

**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

APPELLANTS' OUTLINE OF ORAL ARGUMENT ON APPEAL

11 March 2024

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

KEY ISSUE: should recoverable loss be limited to the overpayment for the farm?

1. PGG's misrepresentation and the Routhans' loss from relying on it continued well past the transaction date. Why, then, should damages be restricted to loss suffered on that date, with recovery of any subsequent losses barred?

SAAMCO risk principle does not limit recoverable loss to overpayment

2. SAAMCO is an expression of the risk principle. For what kind of loss should PGG, as a specialist rural real estate agent, reasonably be taken to have assumed responsibility?
A Sub, [31]–[50].
SAAMCO, 212–213.
Manchester, [17].
Nolan, 176–177.
3. By making unauthorised production representations, PGG assumed responsibility for loss within contemplation effectively caused by that information being misstated.
A Sub, [51]–[63].
SAAMCO, 196A–B, 212C–F.
Manchester, [13].
Todd II, 255.
Deloitte, [87]–[93].
4. Production data *not* only relevant to purchase price. PGG knew production data would be relied on to test *revenue* for purchase of *going concern*. Revenue estimates relevant to both purchase price and ongoing trading. PGG knew that Routhan Prospectus was needed for bank. Entirely within contemplation that, if production (and, hence, revenue) overstated, real risk of continued losses (eg, trading deficit, increased interest costs and extra expenditure). No zone of exoneration limited to overpayment only.
HC, [14], [106], [122], [221].
Routhan Prosp. [305.2915].
SPA, cl 32 [302.1104].
Daly, [21] [201.0282].
Daly Arb Brief: [14]
[303.1774] (quoted at Routhan, [109] [201.0020]).
Denley, [21] [201.0123].
Crews, [19], [44] [201.0098].
Glennie, [12]–[15], [201.0070].
Lewis II, [57] [202.0564].
Dillon, [25] [202.0378].
5. PGG opted to speak (cf silence or appropriately qualified statement). PGG did not need to provide correct information. It just had to provide *authorised* information. It went rogue instead. PGG 'set foot in the arena' and is liable for the kind of loss it should reasonably have contemplated would follow from breaching the duty it freely assumed.
Hedley, 486 (A CA Sub, [29]).
A Sub, [16]–[22].
Routhan Prospectus [305.2914].
Agency Agreement [302.1075].
Rural Information Sheet, [302.0860].
PGG Policy [302.0911], [0922]–[0923] and [0940].

Loss claimed is within SAAMCO risk principle (and not limited by 'normal measure')

6. 'SAAMCO cap' is limited device for valuation cases where loss is effectively crystallised on transaction date when the loan is disbursed. Does not assist in continuing loss cases. Works injustice if inappropriately applied.
A Sub, [41]–[50].
Manchester, [26], [125].
Deloitte, [94].
SAAMCO, 219H–220F.
Cooke, 296–298.
7. Not to be applied to 'extrication' cases.
SAAMCO, 218H–219E.
A Sub, [77]–[78].

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| 8. Such cases show why ‘normal measure’ of diminution in value at transaction date not invariable rule. Object to do justice. CA did not differ on the principle ([115]) but wrong to find that loss did not continue ([134] and [117]). | A Sub, [69]–[78].
<i>Altmarloch</i> , [66], [156], [167]–[173] and [188].
<i>Esso</i> , 820–822.
<i>Downs</i> , 443–444.
<i>Cemp Prop.</i> , 201–202.
Cf. CA, [122] with <i>Harvey</i> , [14]. |
| 9. At most, ‘SAAMCO counterfactual’ warranted (but may be unnecessary). PGG not treated as an insurer. No avalanche. No claim for loss caused by declining milk prices, rising interest rates, property market crash, or anything else extraneous. Routhans would have been better off by at least \$1.58m had information provided been correct. | A Sub, [64]–[68] and [79].
<i>Manchester</i> , [27].
<i>Meadows</i> , [53].
Diagram and Tables 2 and 3 below. |
| 10. Routhans only discovered misrepresentation in Nov 2014, but had lost at least \$1.58m by Dec 2015 (before property values fell). Such losses are within compensatory principle. | Routhan, [107] [201.0019].
Table 1 below. |

Context matters

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| 11. Misrepresentation not only that this was a rockstar farm. It was that it was a rockstar farm <i>based on the advertised inputs</i> . Production data has meaning only in this context. | Cartwright, [3-07]; FTA Handbook, [3.10]; <i>Godfrey Hirst</i> , [59]; <i>Bissett</i> , 183. |
| <ul style="list-style-type: none"> • Had Routhans been told truth, dramatic 2009/2010 fall in value would have revealed complete unsuitability of the farm, which would not have been purchased.
(Savage NOE, 726–727 [204.1346]; Lewis II, [51]–[53] [202.0562]; Glennie II, [17]–[21] [202.0589]) • Conversely, Routhans would have replicated the 103K kgMS production had it really been the historic average based on the advertised inputs.
(HC, [225]–[227]; Glennie, [86] [201.0083]; Lewis II, [77]–[81] [202.0567]) | <p>CA, [28] and [41].
A Sub, [17]–[20].
Davis, [19] [202.0309] and Lewis XXN, NOE 217 (7–10) [203.0837]. Lewis II, [82]–[86] [202.0569] and XXN, NOE 202 to 203 [203.0822].
Savage NOE, 714–715 [204.1334].
Jnt. Ex. Rpt. [3]–[9] [202.0612] (also CA, [49]).
Routhan II, [6]–[8], [88], [116] [202.0513].
HC, [140] (see also [12], [55], [57]–[58], [61], [79], [145]–[146], [174]–[176]).</p> |

CA’s ‘double-SAAMCO’ approach flawed

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| 12. CA erred also by imposing second, compounding, SAAMCO cap. Not put to counsel; improperly excludes context; and invents non-market calculation that does not reflect purchase price had truth been conveyed. | A Sub, [57]–[63].
CA, [136], [145]–[147]; but note [137] and [144].
Compare HC, [175]. |
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DIAGRAM: SAAMCO / Risk Principle

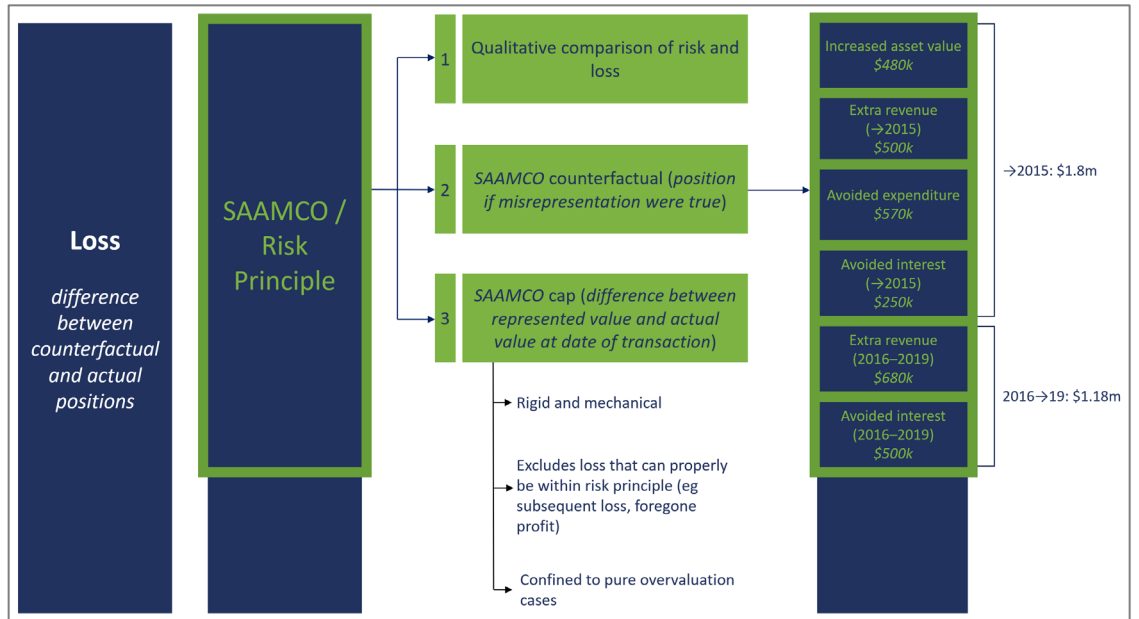


TABLE 1: Measure of loss – actual (Farm 258) vs counterfactual (eg, alternative farm)

Date	Event	Event \$	Actual position	Counterfactual position (alternative farm)	Loss	Reference
20.12.2010	Ingoing net equity	\$ -	\$ 1,570,000.00	\$ 1,570,000.00	\$ -	HC, [10]; Joint Exp. Report, [22] [202.0617]; Routhan, [9] [201.0003], [73] [201.0013]; Hancock, [54] [201.0143].
20.12.2010	Overpayment for Farm 258 - 'normal measure'	\$ 480,500.00	\$ 1,089,500.00	\$ 1,570,000.00	\$ 480,500.00	CA, [136]-[141]; Hancock, [51]-[53] [201.0142] and [201.0148].
→30.06.2014	Farm 258 trading losses - avoided in counterfactual world with positive result	\$ 498,056.00	\$ 591,444.00	\$ 1,570,000.00	\$ 978,556.00	Lewis, [201.0060], [201.0050], [201.0051]; Lewis Reply, [27]-[31] [202.0556] and calculation [202.0579]; Joint Exp. Report, [32] [202.0619].
01.07.2014 → 31.12.2015	Ibid - subsequent period	\$ 600,000.00	-\$ 8,556.00	\$ 1,570,000.00	\$ 1,578,556.00	Ibid, esp. Lewis, [201.0060].
2016 → 2019	Ibid - subsequent period	\$ 1,395,343.00	-\$ 1,403,899.00	\$ 1,570,000.00	\$ 2,973,899.00	Ibid, esp. Lewis, [201.0060].

TABLE 2: SAAMCO counterfactual – improved trading: Lewis [201.0060] & [202.0580]

Year	A MILK REVENUE				B CASH OPERATING RESULT			C CASH TRADING RESULT NET OF DEBT			D NET TRADING RESULT		
	103kgMS at Farm 258	Actual	Extra milk revenue	Accumulated extra milk revenue	103kgMS at Farm 258	Actual	Improved result	103kgMS at Farm 258	Actual	Improved result	103kgMS at Farm 258	Actual	Improved result
YE12	\$ 622,120.00	\$ 585,251.00	\$ 36,869.00	\$ 36,869.00	\$ 264,040.00	\$ 104,261.00	\$ 159,779.00	\$ 65,925.00	-\$ 112,568.00	\$ 178,493.00	-\$ 70,979.00	-\$ 191,621.00	\$ 120,642.00
YE13	\$ 653,020.00	\$ 399,099.00	\$ 253,921.00	\$ 290,790.00	\$ 290,060.00	\$ 33,302.00	\$ 265,758.00	\$ 99,852.00	-\$ 251,141.00	\$ 350,993.00	\$ 65,006.00	\$ 338,294.00	\$ 403,300.00
YE14	\$ 779,710.00	\$ 751,654.00	\$ 28,056.00	\$ 318,846.00	\$ 391,760.00	\$ 282,634.00	\$ 109,126.00	\$ 193,446.00	\$ 3,199.00	\$ 190,247.00	\$ 120,524.00	\$ 63,203.00	\$ 183,727.00
YE15	\$ 509,850.00	\$ 346,632.00	\$ 163,218.00	\$ 482,064.00	\$ 152,800.00	\$ 155,589.00	-\$ 2,789.00	-\$ 44,865.00	-\$ 88,436.00	-\$ 43,571.00	-\$ 133,332.00	-\$ 286,038.00	\$ 152,706.00
YE16	\$ 372,860.00	\$ 297,188.00	\$ 75,672.00	\$ 557,736.00	-\$ 41,560.00	-\$ 186,842.00	\$ 228,402.00	-\$ 156,115.00	-\$ 491,059.00	\$ 334,944.00	-\$ 173,502.00	-\$ 692,927.00	\$ 519,425.00
YE17	\$ 533,540.00	\$ 299,320.00	\$ 234,220.00	\$ 791,956.00	\$ 233,140.00	\$ 115,601.00	\$ 117,539.00	\$ 35,435.00	-\$ 215,043.00	\$ 250,478.00	\$ 29,295.00	\$ 154,883.00	\$ 184,178.00
YE18	\$ 630,360.00	\$ 480,117.00	\$ 150,243.00	\$ 942,199.00	\$ 241,380.00	\$ 186,156.00	\$ 55,224.00	\$ 43,565.00	-\$ 117,054.00	\$ 160,619.00	-\$ 19,358.00	\$ 200,173.00	\$ 180,815.00
YE19	\$ 603,580.00	\$ 365,951.00	\$ 237,629.00	\$ 1,179,828.00	\$ 217,690.00	-\$ 133,978.00	\$ 351,668.00	\$ 19,900.00	-\$ 580,387.00	\$ 600,287.00	-\$ 12,580.00	\$ 661,320.00	\$ 648,740.00
Total:	\$ 4,705,040.00	\$ 3,525,212.00	\$ 1,179,828.00	\$ 1,179,828.00	\$ 1,841,430.00	\$ 556,723.00	\$ 1,284,707.00	\$ 257,143.00	-\$ 1,852,489.00	\$ 2,109,632.00	-\$ 194,926.00	\$ 2,588,459.00	\$ 2,393,533.00

TABLE 3: SAAMCO counterfactual – avoided interest: [201.0060], [202.0580] & [202.0485]

	YE12	YE13	YE14	YE15	YE16	YE17	YE18	YE19
Actual [201.0060]	\$188,373.00	\$282,770.00	\$278,656.00	\$243,895.00	\$304,077.00	\$330,474.00	\$287,843.00	\$ 433,229.00
Lewis assessment at 103 kgMS [202.0580]	\$196,783.00	\$197,535.00	\$197,535.00	\$197,535.00	\$197,535.00	\$197,535.00	\$197,535.00	\$ 197,535.00
Avoided interest per Lewis	-\$ 8,410.00	\$ 85,235.00	\$ 81,121.00	\$ 46,360.00	\$106,542.00	\$132,939.00	\$ 90,308.00	\$ 235,694.00
Avoided interest per Lewis (accumulated)	-\$ 8,410.00	\$ 76,825.00	\$157,946.00	\$204,306.00	\$310,848.00	\$443,787.00	\$534,095.00	\$ 769,789.00
McAra assessment at 103 kgMS [202.0485]	\$201,250.00	\$202,328.00	\$202,214.00	\$197,423.00	\$206,071.00	\$223,111.00	\$227,933.00	\$ 231,939.00
Avoided interest per McAra	-\$ 12,877.00	\$ 80,442.00	\$ 76,442.00	\$ 46,472.00	\$ 98,006.00	\$107,363.00	\$ 59,910.00	\$ 201,290.00
Avoided interest per McAra (accumulated)	-\$ 12,877.00	\$ 67,565.00	\$144,007.00	\$190,479.00	\$288,485.00	\$395,848.00	\$455,758.00	\$ 657,048.00