court stage was $3,184,000 which was made up of various heads of claim as identified in sub-paragraphs 7 (a) to (c) of the Court of Appeal judgment. As noted by the Court of Appeal, the purchase price of the farm was fully funded by debt. In addition, the Trust took the opportunity to refinance its debt on a separate run-off property, with Rabobank, which was the primary funder of the purchase price of the farm.[45]

[52] The Trust incurred further debt of over $1.2 million which was used to fund replacement of the herd and significant capital improvements to the farm and the separate run off property owned by the appellants. The increase in the already high level of borrowing, left the Trust further exposed to the dramatic fall in the dairy price which commenced in the 2014/15 year and continued for several years after that.[46]

[45] CoA at [2] and [54].
[46] CoA at [55].

[53] The Trust's submissions appear to acknowledge that some aspects of its claim of approximately $3,100,000 are not properly recoverable. The focus of its submission is that the recoverable damages should be "*at least*" the loss of equity ("*funds the Routhans went in with of $1.58m*") which was allegedly lost following the forced sale of the farm and the run-off property some 10 years after the purchase of the farm.[47] The claimed loss of equity of $1.58m appears to be made up of cash of approximately $750,000 received from sale of the Routhans' Wellington home and land owned in Hokitika on the West Coast[48] plus the net equity in the separate run off property of $820,000[49].

[54] PGG respectfully endorses the analysis and reasoning of the Court of Appeal at paragraphs 116 to 125 of the judgment. The Court of Appeal was correct to conclude, at paragraph 125, that the losses caused by the forced sale of the properties in 2020 were the consequence of decisions made by the Trust post-purchase in taking on increasingly high levels of debt, leaving it vulnerable to the dramatic fall in milk prices which occurred in 2014. The Court of Appeal was also correct to conclude that the losses claimed, including the loss of equity, were outside of the scope of PGG's duty and were not, therefore, recoverable from PGG.

[55] The basic premise of the Trust's submission appears to be that the misrepresentation as to historic levels of production achieved by the vendor misled the Trust into purchasing on an "*uneconomic*" basis and that the representation as to historical production had a "*continuing effect*" in "*effectively*" causing the losses claimed.[50] The argument for the Trust is that, although the information was only part of the information provided to the Trust for the purpose of informing

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[47] Appellant submissions at [64] and [78].
[48] BOE Routhan at [8] and [9] [201.0001].
[49] BOE Routhan at [73].
[50] Appellant submissions at para [13].

its decision whether to purchase the farm, PGG is liable for the consequences of the Trust purportedly relying upon the historical production information as some kind of continuing representation that the Trust would be able to achieve the same or similar historical levels of production achieved by the vendor.[51]

[56] The highly tenuous link between the misrepresented historical average production figures is demonstrated by the Appellants' submission at paragraph [24] that:

> *"Costs, calibrated to expected production levels, were spiralling and bank pressure mounted. Timpson 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 $1.6 million but were left around $3.4 million in the red".*

[57] The Appellants' argument seeks to elevate the misrepresentation of the historical 3-year average production figures to some kind of warranty or assurance of future production. As noted by the Court of Appeal, the production information supplied by PGG pre-purchase was not provided for the purpose of making any of those investment decisions years later.[52] The information was not provided for the purpose of informing investment and operational decisions to be made in the course of farming the property.

[58] The Trust could not reasonably rely on the historical production information in deciding to cancel the lease of cows from the vendor and borrow money to replace the herd, or the decisions to borrow money to fund the extensive capital improvements to the farm and the run-off property. Any losses suffered as a result of any such reliance were clearly outside the scope of the purpose for which the

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[51] See for example Appellant's submission at [19], [20] and [23].
[52] CoA at [124].

information was provided and therefore outside the scope of PGG's duty.

[59] That is even more so when the expenditure which was undertaken at a time when the Trust knew that production levels were below the historical levels of production achieved by the vendor (which they knew within three months of settlement[53]). As noted by the Court of Appeal, the increasingly lower levels of production achieved by the Trust were attributable, at least in part, to loss of use of the property during the re-grassing operation.[54] Similarly, for the reasons articulated by the Court of Appeal at paragraph 126, it is clear that there is no sufficient causal nexus between the loss and the information supplied by PGG being wrong.

[60] Even if, which is not accepted, the misrepresentation of the 3-year historical production average was equivalent to a warranty of future performance it is doubtful that expectation damages recoverable on that basis would extend to the total loss of equity for which the Trust claims that PGG assumed a responsibility.[55] The real point, however, is that the misrepresentation of historical production, which is the only wrong for which PGG has any legal responsibility, was clearly not a representation that the Trust would be able to replicate that level of production.

[61] PGG, in providing the information for the purpose of sale, was clearly not providing advice on, or assuming any responsibility for, the risk that the Trust might not be able to replicate the historical levels of production; the responsibility for any losses suffered as a result rests squarely on the Trust. The information was not provided for the purpose of budgeting revenue expectations or for the purpose of informing the wisdom and risk involved in incurring further

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[53] BOE Routhan [203.0622] p129 lines 7-9.
[54] CoA at [120], [121] and [124].
[55] *Lion Nathan Ltd v CC Bottlers Ltd* (1995) 6 TCLR 372 (CA), *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 2 NZLR 385 and *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC).

expenditure and debt to fund substantial improvements to the property.

[62] The need for any such expenditure (if there was such a need) was a result of the condition of the property at the time of purchase and had nothing to do with the (misrepresented) historical production information. As correctly found by the Court of Appeal those operational decisions, and the losses which ultimately flowed from their implementation, were well outside the purpose for which the information was provided.[56]

[63] This basic flaw in the argument is reflected in the Appellants' submissions at paras 58 and 59 where it is asserted that the historical production information created "*artificially high revenue expectations*" and the losses flowing from not receiving the "*expected production on the business model*". That flaw is also reflected at paragraphs 65 and 66 of the Appellants' submission that proceed on the assumption that "*farm 258 produced 103,000 kg/MS with a normal farming system*" and that "*with average production of 103,000 kgMS, the Routhans would've been better off by some $2.2 million as at FYE 2019*".[57]

[64] As the Court of Appeal correctly observed, historical production is no guarantee of future production.[58] It is neither reasonable, nor reasonably foreseeable, that the Trust would rely on the historical production information to assume that they would be able to replicate that level of production using a "*normal*" farming system[59].

[65] The provision of the historical production information was not a representation that the farming system implemented by the vendor

[56] CoA at [116].
[57] Appellant's submission at [66].
[58] CoA at [137].
[59] A *"normal"* farming system is not defined by the Trust and it did not form part of its arguments in the lower Courts.

was "*normal*". Nor was it a representation that the Trust, following purchase of the property, would be able to farm the property so as to achieve the same levels of production which the vendor had been able to achieve.

[66] The historical average production figures said nothing as to the farming systems and resources used by the vendor to achieve those levels of production. This highlights the error in the approach by the Appellants' to assessment of loss.

[67] That the claimed losses are outside the scope of the duty is discerned by focussing on the purpose of the duty and the absence of any sufficient causal nexus between the claimed losses and the duty imposed on PGG when providing the information. It is also supported by a proper application of the counterfactual "*cross check*."

Application of the counterfactual test

[68] The counterfactual test articulated by Lord Hoffmann in SAAMCO can, at least in cases at the "*information"* end of the spectrum, operate as a useful tool or "*cross check*" in determining whether there is a sufficient causal nexus between the losses claimed and the scope of the duty (as determined by the purpose for which the information was supplied. The SAAMCO principle proceeds on the basis that the provider of information (as opposed to advice as to the merits of entering into the transaction) is only responsible for the consequences of losses incurred as a result of entering into the transaction, which are properly attributable to the consequences of the information being wrong.[60]

[69] Lord Leggatt, in explaining flaws in the counterfactual test argued by the defendant in *Manchester Building*, stated that:

[60] See *Manchester Building* at [23], [27], [106], [128], [132], [159], [165], [168], [189] and [192].

> *"...the correct counterfactual question is not whether the claimant would have acted in the same way if (on the actual facts) the advice given by the defendant is supposed paradoxically to have been correct advice to give. It is whether, if the defendant's advice had been correct, in the sense that the facts had been as the defendant represented them to be, the actions which were in fact taken by the claimant would have resulted in the same (actionable) loss as the claimant in fact suffered."*[61]

[70] Lord Leggatt opined in that case that the relevant question is whether, if the Society's financial position had been as Grant Thornton represented it to be, the same loss would have occurred as was in fact suffered. Lord Leggatt concluded that the answer was "*no*" because, if that "*critical*"[62] advice had been correct the loss suffered would not have occurred. The loss claimed was therefore properly attributable to the advice being wrong and was within the scope of the duty imposed on Grant Thornton.

[71] At paragraph 72 of the Appellants' submissions it is suggested that the correct counterfactual is the position the Trust would have been in had it purchased another farm. They suggest that their claim for recovery of lost equity is based on the simple *"but for*" premise that, if the Trust had not entered into the transaction, they would not have suffered the losses arising from their investment and operational decisions in the course of funding the property.

[72] The appellants submissions reflect a simplistic application of the "*but for*" factual causation test in "*no transaction*" cases. They reflect a misunderstanding of the purpose of the counterfactual test and the question which needs to be asked in order to obtain the correct answer.

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[61] *Manchester Building* at [165].

[62] Grant Thornton's advice that the hedge accounting would provide an "*effective hedging relationship*", when providing advice that business model would meet regulatory requirements, was regarded by all of their Lordships in *Manchester Building* as being *"critical"* advice - see *Manchester Building* at [38], [142] [168] [206] and [212].

[73] The correct counterfactual question is whether the losses suffered as a result of the various investment and operational and borrowing decisions would have been suffered even if the represented 3-year average production for the farm had been correct. The answer to that question is "*yes*". The losses suffered as a result of the various management and operational decisions would have been the same even if the 103.000 kg/MS had been correct.

Conclusion

[74] The scope of the duty is limited to the purpose for which the information was supplied. The recoverable damages are confined to losses within the scope of the duty which are a consequence of the production information being wrong. In this case, the only losses recoverable are any proved loss resulting from over-payment which is properly attributable to the represented production information being wrong.

[75] That loss is best measured by applying the normal measure of damages of assessing diminution in value of the property caused by the information being wrong. For the reasons articulated in the Respondent's submissions in support of the cross appeal, it is submitted that any damages for which PGG is legally responsible are nil or, at most, $50,000.

[76] There is no sufficient or sensible causal link between the inaccurate historical production figures and the decisions made by the Trust to fund the purchase with debt and then incur further debt to fund major expenditure on replacing the herd, building new infrastructure, re-fencing the property, unorthodox re-grassing, replacing the water systems and operate the farm. PGG had no input into any of those decisions, nor did it assume any responsibility to the plaintiffs for the risk of their being unable, for whatever reason, to farm the

property so as to produce at the same or greater levels of production as the vendor had to been able to achieve.

[77] Similarly, if, as the Trust had clearly decided, the condition of the property was such that major expenditure was required to improve the infrastructure and pasture on the farm and the separate run-off property, those conditions existed at the time of the purchase and were unrelated to the historical production which the vendor had achieved. The need to spend further money on improving the infrastructure at the time of purchase (in spite of inspections pre-purchase), is not a risk for which PGG assumed responsibility in providing the historical production information to the Trust.

[78] It is, with respect, implausible to suggest that PGG assumed responsibility for the investment and operational decisions of the Trust in the 10-year period that they farmed the property. They are not a result of risks for which PGG is legally responsible.

Other issues

[79] It is submitted that the Court of Appeal correctly applied the SAAMCO principle and correctly adopted the "*diminution in value*" normal measure of damages in assessing the loss for which PGG is legally responsible.

[80] Counsel apprehends, however, that the Appellants have raised other arguments which appear to be aimed at persuading the Court that the SAAMCO principle should not apply on the facts of this case or should result in PGG being responsible for, at least, the loss of equity suffered when the properties were sold some 10 years after the initial purchase of the farm.

Real estate agents and "egregious" negligence

[81] The Appellants appear to assert that PGG had a personal interest in the transaction going ahead because it was remunerated on a

commission basis and its interests were therefore *"aligned with the vendor"*.[63] It is asserted that this personal interest, coupled with the (unjustified) assertion that the negligence in this case was "*egregious*," give rise to a conclusion that real estate agents should not be given a *"free pass"* and should be liable, "*for all 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*"[64].

[82] These submissions are an attempt to relitigate the deceit argument, rejected by the High Court and the Court of Appeal, and for which leave to appeal to this Court was not granted. The Courts have long recognised an exception to the general scope of duty principle in cases of fraud[65]. There is no principled basis for extending that exception to negligent breaches of a duty of care by real estate agents, who earn their living on a commission basis, and depending upon whether the established negligence is gross or "*egregious*" negligence[66].

[83] In any event there is no proper basis for concluding that PGG's negligence was *"egregious"*. The negligence of PGG is sufficiently described at paragraphs 81 to 84 of the Court of Appeal judgment. There was no finding in the Courts below that PGG's negligence was *"egregious"* and no pleading that it was.

Expected production in the "business model"

[84] The Appellants assert that the historic production information was a key element in the development of the purchaser's "*business model*"

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[63] Appellants' submissions at [11] and [53].
[64] Appellants submissions at [11], [12] and [53].
[65] See for example *SAAMCO* at 215 from E, *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 (HL), page 279 from para [F], *Gilbert v Shanahan* [1998] 3 NZLR 528 at 536 from line 10.
(Tipping J explained that the remedy for fraud (including breach of fiduciary) was all the consequences of the breach—different to the remedy for negligence by a fiduciary).
[66] There was never a pleading of gross negligence, which is implicit in the use of *"egregious"*. The HC and the CoA made no finding suggesting a higher level of negligence.

and reasonably relied upon by the Trust in structuring that model.[67] The Appellants criticise the reasoning and application of the SAAMCO principle by the Court of Appeal on the basis that the Court of Appeal failed to take into account:

> *"The risk of starting a new business based on "artificially high revenue expectations" and criticises the Court because it undertook no analysis of the effect of "not receiving the expected level of production on the "business model".*[68]

[85] There is no documentary evidence of any "*business model*" being constructed by the Trust based on revenue expectations arising from misrepresented historical production figures (or at all). The only evidence of any budget for the farm being prepared are the forecasts prepared by Mr Bishop prior to the purchase of the farm, which were based on average production from the dairy company for the whole of the West Coast region, and not on actual production of the two farms (the subject farm plus *Casa Finca*)[69]. Mr Bishop's forecasts estimated 245,000kg/MS for the two farms.[70]

[86] Even if there was evidence of some reliance on this information in constructing a business model, it would be wholly inadequate and unrealistic if it did not allow for the risk that the Trust might not be able to produce the same or a similar level of production to that which the vendor had been able to produce. That is particularly so in circumstances where the Trust had made no enquiry as to the detailed aspects of the farming system and inputs employed by the vendor which had enabled it to produce the relatively high levels of production reflected in the historical production information.

[87] The Appellants' criticism of the Court of Appeal for not carrying out any analysis of the effect of *"not receiving the expected level of*

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[67] See for example, Appellants' submissions at [2], [3], [9], [51], [53], [55] and [57].
[68] Submissions for the Appellants dated 17 November 2023 at [58].
[69] BOE Bishop [202.0361] at [10], NOE Bishop page 411 line 12-17 [203.1026].
[70] HC at [40].

production on the "business model"[71] is unfair. No evidence was led by the Trust as to the development or content of any so-called *"business model"*. Nor was evidence led as to the alleged effect of *"not receiving the level of production on the … "business model"*.

[88] Even if it was reasonable to rely, in part, on historical production information in structuring a business model, it would not have been reasonable to continue to do so when the Trust knew, within 3 months of purchase of the farm, that the historical levels of production were below the historical average.

[89] PGG is not responsible for losses attributed to revenue being less than expected revenue based on historical production information supplied for a limited purpose. While such use of that information is a possible input into a business operating model the risk that those expectations might not be realised is not a risk for which PGG, in supplying the information, assumed any responsibility.

[90] This line of argument reflects the fundamental fallacy in the Appellants' case that the representation amounted to a representation or warranty that the Trust would be able to achieve the same or similar levels of production achieved by the vendor.

The "chain of inquiry" argument

[91] *The "chain of inquiry"* argument put forward by the Appellants is, with respect, an implausible construct which does not bear scrutiny.

[92] The simple facts are that, without any enquiry as to how the vendor had achieved those levels of production, or carrying out any cost benefit analysis of major expenditure to be undertaken (a significant portion of which was expended on the separate and previously owned run off property) the Trust decided to incur further massive debt and major expenditure. If, which is not accepted, those

[71] Appellants' submissions at [58].

decisions were based on an expectation the farm would produce 130,000 kg/MS under the Trust's management, that expectation is not attributable to the information supplied by PGG being wrong.

Reliance on Esso Petroleum Co Ltd v Mardon[72] and Downs v Chappell[73]

[93] The *Esso Petroleum* and *Downs v Chappell* cases relied on by the Appellants do not, as discussed by the Court of Appeal[74], assist the Appellants. In the present case, the farm was sold in 2020, albeit at a reduced price. The Court of Appeal relevantly determined that it could have been sold in 2014 with no loss[75].

[94] In *Esso Petroleum*, the negligent misrepresentation was a "*grossly overstated*" estimated *forecast* of annual throughput (*projected*, not historical) of 200,000 gallons; Mr Mardon achieved only between 80,000 and 86,000 gallons. This is in not comparable to the 4.1% difference in *historical* average production in the present case of approximately 98,729 kg/MS as opposed to the (misrepresented) 103,000kg/MS.

[95] The Court in *Esso* stated that the representation in that case emanated from Esso which had:

> *"… the expertise, experience and authority of a large and efficient organisation carrying on the business of developing service stations to sell their petroleum products… On the evidence they clearly assumed responsibility for the reliability of their own e.a.c." [estimated annual consumption]*[76].

[96] By the time the overestimate of future throughput had become apparent there was *"no realistic possibility of finding anyone else to*

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[72] *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB 801.
[73] *Downs v Chappell* [1977] 1 WLR 426 (CA).
[74] CoA at [128] to [134].
[75] CoA at [134].
[76] *Esso* page 828A.

take it over"[77]. The court held that Esso was liable to compensate Mr Mardon for his loss of capital as a result of him having to close the business.

[97] *Esso* was decided before the introduction of the UK Misrepresentation Act and well before Lord Hoffman's exposition of the SAAMCO principle. In any event it is clearly distinguishable from the facts of this case. The Court in *Esso* clearly determined on the facts that the losses were attributable to the representation as to future throughput being wrong. *Esso* also involved use of the *"grossly overstated"* estimate to persuade Mr Mardon to enter the lease. It is, on a SAAMCO analysis, much closer to the "advice" end of the spectrum.

[98] The Court of Appeal decision in *Downs* was also decided before *SAAMCO.* The court relied upon the *"no transaction"/"successful transaction"* distinction discussed by the Court of Appeal in *Banque Bruxelles Lambert S.A. v Eagle Star Insurance Co. Ltd*[78] (one of the decisions on appeal to the House of Lords in *SAAMCO* where the House of lords rejected the *"no transaction"* analysis of the Court of Appeal).

[99] *Downs* involved findings of fraud by the vendor in providing historical turnover and profitability figures for the purpose of inducing the plaintiffs to buy his book shop business and premises. The court, in awarding lost capital, (based on the difference between the purchase price and the value of the property at the time the fraud was discovered) applied the recognised fraud exception which applies to cases of deceit. They also, however, (wrongly) applied the

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[77] Court of Appeal para [131].

[78] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] A.C. 191.

same measure of damages available in cases of fraud to the separate negligence claim.[79]

[100] The Court in *Downs* appears to have (wrongly) treated the representations as to profitability as the equivalent of a representation or warranty as to future profitability. It is respectfully submitted that, had the decision been made after the decision of the House of Lords in *SAAMCO,* it would most likely (in respect of the negligence claim) have been decided differently.[80] *Downs* is not reliable authority for awarding damages for the plaintiff's alleged "*loss of equity*" in this case and is, in any event, distinguishable from the facts of this case. As noted by the Court of Appeal in this case, it is "*not appropriate to assess damages at a later date in order to capture losses that are irrecoverable for whatever reason, including because they are beyond the scope of the duty or too remote*."[81]

Conclusion

[101] For the reasons discussed above, the Court of Appeal was correct to apply the normal, diminution in value test when awarding (reduced) damages from the amount awarded by the High Court. The Respondent seeks an order that the appeal be dismissed and seeks costs of the appeal. It further seeks an order that costs in the High Court be reviewed, if necessary, in light of this Court's judgment on the appeal and cross appeal.

Dated this 8th of December 2023

Les Taylor KC / Michael Parker
Counsel for the Respondent

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[79] See the discussion in *Smith New Court Securities Ltd v Scrimgouer Vickers (Asset Management) Ltd* [1997] AC 254, page 287 from E.
[80] Lord Hoffman in *SAAMCO* at page 216 from B preferred not to express any view.
[81] CoA at [134].