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

SC 45/2023  
[2024] NZSC Trans 5

**BETWEEN** **PHILIP WILLIAM ROUTHAN AND  
JULIE VERONICA ROUTHAN AS TRUSTEES OF  
THE KANIERE FAMILY TRUST**  
Appellant

**AND** **PGG WRIGHTSON REAL ESTATE LTD**  
Respondent

Hearing: 11-12 March 2024

Court: Winkelmann CJ  
Glazebrook J  
Ellen France J  
Kós J  
Miller J

Counsel: D R Kalderimis, T Nelson and O T H Neas for the  
Appellant  
L J Taylor KC, M E Parker, J E Eckford and  
C J J Mair for the Respondent

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**CIVIL APPEAL AND CROSS-APPEAL**

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**MR KALDERIMIS:**

Tēnā koutou e ngā Kaiwhakawā. Counsel's name is Kalderimis and I appear for the appellant with my learned friends Mr Nelson and Mr Neas.

**WINKELMANN CJ:**

5 Tēnā koutou Mr Kalderimis, Mr Nelson and Mr Neas.

**MR TAYLOR KC:**

May it please the Court. I appear with my learned friend Mr Mair, Mr Parker and Ms Eckford.

**WINKELMANN CJ:**

10 Tēnā koutou Mr Taylor and Mr Mair, Mr Parker and Ms Eckford. Mr Kalderimis. It would assist us if you could just clarify for us the pronunciation of your clients' names, who I understand are in the back of the courtroom?

**MR KALDERIMIS:**

That's correct. Phil and Julia Routhan.

15 **WINKELMANN CJ:**

Routhan. Thank you.

**MR KALDERIMIS:**

Your Honours, this is a case about the compensatory principle. In particular it's about the consequences the defendant PGG Wrightson ought to have contemplated by reason of assuming the responsibility of acting and speaking.  
20 A rogue prospectus for a going concern is created for a specific purchaser and their bank by an experienced specialist rural real estate agent, is rogue because it is entirely unauthorised, in breach of all applicable laws and policies, and created without the vendor even being aware of its existence. The prospectus  
25 overstates production, both literally and in context of this going concern

business, and leads directly to just the sort of consequences one would expect. the business is purchased at an overvalue. It fails to make sufficient revenue to cover expenses, and significant time and money is wasted trying to solve an illusory problem of how to obtain the represented production, because it was all  
 5 a mirage, which the purchasers only discover four years later, by which time the die has been cast with the bank preparing to put the business into special asset management. Now before we turn to the road map, which we will follow today, I want to situate us procedurally and financially. Procedurally we should acknowledge the obstacles surmounted by the Routhans, Julie and Phil, who  
 10 were born and bred on the West Coast, and who in 2010 identified a West Coast farm to purchase with their life savings, a place to work, live and leave to their children.

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15 Julie had grown up milking cows, still does, and already owned a nearby grazing block. Phil had also in his youth milked cows before and had a track record of business acumen. They found out about the misrepresentation in late 2014 and raised a claim the following year, shortly after PGG's agent finally owned up.

20 They've since battled, representing themselves until shortly before the 2021 trial through the usual gambit and of ensured defence tactics, denial of duty, time bar, disclaimer, contributory negligence defences, not to mention security for cost application and contested discovery over the very documents that were  
 25 ultimately used to prove breach. They've since proved duty, breach, causation and loss that on the traditional test is not too remote. In most negligence cases, this is enough.

I'd like to look at one case that isn't going to form a core part of the submissions  
 30 but makes nice introduction to contextualise these issues, and that's the case decided last month by the United Kingdom Supreme Court called *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] UKSC 6, [2024] 2 WLR 632. It's the first case in the appellant's supplementary authorities.

If we just look at the headnote of that case, just that first paragraph, you can see what happened there. There were an unfortunate succession of two car accidents, neither of which the claimant was responsible for. Following the first  
 5 car accident the claimant had to hire another car to drive around in, and a Mini Cooper I think was the car that she chose, but then there was another accident and the question was whether the claimant then suing the defendant who caused that second accident could recover the higher costs for the Mini Cooper car which were a part of her contract, and you can see a reference  
 10 there to clause 16 in respect of the 12 days that the car was out of commission. Now, on the two courts below the answer was, no, you can't recover that cost because what was the defendant to know that you were driving a hire car and that there was a special contractual provision that would relate to being able to recover costs. But if we look at the judgment, which is unanimous, you can see  
 15 that wasn't the way the Judges, led by Lords Leggatt and Burrows, saw tort law operated.

So, if we look at the key reasoning beginning at perhaps page 639, paragraph 18, you can see the general principles are set out in a list and if we  
 20 turn to paragraph 23 on the next page, 640, we have the summary. "Where it is shown that loss has (factually) been caused by the defendant's breach of a duty of care, five principles are capable of limiting the damages recoverable by the claimant", and they're all very familiar. Scope of duty is the first one, that's what this case will be about, remoteness, intervening cause, failure to mitigate,  
 25 and contributory negligence. That maps very closely, if you are interested, the way Lord Burrows describes the terrain of negligence law in his wonderful book *Remedies*, which we have in our authorities.

**WINKELMANN CJ:**

It's interesting that it's these two who have written this judgment.

30 **MR KALDERIMIS:**

Yes.

**WINKELMANN CJ:**

Given their role in the previous two significant UK Supreme Court judgments.

**MR KALDERIMIS:**

5 There is a conversation going on, isn't there, and you can see perhaps the conversation getting to its peak when you turn to the discussion of burden of proof –

**KÓS J:**

Why is this case about scope of duty and not remoteness?

**MR KALDERIMIS:**

10 Well, this – why is our case about scope of duty and not remoteness?

**KÓS J:**

Yes, this case.

**MR KALDERIMIS:**

15 That's a good question. Perhaps two answers. The first is that conceptually professors such as Jane Stapleton see the scope of duty principle really as a form of remoteness. So her way of viewing what you are doing with scope of duty is you are applying a more nuanced and sculpted remoteness rule. So instead of the foreseeability rule only, you have something that excises from the scope of the defendant's responsibility loss which, even if it may be  
20 foreseeable, was not within that defendant's own sphere of responsibility. So in that sense if one is successful in a scope of duty case, loss will very rarely be remote on a traditional test. One of the points made, of course, in the *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSO 20, [2022] AC 783 case by Lord Leggatt.

25 **KÓS J:**

What's the second point because I want to take you up on the first in a moment?

**MR KALDERIMIS:**

The second point is that here there could be no question that the loss that was suffered was foreseeable. So the issue to be determined by the Court can't be that. It must be the question of whether the foreseeable loss was part of this defendant's responsibility and that is when our submissions, when I get to the road map, will focus squarely on. The reason why this is a scope of duty and not a remoteness case in *Armstead* was a remoteness and not a scope of duty case is because the essence of the defendants, the respondents' objection, is that this foreseeable loss didn't occur on their watch. It is not their problem. It was caused, it was foreseeable but it's not their concern.

10 **KÓS J:**

Well we're not necessarily bound by the views of either of you so there must be argument that in the traditional policy, sorry duty of care analysis, where we look at proximity in a physical sense and policy as a limiting factor, that policy is one of those areas that can segway across from duty into causation and damages and it's one of those – it's like a cloud that floats above it all and the question is where does it land.

**MR KALDERIMIS:**

I don't disagree with any of that. In fact, I would submit to this Court that if one surveys the cases starting with *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA), *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 (CA) which had the main juristic of dividing up responsibility using the language of opportunity or occasion to cause loss and then the actual substantive and material cause and then move over to cases like *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) which use different language, which use the language of for what risks did the defendant assume responsibility and *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] NKHL 48; [2009] AC 61; [2008] 3 WLR 345; [2008] Bus LR 1395; [2008] 2 All ER 159, HL(E) as well you are finding the same debate taking place at different – situated at different parts of the tortious analysis but what I would encourage this Court to do is exactly what your Honour is hinting at, which is not get lost in the semantics but see that wherever you choose to situate this analysis, wherever it makes most sense for you, you

are doing effectively the same job, which is why cases like *BNZ v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) use both of those types of languages, the opportunity cause distinction and the scope of duty language to explain what they're doing. They're not mutually inconsistent concepts. They're really different ways of trying to explain the same thing and perhaps my last observation on this is that we put in that essay by Lord Cooke, as he later became, written on sabbatical, called *Remoteness of Damages* into our authorities and we refer to it in our submissions. I won't go to it, it's tab 17 but I recommend it to your Honours as a quite masterful discussion of how when he wrote that essay these questions defied a simple judicial answer. You couldn't answer them by coming up with the perfect formula.

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- 15 There was no escape from the need to apply considered enlightened judicial judgment as to what the fair responsibility, and I would say in both a principle and policy sense, of a defendant is, and when one reads all of that essay, one can see that a great legal mind such as Lord Cooke was deliberately refusing to get tracked in the labels and so –

20 **WINKELMANN CJ:**

Can I just ask you, this may be testing your ability too much, but I don't think I understood your second reason, because it sounded like a restatement of the first reason. Why is it about scope of duty and not remoteness?

**MR KALDERIMIS:**

- 25 Because on a traditional remoteness test the limiting factor from cases such as *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617 (PC), is foreseeability. So if we think about *The Wagon Mound*, think about the last four pages of that case, Lord Reid's discussion as to why the risk of oil on the water catching fire in some way was the test.
- 30 That test is plainly met here. There is no foreseeability issue. Now my learned friends say that that's not sufficient, simply proving that the loss is foreseeable is not enough, something more needs to be proven. When someone puts the

case like that, their objection like that, the easiest way to understand it is it's a scope of duty –

**WINKELMANN CJ:**

Well it's not just your learned friend's who say that, Lord Nicholls also says it,  
5 doesn't he?

**MR KALDERIMIS:**

Yes, and so does Lord Sumption, and I don't disagree with that characterisation of the issue. I'm not here to fight about which box we situate the analysis in.

**WINKELMANN CJ:**

10 So you're saying whether you approached it through *SAAMCO* principles or without the cap in the contract warrantee analysis, or through principles of remoteness, you arrive at the same point?

**MR KALDERIMIS:**

Exactly, there is the same question to answer. I might say at this point that I  
15 have five main points in rebuttal that I will discuss during the course of my submissions, and let me get to the first one now. My learned friends say –

**MILLER J:**

There's also an extended discussion because – how long are you going to be on your five points, because I have a burning question I must ask you.

20 **MR KALDERIMIS:**

I won't do the five points. I'll just do the first point and then I will have it out of the way. My learned friends say at three points in their submissions that we are running what they characterised as a simplistic but for case. Now that critique is itself simplistic and its wrong. We are not here to say to this Court  
25 that we should have recovery simply because we have proven causation and that the loss is foreseeable. We accept that foreseeability is a necessary, but not in all cases, sufficient criterion for recovery. We are here to explain why, to the extent there is another test, and we don't disagree with that in concept,



however it's formulated we vault over that test, and I won't say anything more about that now, I'll develop that with more structure when I get to that point.

5 But all I wanted to say about the *Armstead* case is when you look at it, they had all of these sorts of things. So it's true that their objection was focused on traditional remoteness, not scope of duty, but everything landed there, and those judges did not find it difficult to cut through the language of justification and excuse of exculpation to arrive at what was a fair outcome, and in that last section from 58 to 64 in discussing the burden of proof, you can see something  
10 of an attitudinal sea change because whereas in the *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599 case, with reflections in *Manchester* the Court was very keen to indicate that the burden of proof for a scope of duty case lay on the plaintiff, or the claimant in the UK courts.

15 Here, the Court is doubting whether that really is so, it doesn't decide it at paragraph 60, but it is emphatic in paragraphs 63 and 64 that all of the other defences have to be raised by the defendant and it's them that has the duty of showing that recovery that would otherwise be due is in fact not due. So, all I wish to make of this case is that there is a policy underlying all of these different  
20 developments in the law and I submit that the *Armstead* case situates that policy in a place that's more in keeping with a claim of this type brought both under negligence but also under the Fair Trading Act 1986, and the only other introductory case I want to go to is just to remind your Honours of four paragraphs in the *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2  
25 NZLR 492 case.

**WINKELMANN CJ:**

In the what case?

**MR KALDERIMIS:**

30 The *Red Eagle* case. So this is Justice Blanchard giving judgment of the Court and we're at paragraph 28. There are two important points in these paragraphs 28 to 31. The first is that when you're dealing with a breach of section 9, what you are doing is looking at the conduct objectively and then the

next sentence says: “Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected.” That may not seem like a very important point to your Honours right now, but when we get to it context will be a very important point about how we deal with the facts of this case.

**WINKELMANN CJ:**

Well as to that, the Court as a whole would be assisted by a little more understanding of the facts because it's not apparent with submissions, nor particularly the judgments below about the fine-grained nature of the dealings with Mr Daly and the Routhans about regarding what Mr Daly understood as to the Routhans' circumstances and the basis upon which they're entering into this transaction.

**MR KALDERIMIS:**

Thank you, your Honour.

**15 KÓS J:**

But that was my burning question, because you say all this loss was foreseeable. I'm far from convinced myself that that's the case. Some, clearly, entering into the transaction seems to be an entirely foreseeable consequence of misrepresentation because of the limitation of sources of alternative information, but for the matter not to come to their attention for almost four years, three years and 10 months, seems to me to strain foreseeability to say there's quite a lot of work on the facts for you to do, I think.

**MR KALDERIMIS:**

I will focus on that and that is why context is so important here. My submission will be that once your Honours understand those dealings and the context, it is very clear, not only why this was foreseeable but why it was precisely the sort of risk that ought to have been contemplated by Mr Daly, but –

**WINKELMANN CJ:**

Yes, but what Justice Kós is raising with you is something else I think, which is that at a certain point your clients knew as much about this farm as anybody did because they were farming it actively and had expert advice, so at what point does that become their own problem and –

5 **MR KALDERIMIS:**

Yes, I will address that as well, I understand the question.

10 The second point I wanted to just make from the *Red Eagle* case is that when we are talking about entitlement to relief, what we have here is a robust common sense causation test, and so that is set out in paragraph 29 using the common sense concept of causation by reference to section 43, and then down to the end of paragraph 31.

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15 We're talking here the language of cases like *BNZ v Guardian Trust*, et cetera, effective cause materially influenced and whether any other thing should be regarded as a sole or contributory operative cause of the loss. So in relation to the Chief Justice's question, when we get to the facts, I will be submitting to you that there is no way of saying on these facts that the Routhans were the authors  
20 of their own misfortune here, but I understand that that is a question that I will need to persuade your Honours by going to the facts.

**GLAZEBROOK J:**

I'm not sure if it's authors of their own misfortune. It is at what point should they have stopped and realised – this is putting it in a colloquial way – at what point  
25 should they have stopped and realised this was actually we're operating under a misrepresentation.

**MR KALDERIMIS:**

Yes, the answer to that question, so you have a date, is they realised in late 2014 that there was a misrepresentation and we say there was no earlier –

30 **GLAZEBROOK J:**

Well I understand they realised that but it's possibly a reasonable discoverability if you want to have something that puts it into a framework that you look at, so at what stage should they reasonably have discovered that as against at what stage they did.

**5 MR KALDERIMIS:**

I understand that question and I will address that with the facts rather than trying to do it contextually. So what we say here when we look at these cases is that a final barrier of recovery or to recovery in negligence and under the Fair Trading Act with its purpose of protecting consumer interests should not  
 10 readily be placed in the way of otherwise meritorious plaintiffs. Now I will need to persuade you that that is the case but I submit that when we look at the facts that is what we will see, and your Honours will remember the way Lord Burrows at pages 117 and 122 of his *Remedies* textbook describes the SAAMCO principle as something that needs real explanation so that it can do fairness and  
 15 not just be seen as a rule protecting professionals which doesn't apply in other kinds of cases.

The second point that I wanted to just raise by way of context is that we should acknowledge that more than \$5 million of loss was ultimately suffered and it  
 20 was borne almost equally by the Routhans, by their bank and by their late friend and benefactor Tony Timpson. Even so the claim before you is rigorously tailored focusing on an amount we describe as being not less than \$1.58 million being the funds that the Routhans contributed, have now lost, but would otherwise still have. They may also have made profits in a but-for world or  
 25 otherwise improved their position but the core claim isn't for lost profits.

**KÓS J:**

While you're on that point can you explain to me what has become of the Cooks, the vendor whose agent this was who misrepresented the position? In the ordinary commercial life one would have expected that they were to borne some  
 30 responsibility so what's happened to the Cooks?

**MR KALDERIMIS:**

The Cooks were not sued in this case and the reason for that is that they didn't see the prospectus and didn't authorise it. It wasn't their prospectus. They didn't make those misrepresentations. They didn't sign off.

**GLAZEBROOK J:**

5 So, it wasn't within the scope of the agency, is that the argument?

**MR KALDERIMIS:**

Yes –

**GLAZEBROOK J:**

If you're going to put it in those sorts of terms?

10 **MR KALDERIMIS:**

Correct. What was conveyed was conveyed, and that's the oddity of this case, but we'll get to those facts. It very rarely happens that an agent acts so far outside the scope of their authority. This is a very unusual case in that sense where there was no agency agreement, there was no right to make  
15 representations, there was nothing signed by the vendor which is the way representations can be grounded but the agent just takes it upon themselves to produce all of that data.

**ELLEN FRANCE J:**

20 So where's the line between how you put that and the deceit argument on which you weren't successful?

**MR KALDERIMIS:**

It's just a case of negligence, so none of it then turns on the subjective mind of Mr Daly. Mr Daly was negligent and it seems pretty obvious that it was a case of quite extreme or gross negligence, but let me be very clear, this is my second  
25 rebuttal point, my learned friend says at various times in his submissions that we are trying to resurrect the deceit argument and claim damages as if this were a deceit claim. We are not doing that. We are – if this were a deceit claim, the remoteness rules, even the ordinary remoteness rules, would not apply and

the defendant would be liable for all of the consequences, the direct consequences that followed from the breach of duty, and you wouldn't ask any further questions. We are saying here that we are proving loss that's not only foreseeable but is within the scope of the respondent's duty which is not at all the approach one applies in a deceit case. So we don't need to prove the subjective elements of deceit, we are not trying to prove them, and we are not trying to run a damages case as if the deceit standard applied.

Now, the last thing I'll say by way of introduction before we go through the roadmap and I will then go straight to the facts so we can focus on where we're at, the key to this case, we say, is to understand that whatever its merits, the so-called *SAAMCO* rule is a really a rule about setting foot in the arena. That's what it is when you get down to it. If you look at say the third restatement which is the wonderful American summary of effectively the same principle, what one is trying to do is to work out what are the risks that made the actor's conduct tortious, because an actor's liability is limited to the harms that result from those risks.

Now, if that's the essence of the *SAAMCO* principle, and we say it is the essence, then it matters what PGG was doing and what other choices it could have made. It could have stayed outside the arena. It could have stepped inside but disclaimed responsibility for certain types of loss. What is unique about this case is that PGG leapt in, boots and all, creating a prospectus with no authorisation to do so, mis-stating the position in that prospectus, and all we ask is for PGG to take responsibility for the natural consequences of what it said and did. Now, with that, I'm going to turn to the road map itself and I will –

**WINKELMANN CJ:**

But the absence of a disclaimer doesn't affect – I mean the disclaimer may limit the scope of the duty that would otherwise be imposed, the scope of the risk that would otherwise flow, but it can't expand it.

**MR KALDERIMIS:**

No, no, that's right, but this Court equally should be watchful about creating a scope of duty that effectively gives PGG a disclaimer that it never indicated. For instance, if PGG had said to the Routhans, I'm providing you with this prospectus, but you may not rely on it in respect of any revenue loss that you may suffer, so you may be using this to calculate the revenue that this farm can reasonably produce, but if you do that you're on your own, they would've taken it to a different real estate agent. This Court shouldn't – this is really Lord Burrows' point in his *Remedies* text, that this is a rule that doesn't exist in the rest of negligence, it's a rule that exists to protect professionals providing information, and this Court should be wary about being too defendant-friendly, creating rules that exonerate defendants where the defendant could have indicated that it wasn't taking certain kinds of responsibility in circumstances when it otherwise looked to everyone that that's exactly what it was doing.

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15 **KÓS J:**

I don't understand your point. A prospectus is a unilateral document, it's not negotiated. The beauty of a prospectus is you can put whatever disclaimers you want into it.

**MR KALDERIMIS:**

20 Well that's right but they didn't is my point.

**KÓS J:**

Quite. Well they put a very limited one in.

**MR KALDERIMIS:**

Yes, yes, that's all I'm saying.

25 **WINKELMANN CJ:**

Can I ask you –

**GLAZE BROOK J:**

I think you just say that the Court shouldn't diminish the scope of duty as if there were disclaimers put in it?

**MR KALDERIMIS:**

That is what I'm trying to say.

5 **GLAZEBROOK J:**

So the scope of duty is the scope of duty and they could have made the scope of duty lower, didn't, and we shouldn't make the scope of duty lower as if there were a disclaimer?

**MR KALDERIMIS:**

10 Precisely, your Honour.

**WINKELMANN CJ:**

So Mr Kalderimis, you say that this a principle rule which doesn't exist in the rest of negligence, *SAAMCO* is a rule which doesn't exist in the rest of negligence, can you be particular about what aspect of the *SAAMCO* rule  
15 because there are several aspects to it or at least three?

**MR KALDERIMIS:**

Yes, why don't I do that with the context of the road map. So if you turn please to the – we have two road maps. We have one for the main appeal and for the cross-appeal and if you pick up the road map for the main appeal you'll see it  
20 has 12 numbered points. The first point is what we characterise is the key issue. Points 2 to 12 are the propositions that I will be arguing for. This issue, this question that we say is the important point is, should the recoverable loss be limited to the overpayment of the farm. Now my learned friend has kindly –

**WINKELMANN CJ:**

25 Well are you saying, because it might just help me if you actually just answer the question, are you saying that's the aspect of the *SAAMCO* rule that doesn't exist in the rest of –



**MR KALDERIMIS:**

Sorry, if you look at point 2 we say that in the rest of negligence rule where there is no statement by a professional like the *Armstead* case by a large scope of duty doesn't apply. Perhaps one could say it theoretically could apply but it  
 5 never really seems to. So if you look at the way *Armstead* dealt with scope of duty it was just one paragraph. The Judges just said: "Can't see a scope of duty issue here." Scope of duty is tied to misstatements.

**WINKELMANN CJ:**

But that's *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) at  
 10 486 really.

**MR KALDERIMIS:**

That's *Hedley Byrne* exactly and –

**WINKELMANN CJ:**

Are you asking us to overturn *Hedley Byrne*?

15 **MR KALDERIMIS:**

No, no, I'm asking you to apply *Hedley Byrne*. So I'm asking this Court to see what it is about cases like *Hedley Byrne* that gives rise to the liability that we are concerned with here. So in my map, your Honour, *Hedley Byrne* is firmly on our side.

20 **WINKELMANN CJ:**

Yes.

**MR KALDERIMIS:**

Perhaps if I look at point 2 to answer this question but I just want to state the key issue very clearly so that I don't miss it. The key issue that seems to divide  
 25 the parties is whether the Routhans' recoverable loss ended at the transaction date. So in my learned friend's road map his issue 4 says it did. His issue 4 said all that can be recovered is the diminution in value. What I am asking this Court is, if the misrepresentation and the loss actually factually flow past the

transaction date, why should damages stop at that date? I just want that question borne in mind as I go through the logic of how I explain *SAAMCO*.

**WINKELMANN CJ:**

If it's a no transaction case?

5 **MR KALDERIMIS:**

Yes, and we say there's no magic in the terms transaction and no transaction case as such. That's something that Lord Hoffmann and Lord Sumption both have pointed out. The importance of it being a no transaction case is that if it's a no transaction case in theory, subject to the application of what we will call  
10 the risk principle, what *Manchester* called the scope of duty principle, what you could also call the *SAAMCO* principle, subject to that what you get back is the tort measure where you would have been but for the misrepresentation less where you've ended up and if where you would have been was a no transaction case, you wouldn't have been in this bargain, you would have been somewhere  
15 else. So while whether it's a no-transaction case or not doesn't determine whether the *SAAMCO* principle applies, it applies either way, the way you calculate damages does depend on what your ex-ante position would've been. Would would you have gone through with the transaction, would you not.

20 But I want to come to the Chief Justice's question and answer it fairly and squarely. We say that *SAAMCO* is nothing new in the law. We say it is an expression of what we call the risk principle. That was really what flashed up when we looked at the third restatement. So this is dealt with in paragraphs 31 to 50 of our submissions, I won't go to them but I will go to the *SAAMCO*  
25 reference immediately under which is at pages 212 to 213. So if you look at those paragraphs in the middle of the page beginning with: "How is the scope of duty determined" and look at the last very long sentence at the bottom beginning with: "The scope of duty..." We say that that last sentence is what I mean by saying *Hedley Byrne* on our side.

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At the heart of the risk principle, which is applied most usually in negligent misstatement cases, what one is concerned with are the sorts of questions that

*Hedley Byrne* was concerned with. Why is there an assumption of responsibility here? What is it that has led to the duty being put in place because the scope of duty principle is a principle that says that the risks – the harm for which the defendant is liable is limited to the risks which made the defendant's conduct

5 tortious in the first place, meaning the risks that were assumed by that responsibility.

If I come back to my earlier discussion with his Honour Justice Kós, what we say this Court should be doing in this case to help elucidate New Zealand law

10 on *SAAMCO* and to bring coherence to this aspect of tort law more generally is to orient the analysis of what the *SAAMCO* principle is as part of the risk principle, recognising that it is a way of delimiting a defendant's liability by reference to the scope of the risks by virtue of which the defendant's conduct is tortious in the first place, and that involves looking closely at what responsibility

15 was assumed. That is what you are doing. If you don't look closely at that, you're just using labels to define where the policy is.

**WINKELMANN CJ:**

Well the UK Supreme Court tried to orientate itself in terms of the broader landscape of tort law and the two cases and has been the subject of significant

20 criticism for that.

**MR KALDERIMIS:**

Yes, I'm not asking for a new seven-point list –

**WINKELMANN CJ:**

A six-point analysis.

25 **MR KALDERIMIS:**

Exactly, and I will say about that that if you compare Lord Burrows' six-point list with the list for the majority of both *Meadows v Khan* [2021] UKSC 21, [2022] AC 852 and *Manchester* led by Lord Hodge, you can see you don't get any further by just creating new lists which have the scope of duty questions

30 somewhere in it, and perhaps you have a duty nexus question, you can see

that items 2 and 5 of the majority's list are really one and the same question. Let me try and illustrate that by the Nolan case.

**KÓS J:**

Well before you do, how is that really different from the policy plank within duty  
5 of care which we deal with in regular negligence cases, which you have to deal with in *Armstead*, it was a more complicated case.

**MR KALDERIMIS:**

Yes, I'm not sure it is really different at all because I think if you are minded to situate the scope of duty analysis within the duty of care element, then what  
10 you would be seeing is that the question here is for what – what are the reasons we are creating a duty on this defendant in the first place, and more particularly, against what risks are we creating the duty? For what risks is the defendant's conduct meant to keep the plaintiff safe from harm and it's against harms flowing from those risks that the scope of duty principle attaches.

15 1050

So if you think about it that way you really would see the policy factors as dovetailing. If you put it at the end of the analysis, then you have to ask the question separately. But the point that is most important to grasp here is that  
20 no part of our case is saying: "Don't do that, just give us a free pass, make the defendant liable for everything." However your Honours conceptualise this case, what we are saying, and I'll come to the facts very shortly, is that on these facts the defendant ought to be liable for precisely the risks that have eventuated and the harms that have eventuated.

25

So if I come just very briefly to the fourth authority that's listed there, the Nolan article, it explains it I think persuasively and simply. If we just look at the first page of that article. This is in the wake of *Manchester* and *Meadows*. Look at the heading. That is what ideally we would be doing. "Simplicity is a neglected  
30 legal virtue, perhaps because achieving it can be very hard. It is often easier to pile on complexity than to sit back and try to pare the analysis that is required back to its bare bones." Then on the next page it says *Meadows* really didn't

look like a very hard case because it was fairly obvious that the doctor's risk, the reason why the doctor had the duty in the first place wasn't connected to autism and of course it wasn't. Then the mountaineer analogy is introduced at the bottom of the page but what I want to take your Honours to is page 177,  
 5 second paragraph.

**WINKELMANN CJ:**

Although I think that criticism is a little unfair since *Meadows* was heard with *Manchester* and the Court obviously had in mind that it would be useful to have two fact situations.

10 **MR KALDERIMIS:**

I think that's very fair and that's probably why it got such extensive treatment. The second paragraph of 177, after explaining that *SAAMCO* is just an expression of the risk principle, Professor Nolan and his co-author say: "The risk principle is of long standing" going back to the first *Wagon Mound* case  
 15 "and is itself an application of a broader principle, namely that tort liability is usually limited to those consequences which are attributable to that which made the defendant's conduct wrongful." And you can see going straight to the third *Restatement of Torts* because that's the most epigrammatic statement of that principle and going then on to apply it. And you can see that in the *Manchester*  
 20 case itself if you look at paragraph 17: "Therefore, in our view, in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk. This is the point of the mountaineer's knee example given by Lord Hoffmann." And with that we  
 25 respectfully agree. That's what the mountaineer's knee analogy is about. That's what this case is about.

Now in *SAAMCO* itself, if we now go to page 212, we've looked at that, if we now go, sorry to page 195, you can see, just perhaps to explain this very clearly,  
 30 it's at page 195, at the bottom of the page, you can see just before we get to the judgment we see the argument and, of course, it was none other than Jonathan Sumption QC making the argument for the defendants and at the

bottom of the page we go through the old way of looking at these issues *Bright*  
*Grahame Murray* opportunity, cause, and then Mr Sumption as he then was  
 says: “The ‘but for’ test is a necessary, but not a sufficient, condition...  
 Questions of causation cannot always be answered simply by reference to the  
 5 concept of foreseeability. The defendant is not liable for anything that was  
 unforeseeable, but that is not to say that he is liable for everything that was  
 foreseeable,” and then we get to the heart of it.

“The question is whether the defendant ought to have contemplated it by reason  
 10 of the responsibilities that he assumed by his conduct.” That’s my *Hedley Byrne*  
 point. That the heart of the enquiry for this Court is what ought PGG to have  
 contemplated by virtue of the responsibilities they assumed, by providing that  
 prospectus. What ought they to have contemplated. It’s hard to get much  
 deeper into the analysis than that, and if we go back to the *Manchester* case,  
 15 now at paragraph 13, we see that passage that we were looking at from  
*SAAMCO* being quoted there, and that’s really the analysis that they apply as  
 well. What ought the defendant to have contemplated by reason of the  
 responsibilities they assume. That tells you what the risk is against which the  
 duty was imposed, or is imposed to guard and perhaps the –

20 **WINKELMANN CJ:**

I rather think, thought when I was reading *SAAMCO*, that it was a reaction  
 against Lord Denning’s judgment in *Eso Petroleum Co Ltd v Mardon* [1976]  
 QB 801 (CA), which equated the measure of damages to negligence  
 misrepresentation to that for fraudulent misrepresentation in *Doyle v Olby*,  
 25 although it doesn’t expressly engage with it, and of course Lord Denning also  
 allowed an individual to recover the company’s losses in that case. It was a  
 very remedial judgment, and allowed a very full measure of recovery, and it  
 read to me as a correction.

**MR KALDERIMIS:**

30 I can understand that reading the paragraph of *SAAMCO* that is important to  
 then take into balance is if you go to page 218 and look at the bottom.  
 Lord Hoffmann there is referring to two categories of cases discussed in, so this

is after discussing *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), really there had been a *Hedley Byrne* principle, but by the Court of Appeal, and then says: “The second category of cases relied on by the plaintiffs concerns the question of whether the plaintiff’s voluntary action in attempting to extricate

5 himself from some financial predicament in which the defendant has landed him negatives the causal connection between the defendant’s breach of duty and the subsequent loss.” That’s really *Esso*, because *Esso* was a, what I’d called an extrication case. They got trapped there and said that they couldn’t easily get out. These cases, though, Lord Hoffmann said, are not concerned with the

10 scope of the defendant’s duty of care. They’re all cases in which the reasonably foreseeable consequences of the plaintiff’s predicament, *Esso* getting trapped, are plainly within the scope of duty.

**WINKELMANN CJ:**

I mean the defendant’s conduct in *Esso* was terrible.

15 **MR KALDERIMIS:**

And then if we go over the page at 219 you can see our own *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) is given as –

**WINKELMANN CJ:**

*McElroy*.

20 **MR KALDERIMIS:**

*McElroy*, thank you your Honour.

**WINKELMANN CJ:**

You’re showing your age Mr Kalderimis.

**MR KALDERIMIS:**

25 I am.

**WINKELMANN CJ:**

Everyone on the Bench is old enough to remember the name.

**MR KALDERIMIS:**

And probably in more ways than one.

**WINKELMANN CJ:**

No your youth is my reference.

5 **MR KALDERIMIS:**

You see that's the signal example given of this, because in that case you'll remember that it was Mr Miles QC, as he then was, arguing valiantly that the damages needed to be cut down, that was a case where a lease was entered into, or a building was built on the assumption that there would be a lease.

10 There was a lease contract but there was no guarantee for the parent company, there should have been, and the question was whether the damages for not getting that parent company valuation, should really be hived down, and the answer was no. If you look at D: "All the reasonably foreseeable consequences of that situation were therefore within the scope of the duty of care."

15 1100

So if we then look at, there's one other paragraph I just want to draw your Honour's attention to on this topic. Yes, if you just look just further down the page to you can see Lord Hoffmann discusses the theory that you might  
20 use a cap in this case as a tool or mechanism, as explained in *Manchester*, to give effect to the risk principle, the theory will ordinarily produce the same result as the requirement that loss should be the consequence of the valuation is wrong. But he goes on to say at the end of the page: "I would not wish to exclude the possibility that other kinds of loss may flow from the valuation being  
25 wrong." So the *SAAMCO* isn't an anti-*Esso* case, it is not saying you are restricted ipso facto by some form of swing in judicial logic to the diminution in value, he is saying there's a risk principle.

**WINKELMANN CJ:**

Although he does expressly say that the *Doyle* measure of damages is not  
30 appropriate I think.



**MR KALDERIMIS:**

That the?

**WINKELMANN CJ:**

The *Doyle* measure of damages is not appropriate, at some point he says that.

5 **MR KALDERIMIS:**

Well, yes, but there are two different questions here. So it is absolutely the case that what you call the *Doyle* measure or the *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254 measure, the fraudulent –

10 **WINKELMANN CJ:**

Which is applied by Lord Justice Denning in *Esso*.

**MR KALDERIMIS:**

Well up until *Esso*, that was the way for both negligent misrepresentation and fraudulent misrepresentation. What he is saying is that in negligent  
15 misrepresentation, there's a further step, and that further step is relating the damages that are being sought to the scope of the duty, and we accept that that is something that Lord Hoffmann was trying to achieve. What I am saying is he was not trying to achieve it by saying one has to impose a diminution in value cap as at the date of the transaction is the inevitable tool to do that and  
20 perhaps the way to explain this point, without spending further time on it, is to ask your Honours to turn over the page, or two pages, to the diagram that's at the top and to save your Honours' eyesight we have blown up the diagrams. There are three tables and a diagram between our road maps –

**WINKELMANN CJ:**

25 We've got that as well, yes.

**MR KALDERIMIS:**

This one here so if you pull up the bigger one we are in our way through the discussion about two-thirds across this diagram if we're looking at the terrain.

So they start on the left-hand side of the diagram. We know that the measure of damages in tort is the left-hand column. Your recoverable loss is the difference between your counterfactual way you would have been but for the wrong, and your actual. The same kind of risk principle says that in some cases

5 there will be an additional gauge put over your loss to ensure that the loss is within the risk that the duty was imposed to prevent, and then in the third column there are three ways of conceptualising this which are now elucidated well in *Manchester and Meadows*.

- 10 Firstly, you could, if we do it in reverse order, you could impose a cap and say that one way of measuring it is the difference in value as at the date of transaction, but you can see the difficulties with that at the bottom that where it only works where you don't have a continuing loss case, that cap, where you're like a bank, you've lent money on a valuation, you don't the next day go and
- 15 lend more money. It's happened and so the worse off you will be by virtue of that breach is already locked in. Of course, your loss hasn't truly crystallised yet but it's been locked in and so you can use the cap but the cap has fallen out of favour precisely because it is too mechanical, and Professor Stapleton and Professor McLauchlan have both criticised it on the basis that it does seem like
- 20 a very strange way of measuring tortious damages by virtue of a breach of warranty that was never promised, and you can see Lord Hoffmann tried to explain his way out of that at the top of page 220, as Mr Sumption said on behalf of the defendants: "It seems odd to start by choosing the wrong measure of damages (the whole loss) and then correct the error by imposing a cap.
- 25 The appearance of a cap is actually...to satisfy..." because the plaintiff has to satisfy two requirements to prove who suffered loss and to show the loss fell within the scope of the duty. So a cap is a way of doing it but it's not a very good way and it doesn't work in continuing loss cases.

#### **WINKELMANN CJ:**

- 30 So continuing loss cases, you could conceptualise them as so long as it remains reasonable to continue to rely upon the representation and when it no longer is reasonable to continue to rely upon the representation, then your duty to mitigate kicks in would you say?

**MR KALDERIMIS:**

Yes, I completely agree with that. I would say that you could see, and I can see that these questions relate to facts that I will need to come to, but you can see that the concept of – or concepts like reasonableness and the duty to mitigate  
 5 are sort of at the heart of how continuing loss cases work. It's very hard to say that a loss is within the scope of duty that a defendant is obliged to protect you against when it's really your own independent conduct that has caused him the loss so that is definitely a part of the inquiry. So all I'm really trying to –

**GLAZEBROOK J:**

10 And you accept presumably that unreasonable expenditure relying on the – that there would be another aspect to reasonableness?

**MR KALDERIMIS:**

I do accept that.

**KÓS J:**

15 But the critical importance of the absence of the Cooks, or a claim against the Cooks, here is this, that the ordinary counterfactual here would have been identification of the misrepresentation, cancellation of the contract and everything unwinds in reasonably short order but I think your argument is clearly that that option is simply not available here?

20 **MR KALDERIMIS:**

Yes.

**KÓS J:**

So, there was no way of returning the farm, they were stuck with the farm, they either had to make it better or sell it?

25 **MR KALDERIMIS:**

Exactly right, and as we will come to, it is the correct factual analysis to see that it was entirely reasonable for the Routhans not to have discovered there is a misrepresentation about historic production until they did discover it. The short

point, so that I can give it clearly, is that they did know that the production they were getting was down but they purchased a going concern farm with all of the relevant metrics, both of production and about how production was achieved, clearly spelt out to them and they'd even arranged to lease cows from Mr Cook himself. Now the difference in the cow leasing is that Mr Cook said: "I'm not going to give you all of my best cows" but there were relevant provisions that meant that they were going to be reasonably good cows and so the Routhans naturally understood when they were not getting production that matched the production that had been achieved using the Cooks' old farm manager, using the same inputs that were advertised, that it must be the cows. It must be that they were not – they're not being given the right cows. They had dud animals and so they took action against Mr Cook saying: "Well the problem is the cows" and, as we will see, it was in the course of the cow lease arbitration that Mr Daly came and gave evidence and said: "I just advised them of the production Cook advised me" and Mr Cook, when he gave evidence said: "No, you did not. I didn't advise that production" and it was only through that arbitration, after Cook repeatedly declined, that they were finally able to get the historic figures direct from the cow's mouth, as it were, from the dairy company.

**KÓS J:**

How many shares do they have in Western Dairy because I thought the shares reflected the current –

**MR KALDERIMIS:**

Yes, 103,000 so the shares they got represented the production that had been represented.

**KÓS J:**

Well how –

**WINKELMANN CJ:**

How did they get those shares because he would have to have had –

**ELLEN FRANCE J:**

How did that – yes.

**WINKELMANN CJ:**

– because he would have to have had milk fat production to base that, wouldn't  
5 he? Did he take it off one of his other farms?

**MR KALDERIMIS:**

Yes, it must have just come out of one of the other farms so it just – I think it was, it was just split, that he had enough overall milk production and 103 was just assigned to this one.

10 **WINKELMANN CJ:**

It wasn't facilitated really by the fact that the transaction was occurring mid-year because it wouldn't be able to occur in that way if it was end of year, would it?

**MR KALDERIMIS:**

I'm not sure about whether that is so.

15 **ELLEN FRANCE J:**

And it's not clear that in terms of the allocate – what you know in terms of the allocation of shares, where that's coming from if you like?

**MR KALDERIMIS:**

Well no, when you get given 103 shares that is meant to represent that your  
20 farm is doing 103.  
1100

**KÓS J:**

Well who's representing that, Western Dairy?

**MR KALDERIMIS:**

25 Well not, not the dairy, but the contract itself is supporting the wider representation. If it was just that –

**KÓS J:**

No hang on. Western Dairy issued the shares.

**MR KALDERIMIS:**

Yes, Western Dairy issued the shares.

5 **KÓS J:**

And they adjust the shares season by season?

**MR KALDERIMIS:**

I'm not certain whether they adjust them season by season. I don't think it needs to be adjusted until there is some event that requires the adjusting.

10 **WINKELMANN CJ:**

End of year probably. Different milk – but then Mr Cook must have provided the extra shares, so he must have known the representation was 103,000?

**MR KALDERIMIS:**

Well all of this happened through the lawyers, and so it was just a sort of part  
15 of tidying up the purchase. So that was very much a consequential factor on the clear representation, and I think it would be very unlikely that we'd be here if all this was was the relevant shares without the context, and so please let me come to the facts and explain them in order otherwise I think we're liable to get lost.

20 **WINKELMANN CJ:**

Yes, well you can hear, we've got into the details with not enough knowledge.

**MR KALDERIMIS:**

Yes, fair enough, then the last legal point I wanted to make is if you look at those other two boxes up above the SAAMCO cap, you've got two other  
25 choices. You can run a counterfactual in the middle box, number 2, which is what was described as a cross-check in the *Manchester* case, and that's where instead of just applying a cap as at the transaction date, you try and keep

everything the same and work out what would have happened. What would have happened if the representation was true but everything else was the same. Now the relevance of that here is we've run a counterfactual, and my learned friends haven't, and we say it is clear that if you change only the production  
 5 numbers so it's 103, they keep everything else the same, then the loss that was suffered wouldn't have been suffered. It's a way of testing what was the operative and material cause of that loss. It was the representations because if you change only that and keep everything else the same, the loss by the end of 2015, which was when – which is the time by all the equity was gone, was  
 10 already suffered but wouldn't have been suffered in a counterfactual world or, point 1, you can avoid a cap or a counterfactual if you use your developed judicial instinct to be able to see clearly for what kinds of loss the defendant is liable.

15 But what you're doing in all of these cases is you are trying to match responsibility for the loss with the reasons why the duty was imposed in the first place, and I won't take you to it, but I recommend to you the two references at the bottom of point 3 on the right-hand side. So the first one I call Todd II, that is Todd in the supplementary authorities, and then the  
 20 *Deloitte & Touche v Livent Inc* 2017 SCC 63, [2017] 2 SCR 855 case. That was the case that was discussed by Professor Alan Beaver at the recent conference, and I've given you the relevant paragraph references there to the judgment of the majority explaining that this is explaining what the SAAMCO principle is all about. At its heart is assumption of responsibility. In that page of Todd –

25 **WINKELMANN CJ:**

So it's Todd II and which other case?

**MR KALDERIMIS:**

And *Deloitte*. So point 3, right-hand side, the two last references, and they're both worth reading carefully. The Todd reference is to Justice Tipping's  
 30 judgement in the *Carter* case where, coming back to policy, his Honour explained that assumption of responsibility is a funny sort of term because tort law obligations are imposed and not really assumed. So he prefers the phrase

“deemed assumption of responsibility”, and that’s what the Court is really doing here. Working out what is the scope of “deemed assumption of responsibility” that attaches to PGG by virtue of them stepping in the arena and creating this prospectus, and the *Deloitte* case explained by reference to a negligent audit, why the consequences there were within the assumption of responsibility, but for instance a previous comfort letter that was written worked.

But what I need to do now is to get into the facts so that we know where we stand. If I could ask you to pick up the chronology please. So if we look at the first three boxes on the right-hand side, you can see that Mr Cook had listed Farm 528 for sale but it hadn’t sold in 2009 and it was Mr Routhan who contacted Mr Daly because he had been shown the CRT brochure, which is in the third box, that had been used in the previous marketing campaign, and if we just click on that brochure which is 301.0227 you see the front page of it, and just – so this wasn’t the brochure Cook prepared, this is the one that he was given by Mr Routhan, but if we just blow it up and look closely at it. Look at the second sentence, averaging 103 kilograms of milk solids for the last three seasons. Does the sentence stop there? No. “... from approximately 260 cows on a grass based system with half the herd wintered off each year.” So it’s a statement made in context. The evidence, as we’ll come to see, right throughout the trial from experts on all sides is that production data doesn’t mean anything unless it’s a context. You can pretty much get different kinds of production from different areas of land if you use different farming systems and put different kinds of fertiliser on the paddock and do different kinds of things, so –

**WINKELMANN CJ:**

And this brochure doesn’t have a fertiliser representation?

**MR KALDERIMIS:**

No, it doesn’t, but it very importantly has a grass-based system, so it’s not, they’re not being pumped up by supplemental feed and it’s not a big rotation, it’s just half the herd wintered off each year. That’s what that is saying.



Now the next document to understand is 305.2913. They're the notes that Mr Daly made on the inside cover of the CRT brochure when he took it to see Mr Daly [sic]. Then if we go to 305.2948.

**WINKELMANN CJ:**

5 Is there anything you wanted us to note about the notes?

**MR KALDERIMIS:**

No, they're not very illuminating, they're not very long. This is the draft that Mr Daly then prepared himself of what would become the Routhan prospectus. So you can see – oh, I'm sorry, I need to correct myself about the CRT brochure,  
10 your Honour. I have to point out to you that there is a fertiliser record –

**WINKELMANN CJ:**

I was just wondering where he'd come up with it if there wasn't.

**MR KALDERIMIS:**

– attached to the CRT brochure. So fertiliser was a part of CRT, let me show  
15 you that page, it's just further down and it's there, thank you.

**KÓS J:**

Does that show the very high levels?

**MR KALDERIMIS:**

No, not at all. So if you look at what that adds up to, that fertiliser representation,  
20 as we'll come to see, the amount that you can get from this is 146 kilos of nitrogen per hectare, that's the block total on the second left-hand column down at the very bottom, that 146 number.

**WINKELMANN CJ:**

So it's the recommended fertiliser pattern and plan and by attaching it to a  
25 brochure it's implicitly representing that that's what was applied?

1120

**MR KALDERIMIS:**

That's exactly right. That's exactly right. So Mr Daly takes this away, has a quick chat to Mr Cook, does not, as we'll see, get any authority to market the farm but starts, if we go back to the document we were just looking at, 305.2948, starts filling out his own views as to what the key metrics of the farm are and then if we go to the High Court judgment at paragraph 106 please, that's what the Judge found out, that he was asked to put together a proposal with the key farm metrics on it for the express purpose of applying for finance from the bank. And when you look at Mr Daly's evidence in the case, it's clear that that is what he knew he was doing and –

10 **WINKELMANN CJ:**

So the Routhans asked him to do that?

**MR KALDERIMIS:**

The Routhans asked him to do that and maybe the reason I'm emphasising this, partly it's to educate your Honours about the facts, but partly it's to point out that Mr Daly didn't have many jobs. He didn't have to find a purchaser. He didn't need to market the farm. He just needed to verify the metrics, and that's what the Judge at say paragraph 14, I won't go through it, stated right at the outset that he was asked to do. So Mr Routhan, I mean you might ask, why did Mr Routhan, already in possession of the CRT brochure, not just go to Mr Cook and say: "Is this the deal?" and maybe they could both save on the real estate fees. The reason he didn't is, as Mr Routhan says very clearly in his evidence, both in his brief and under cross-examination, it was important, critical, to get verified information and so PGG, by stepping into the arena, picking up the \$56,000 commission, that just simply being the go-between entailed –

25 **WINKELMANN CJ:**

Well he did locate the farm as well, didn't he, Mr Kalderimis?

**MR KALDERIMIS:**

Mr Daly?

**WINKELMANN CJ:**

Yes.

**MR KALDERIMIS:**

No, Mr Routhan found the farm. He said: "It's this farm I want."

**WINKELMANN CJ:**

- 5 All right, but then Mr Daly was allowed to go and find out if it was still on the market et cetera?

**MR KALDERIMIS:**

Yes, he –

**WINKELMANN CJ:**

- 10 So he was doing a standard agent type thing?

**MR KALDERIMIS:**

Yes, well he had to be the go-between between an identified vendor and an interested purchaser.

**KÓS J:**

- 15 But Mr Routhan, you presented to us before, is a man of considerable business intelligence so we have to assess the duty of care, don't we, given that fact? He wasn't, you know, a total newbie?

**MR KALDERIMIS:**

- Yes, absolutely, and we don't resile from that at all. So then we come to the prospectus itself. Well in fact let's look at just 106 of the judgment first and then  
20 get to the prospectus. So we've looked at 106 and now if we look at the prospectus which you can see is three boxes from the bottom of the chronology. On the right-hand side it's 305.2914. So that page in the prospectus is the information supplied in the context in which it's supplied. If we just go to the  
25 front page of that prospectus, it's a prospectus prepared for the Kaniere Family Trust. It's a bespoke prospectus. There's no one else that is looking to buy this farm. Mr Daly has been asked by Mr Routhan to prepare it for the Trust and

Mr Daly knew it would be going to the bank because the bank would need to see all of these things verified in order to lend the money. So if we then go to the relevant page that Mr Daly produced.

**KÓS J:**

5 Whose agent is it at the time of the –

**MR KALDERIMIS:**

He's Cook's agent. Well he's really no one's agent because Cook hasn't given him – he has –

**GLAZEBROOK J:**

10 He represented himself, is that to be Mr Cook's –

**MR KALDERIMIS:**

Yes, that's right. I would say he is a rogue agent. That is the fairest way to describe it.

**KÓS J:**

15 Well why is it –

**WINKELMANN CJ:**

Well he's an individual at that moment.

**ELLEN FRANCE J:**

Well I'm not quite sure why you say he's a rogue agent?

20 **WINKELMANN CJ:**

Yes, I can think we –

**MR KALDERIMIS:**

Perhaps let me explain –

**WINKELMANN CJ:**

25 He has not yet secured the agency.

**MR KALDERIMIS:**

Yes. Let me –

**WINKELMANN CJ:**

I don't think it's all that unusual in the real estate world for people to do this sort  
5 of prospecting-type work.

**MR KALDERIMIS:**

I respectfully –

**WINKELMANN CJ:**

So what do you mean? Are you saying he told them that he had, he was the  
10 agent?

**MR KALDERIMIS:**

Yes, I'm saying that is the evidence, your Honour, and perhaps just before the  
break let's turn, there were two real estate experts –

**KÓS J:**

15 Well hang on, he's not the Cooks' agent?

**MR KALDERIMIS:**

True, he is not –

**KÓS J:**

So if he's anyone's, isn't he your client? I mean I think this is a point for you.

20 **MR KALDERIMIS:**

Yes, I mean, quite possibly that is the only way to really see it, that he was  
asked by us to do a job and that job required going to get the agency for  
Mr Cook but he didn't actually have the agency for Mr Cook so perhaps that is  
the way to conceptualise it, your Honour.

25 **GLAZEBROOK J:**

Do we – can you, just so we're clear what the findings of the Judge were, perhaps after the adjournment, can we have the findings of the Judge exactly what happened in respect of this?

**MR KALDERIMIS:**

- 5 Yes, I will do that but before the break, can I just take you then to the two real estate agents who both gave very clear evidence about what happened and what was meant to happen. They were unchallenged. There were no real estate agents for PGG and they are Mr Denley and Mr Crews. So these references are in the right-hand column of proposition 4. If you look at  
10 Mr Denley first, so his evidence, his brief...

**WINKELMANN CJ:**

So they are called as expert witnesses for your client?

**MR KALDERIMIS:**

- Exactly, that's right, your Honour. So if we look at Mr Denley's brief and go to  
15 paragraph 15 to 18, so here's the context. There's an Act, the Real Estate Agents Act 2008, paragraph 16, there are Conduct and Client Care Rules, the relevant ones. If you look at paragraph 17 with the 2009 version and if we then go to paragraph 25 in the real estate world an agency agreement is required before acting. Look at the second sentence of 25: "If the owner wishes to then  
20 list the property" so the real estate agent can visit them but: "If the owner wishes to then list the property with the agent, a written agency agreement must be concluded before the agent takes any steps to list or market the property. This is a critical requirement." Skipping a sentence to 26: "Section 126 of the  
25 Act requires that such an agreement be in place before any work is taken in relation to a property, including before key information is passed on to a potential purchaser and especially before the property is offered for sale." If we're thinking about policy in this case: "The policy reason for this is that having an agency agreement in place provides an important quality control and accountability mechanism that works to reduce errors and problems down  
30 the line."

So the answer to the Chief Justice's question is Daly knew, PGG knew you can't do anything like this. You cannot represent data about a property where you don't have an agency agreement and that's not just bureaucracy. The reason for that is that, as we will see after the break, the agency agreement

5 has all of these safeguards in it to prevent just the misrepresentations that took place here. By going rogue, Mr Daly assumed a whole lot of responsibility for himself and we are simply trying to make PGG accountable for that. If that's a convenient time, your Honour, we've hit 11.30.

**WINKELMANN CJ:**

10 Yes, we'll take the break.

**COURT ADJOURNS: 11.29 AM**

**COURT RESUMES: 11.48 AM**

**WINKELMANN CJ:**

Mr Kalderimis.

15 **MR KALDERIMIS:**

Your Honours, we were just looking at Mr Denley's brief, just to understand what responsibilities PGG had, and knew it had, and we were around about paragraphs 29 to 32 if we just turn over the page. You can see there, without me reading it out, in 29 there's a lot of important information meant to get

20 verified, simply by the process of having an agency agreement signed before you say a word about the farm, which is the only way this could lawfully have happened under section 126. In paragraph 30 you can see that the Conduct and Client Care Rules requiring –

**WINKELMANN CJ:**

25 But he does ultimately get it signed, doesn't he?

**MR KALDERIMIS:**

No, he does ultimately get it signed, but not in the way that needed to be signed, as we will see. There are two problems with it. One is it was backdated, and the other is that Mr Daly ticked a box to say that something called the rural information sheet, which was PGG's way of recording all of the information you can see in the second sentence of 29, production stock units, fertiliser application et cetera, Mr Daly ticked a box that said that that had been completed, but it hadn't been, and that it was attached to the agency agreement, but it wasn't.

**GLAZEBROOK J:**

10 That's the rural information form did you say?  
1150

**MR KALDERIMIS:**

That's exactly right your Honour. So just to speed things up, if you look at point 5, I've got the references there. So you can see the agency agreement, the rural information sheet, and PGG's policies are all listed there. If you stay with paragraph 31 of Mr Daly's brief, he summarises the effect of PGG's policies, which in short are very clear, that all of this is very important and critical, so I've got the relevant pages there, I won't take you to them.

**WINKELMANN CJ:**

20 Well this all goes to him being negligent.

**MR KALDERIMIS:**

That's right, it goes to him being negligent, but it also goes to how much of a step into the arena he took. So was meant to happen is he was meant to have an agency agreement in place. The rural – before he started, not one that was backdated. He was meant to have, when he ticked the rural information sheet box, that the rural information sheet that you can see at, and we might bring that up, at 302.0860, that was meant to have been completed, and just if you scan down it –



**KÓS J:**

By what point?

**MR KALDERIMIS:**

But by, at the same time as the agency agreement. So the two –

5 **KÓS J:**

By when?

**MR KALDERIMIS:**

Before he said anything about the farm. Before he made any representations at all. Let me put it this way. The evidence was that the rural information sheet  
10 was an integral part of the agency agreement. So until all of these things were in place –

**KÓS J:**

Before he said anything to the Routhans?

**MR KALDERIMIS:**

15 Before he said anything to the Routhans.

**KÓS J:**

But the Routhans came to him.

**MR KALDERIMIS:**

The Routhans came to him and said, can you get the agency to the farm and  
20 tell us something about it. So you could have that initial conversation, but when he came back he couldn't say anything to the Routhans about the farm, unless he had the agency for the farm.

**ELLEN FRANCE J:**

And what's the source of the requirement relating to the rural information sheet?

25 **MR KALDERIMIS:**

Let me...

**WINKELMANN CJ:**

It's the agency agreement, is it?

**MR KALDERIMIS:**

It's the agency agreement, so if we go to the agency agreement, so let me show  
5 you the box.

**ELLEN FRANCE J:**

What I mean is it's a, it's a...

**WINKELMANN CJ:**

Contractual requirement not a statutory.

10 **ELLEN FRANCE J:**

Yes.

**MR KALDERIMIS:**

Well the statutory requirement is that all, if you look at paragraph 30 of Denley,  
you need to have all of the particulars in place, and the particulars, the way the  
15 PGG system worked, perhaps if we bring up the agency agreement, that's  
302.1075, you can see it from the road map at tab 5, the agency agreement,  
we'll just open that up. So you can see that's there. You can see the date.  
It's said to have started on the 1<sup>st</sup> of September 2010, but it didn't. All sorts of  
representations were made during September. This brochure was handed over  
20 during September, and if you look at the bottom of the page, the rural  
information sheet was said to have been completed, but it wasn't.

**WINKELMANN CJ:**

But Mr Cook signed this so he assumes, that's presumably a confirmation that  
he thought he'd clothed Mr Daly with authority to go out and talk or did he just  
25 not read the document?

**MR KALDERIMIS:**

No, because what happened was at this meeting, so if we skim down the page and look at when this document was signed. So you can see it's signed on the 11<sup>th</sup> of October the sale settled – sorry, the sale and purchase agreement was signed, if you look at the chronology, on the 18<sup>th</sup> of October. So this has all  
 5 been done just days before purchase. So Mr Daly, who has already made all of these misrepresentations without any authorisation, at least realises that he's got to get something in place, otherwise he can't be paid his commission. So he goes to see Mr Cook with this document, and he says to Mr Cook, he shows Mr Cook the page of the prospectus that he has already given, but doesn't say  
 10 it's, being in the prospectus, doesn't say it's being handed over, and says, can you confirm production, and the evidence is that Mr Cook's said, hang on, I need to check that, I can't.

**WINKELMANN CJ:**

So does this take us any further than that Mr Daly clearly assumed responsibility  
 15 for the accuracy of the representations and he didn't have the comfort that the owner was standing behind him and would hold him harmless for any inaccuracies in it?

**MR KALDERIMIS:**

Yes, it does, it takes us one further step, which is that to the extent policy is a  
 20 part of assumption of responsibility and trying to work out whose consequences, you know, what are the risks against which the Routhans sought to be protected which informs the scope of Daly's duty of care, the risks they sought to be protected from were that unverified information could cause the loss and this shows the extravagance of the unverified information.

25 **WINKELMANN CJ:**

But that doesn't come from his conduct, that comes from the fact, the representation and the circumstances in which he had dealings with the Routhans.

**MR KALDERIMIS:**

30 Well the –

**WINKELMANN CJ:**

I'm just wondering if it's, you know, you have emphasised how rogue he was but I'm just concerned that really it's, we're shifting our focus from the critical shaping of the duty, which is the dealings between him and – Mr Daly and the

5 Routhans.

**MR KALDERIMIS:**

I'm trying to emphasise that the purpose of the statutory scheme is very detailed so that as Denley says at paragraph 26, you have an "important quality control and accountability mechanism that works to reduce errors and problems down

10 the line", that's why it's there.

**WINKELMANN CJ:**

And he put himself on risk by stepping outside it.

**MR KALDERIMIS:**

Yes, that's all I'm trying to say. So let me move on from that point and, your

15 Honour Justice Glazebrook, I will and I have in mind to take you through the relevant paragraphs of the Judges' findings but let me –

**GLAZEBROOK J:**

I suspect also that the rural information form to a degree comes out of the client conduct provisions that actually says that you've got to make reasonable

20 enquiries of the vendor, et cetera. There's a number of – and make sure that any information that you're providing is true and if there are, if there is anything about the property that ought to be disclosed to the purchaser to find out about it, I'm paraphrasing from memory, but –

**MR KALDERIMIS:**

25 No, no, that is exactly right, your Honour. That's exactly why it's there and of course the effect of all of this if it's done properly is that the vendor has represented as being true and correct all of this information. So it might not be in the end, it might not be, but as we say in proposition 5, PGG didn't need to provide correct information, it just had to provide authorised information.

**WINKELMANN CJ:**

Yes, but the reason – they were not relying upon him, the key aspect of their reliance was to obtain accurate information. I mean had it been unverified and was right, they wouldn't have a cause of action so –

5 **MR KALDERIMIS:**

Yes, I accept that.

**WINKELMANN CJ:**

I mean, so I think you're underselling it in some ways. The risk they sought to be protected from were not reliance on unverified information, it was unverified  
10 and inaccurate information.

**MR KALDERIMIS:**

No, I accept that correction, your Honour, and if it had been accurate we wouldn't be here. All I'm saying is that PGG would have been protected if it had followed the proper process, it's – the heart of its duty is a process duty, just  
15 like an airline pilot, the heart of what they are meant to do is follow protocols and procedures to keep passengers safe.

**WINKELMANN CJ:**

And that's why he was found to be in breach of duty.

**MR KALDERIMIS:**

20 Yes, okay. So let me turn to proposition 4 which is why go to Mr Daly, what is this all about. The production data wasn't relevant only to the purchase price, PGG knew that the production data would be relied on to test revenue for the purchase of a going concern. So you can see at the bottom of the prospectus, if we just pull up that page and look at the very bottom line under "comments",  
25 thank you, "available going concern". If we pull up the sale and purchase agreement that ends up being signed, that's available from the road map, and look at clause 32.

**GLAZEBROOK J:**

I'm not quite sure what you mean by that. Perhaps –

**MR KALDERIMIS:**

This was a going concern.

**GLAZEBROOK J:**

5 It's not just relevant to the purchase price but –  
1200

**MR KALDERIMIS:**

Oh, yes, sorry, perhaps that was unnecessarily concise. If we come back to what I've called the key issue at point 1, a major platform of PGG's case relying  
10 on the SAAMCO's case is that the scope of the duty ends at the date of the transaction and all a claimant can properly recover is the diminution in value. But we say that when you're buying a going concern, the production data is about revenue, that's why you want the production because revenue – production is the key determinant of revenue and the revenue, as  
15 you can see in the third sentence of four, is relevant to both the purchase price, how much you're going to pay for it, but also how well your ongoing trading is going to go. PGG knew the relevant prospectus was needed for the bank and we say it was entirely within, using Lord Sumption's language, as he then wasn't, PGG ought to have contemplated that if the production and hence  
20 revenue was overstated then there was a real risk of continued losses, a trading deficit, increased interest costs and extra expenditure. And there's no reason for this Court to create a zone of exoneration, that if the Routhans had been told that was all PGG was going to be liable for, just the diminution in value, they probably would have found another real estate agent.

25 **KÓS J:**

Why? You've made this point twice now and it hasn't registered either time. Why would they have gone and found another real estate agent?

**MR KALDERIMIS:**

Because they wanted to be given reliable figures for their going concern business.

**KÓS J:**

But they never thought they would be suing a real estate agent. They thought  
5 if things went wrong they would be suing the vendor. That's what every purchaser thinks.

**MR KALDERIMIS:**

Well maybe that's true but it would relate to obviously both of the things that they would be suffering, the capital loss on overpaying for the farm but also,  
10 and I will get the finding of fact that they reasonably didn't discover this any earlier than they did, the losses in between. All I'm saying is that there's no reason to make that distinction. It's all and the same thing for a purchaser in their circumstances. They are overpaying but they're also going to be missing out on the revenue they need to make the business work. There's no reason  
15 to artificially segregate what is really a singular concept.

**GLAZEBROOK J:**

But wouldn't the valuation be worked out usually on discounted future revenue?

**MR KALDERIMIS:**

Yes.

20 **GLAZEBROOK J:**

And so that's a distinction without a difference at least in respect of future revenue. I mean what you're really doing – what you're really claiming is reasonable expenditure that was incurred because of it, not a revenue issue, is it –

25 **MR KALDERIMIS:**

Well it's actually –

**GLAZEBROOK J:**

– because that should be built into the valuation?

**MR KALDERIMIS:**

It is built into the valuation if you discover it and can get out. Think about it this way. You buy a business, you've overpaid, you realise the next day that the  
 5 business is not worth what you paid for it. You can sell it the next day, you use the proceeds to buy a new business. You haven't missed out on any year's profit. But we say for four years the Routhans were reasonably under the impression that the reason they weren't getting the production was their own fault and so for those four years not only did they overpay for the golden goose  
 10 but they didn't get the eggs. Now that comes down to what we've been discussing, the mitigation point, the reasonableness point, if the Routhans ought to have gotten, bailed out early, well then they only get the golden goose differential, but if it is reasonable for them to have been where they were, well then they can also get the golden eggs.

15 **GLAZEBROOK J:**

I suppose I was just challenging your distinction between purchase price and ongoing revenue and going concern because in fact that is the future revenue is the very thing that's built into the valuation.

**MR KALDERIMIS:**

20 I agree. All I'm trying to say is when you buy that golden goose on the basis of expectation of future revenue if –

**GLAZEBROOK J:**

And carry on reasonably for a period –

**MR KALDERIMIS:**

25 Yes, and carry on then you are missing out on those years of future revenue but you're exactly right, your Honour. So let's look at Mr Daly's brief at paragraph 21, this is on the road map. So this is Mr Daly in his arbitration making it clear that he knew this proposal would be given not only to Mr Routhan and but also the Routhans' bank. It was needed for financing which



is why he was creating it. And if we go back to the road map, the brief that Mr Daly gave in the road map, this is the cow lease arbitration in which all of this was discovered, thank you. You can see that, look at that 14.1, if we just blow that up.

5 **KÓS J:**

What's the page reference to this?

**MR KALDERIMIS:**

This is 303.1774. If we just go down, you can see in the cow lease arbitrations, he's attributing it to the relevant brochure but in fact it's something that he's just  
 10 saying and there was no debate that this was his view: "The main considerations in calculating the purchase price of a dairy farm are production achieved...and the hectare price" et cetera. So there's no debate here that the production was a key determinant here of what was happening. And if we go back to the road map and look at Mr Glennie's evidence, he was one of the two  
 15 experts for the Routhans, and look at 12 to 15: "The annual –

**GLAZEBROOK J:**

I'm sorry, what was the name again?

**MR KALDERIMIS:**

Glennie, Simon Glennie. So this is his first brief. There are two farming experts  
 20 for the plaintiffs, Mr Glennie and Mr Lewis. There was one farming expert for PGG, Mr Savage. All of their evidence is important as I'll come to explain. Mr Glennie says: "The record of annual production is a key metric –

**WINKELMANN CJ:**

Has anyone ever thought of giving us a dramatis personae. I just think there's  
 25 so many names and...

**MR KALDERIMIS:**

That is a very good point, your Honour. Let me just isolate those three names so that you have them. I'll say it again, Glennie, Lewis and Savage are the three farming experts. Their evidence –

**WINKELMANN CJ:**

5 I was trying to do this myself.

**MR KALDERIMIS:**

It needs to be read and Denley and Crews are the two real estate experts.

**WINKELMANN CJ:**

Are the two real estate agents?

10 **MR KALDERIMIS:**

Real estate experts. And so I won't read 12 to 15 for you but all of that is exactly what you would expect about why production is a driver of revenue and we say that we could look at many other things. I've given you Mr Lewis' evidence in the road map as we go down but I'll take you, not to that one, but to the one –

15 because he says the same thing, Mr –

**KÓS J:**

I think we should remember in this that we denied leave to the respondents to argue the materiality point so it's accepted for the purpose of this appeal that the misrepresentation was causative of the transaction.

20 **MR KALDERIMIS:**

Yes, and I'm not – well thank you, your Honour, I'll bear that in mind and not spend time on matters I don't need to. I'll just note then that Mr Dillon at paragraph 25, he was a banking expert for the respondents, says the same thing and I just want to blow this up. It's: "Key production metrics drive the  
25 financial performance." Now one of the things that I –

**WINKELMANN CJ:**

It's quite remarkable, isn't it, the bank doesn't require some sort of independent verification of the milk fat figures. I mean they certainly don't act like that when they're lending to individuals for their homes.

**MR KALDERIMIS:**

5 Well yes as you can see from the real estate experts they go into this in some detail. There are only two ways you can get the production information given to you if you follow the proper process. You can get the vendor to sign it and verify it as true and correct or you can get it from the dairy company and Mr Cook's evidence is that he would never have given it to Mr Daly. He always  
10 required you to go to the dairy company but the banks were happy with either one of those two options. You can see here that what Mr Dillon is doing is explaining the figures that Ross Bishop came up with on production. He was the financial advisor, the farming advisor who put together the budgets for the Routhans and for Rabobank.

15 I just want to mention that because firstly he says the key production metrics drive the financial performance, secondly, because one of the points, and in fact you can see it is really the second point in my learned friend's road map, would be trying to suggest to your Honours that Mr Bishop's farming budget did  
20 not rely on the prospectus and the production amounts in it. They did as Mr Dillon could see.

1210

I'm going to explain that subsequently because it is technical but I just want to  
25 headline point which is that Mr Bishop's work was a link between Mr Daly preparing the prospectus knowing it would go to the bank, everyone knowing that it was all important for production and revenue, and Rabobank itself, and as Mr Dillon could see. If we just turn to the judgment, I won't go through all of the relevant paragraphs just yet, but if we just turn please to paragraph –

**WINKELMANN CJ:**

So Mr Bishop considered that the Routhans could achieve an additional 9,000 kilograms above the 103,000 kilograms, and that was the budget, he put that into his budget?

5 **MR KALDERIMIS:**

Yes, that is what he represented yes, and that's certainly what the Routhans were thinking. But when you look at his budget it says that you can get the represented production. So it is calculated on –

**WINKELMANN CJ:**

10 Did the bank lend them on that –

**MR KALDERIMIS:**

Yes, they lent –

**WINKELMANN CJ:**

– projected increase?

15 **MR KALDERIMIS:**

No, no, only on the represented. The 103 was the number the bank used, and we will get to that as well. If we just turn to paragraph 122. Now this is from within the deceit part of the judgment. We are not running a deceit case here, of course, but this was Mr Daly's cross-examination. It's important to read that  
20 passage because it shows what Mr Daly accepted he knew was going to happen. So if you're thinking about, why is the duty there, what is the risk against which the duty is to protect the Routhans, what was within reasonable contemplation, what ought he to have contemplated, and I won't go through all of the questions there, but Mr Daly knew all of the facts that have come to pass  
25 might well happen, and none of that was denied. So what I'd like to do now –

**WINKELMANN CJ:**

Well that's not – what is it in particular you're drawing our attention to. It's quite a long passage here.

**MR KALDERIMIS:**

Sorry, yes, if you look at the second question. "So you knew that unless you said something to the Family Trust they'd continue to reasonably rely on the information in the prospectus?" Answer: "Yes." But they didn't realise, because  
 5 this was after Mr Cook has refused to sign and confirm the production, and if we just go down the page onto the next page, and you knew "Rabobank would continue to rely on the information". Yes it would be.

**WINKELMANN CJ:**

Is that the critical part?

10 **MR KALDERIMIS:**

Yes, and the next two questions, because it would affect the basis on which they would purchase the farm, "and on the basis on which Rabobank was prepared to finance the farm?" Answer: "Yes, potentially." So stopping there.

**ELLEN FRANCE J:**

15 Sorry, what do you say is the relevance of that?

**MR KALDERIMIS:**

I say the relevance of that is that Daly subjectively knew because it was, because any real estate agent in his position would have known that this document was being relied on to undermine the financing by Rabobank and the  
 20 purchase decision by the Routhans, because it went to the production they could reasonably achieve. That's what I'm going for.

**MILLER J:**

But all of that goes to a loss that's recoverable in the measure of the price paid for the property, whereas what you want is losses that were incurred  
 25 subsequently. So you have to show that somehow his responsibility extended to the actual delivery of the projected revenue, and also to the expenditure of money in an attempt to get the farm up to 103,000 kilos.

**MR KALDERIMIS:**

Yes your Honour. I accept that.

**MILLER J:**

Yes, this isn't taking us this far. It doesn't go beyond saying they paid too much for the property.

5 **MR KALDERIMIS:**

Let me then turn to those points. So the first thing I want to do, and perhaps because we need to get the facts right we'll go to point 11 and address what I call context now. So I've given you some legal references at the top right-hand side, I don't need to go to any of them, they are all hyperlinked, but it's –

10 **WINKELMANN CJ:**

So Mr Daly, can I just ask, what about the run-off, because you're claiming for the loss of capital on the run-off too, aren't you?

**MR KALDERIMIS:**

No.

15 **WINKELMANN CJ:**

No?

**MR KALDERIMIS:**

We're, perhaps why don't I explain what we're claiming for by reference to this chart, and then come to context. So I want to try and get the facts in place  
 20 before I discuss the calculations in detail, but I can do this reasonably fast. So if we turn to table 1, just under that diagram, and perhaps if you put table 1 at the bottom and the diagram just above it so we can see them both. Table 1 describes the loss on the left-hand column, so table 1 is a way of calculating the difference between the counterfactual and the actual positions, and the way  
 25 it does this is you can see that immediately on buying into the farm, this is line 2 of table 1, the Routhans eroded their ingoing net equity, which is in column 4, of 1.57 million by 480,000. Then you can see on line 3 just below it, through to mid-2014, which is the end of the dairy season, there was lost revenue that

eroded their equity further and then further revenue is lost through to the end of 2015, and we say by 2015 the difference between the actual and counterfactual, the counterfactual's in the third last column, all of their equity was gone. So the relevant date here is 2015. We don't even get to the forced  
 5 sale of the farm and the run-off in 2021 because what we are claiming back is the money that the Routhans would've had in the counterfactual world, and all the evidence was they wouldn't have lost it, there was a whole alternative farm scenario that was modelled by the experts –

**WINKELMANN CJ:**

10 And the precise date that they accept that they knew that there was a misrepresentation?

**MR KALDERIMIS:**

The end of 2014. If you go to the chronology, I'll give you the exact date there. Go to the final page of the chronology and look at the sixth bottom box,  
 15 16/11/2014. That's when they discover.

**KÓS J:**

And you say that was in the course of Mr Daly's evidence?

**MR KALDERIMIS:**

That was in the course of getting, finally after trying numerous times, getting the  
 20 milk production figures from the dairy company about Mr Cook's year by year production. Mr Cook had to sign off to let them get it and eventually, in the course of the cow lease arbitration, he did let them get it.

**KÓS J:**

Okay.

25 **MR KALDERIMIS:**

So there were two things to learn. The one thing that they learnt on the 16<sup>th</sup> of November is they discover what the actual year by year season's production was. They don't know why it's different or how this happened, then

during the arbitration itself they discover that Cook and Daly are giving different evidence about how this happened, and if you go to the next line down you can see that they're now in asset management, and the next line down, November 2015, Mr Daly then came to Mr Routhan and fessed up, and that's

5 in November 2015.

**WINKELMANN CJ:**

But in December 2014 they received the figures?

**MR KALDERIMIS:**

Yes, that is right. So let's look at what the Judge said about that. If you look at

10 paragraph 217, so this is just the summary of the submissions, well I'll let your Honours read that. So that's the submission, and then we go on to the discussion from paragraph 219 to 221 and remember that in the case there was a claim of a failure to mitigate, in terms of defence, a failure to mitigate as well as contributory negligence. So all of these issues were ventilated and at

15 paragraph 221 the Judge concludes: "I am satisfied the Routhans completed adequate due diligence" at the time of the purchase. "For the reasons already explained, I consider it was reasonable for them to rely on the production of figures which they understood had," come from Mr Cook, and then Mr Bishop's evidence is addressed.

20

Then at paragraph 227, there were lots of criticisms about the Routhans' farming ability but the Judge rejected them. "Their difficulties arose because they did not realise," that what they were doing "was a reasonable achievement when they led to believe that for the last four years, on an orthodox farming

25 system the farm had produced an average of 103." Now one needs to read other paragraphs of the judgment to see everything together and I'll take you to more paragraphs very shortly at the end of the context section but if we go back to the road map –

1220

30 **KÓS J:**



I'm still puzzled about these shares, Mr Kalderimis, which we'll have to come back to.

**MR KALDERIMIS:**

Yes, well I've clarified that during the break. The shares do not change season  
 5 to season and so you can, within the dairy company, keep levels of shares that  
 do not in fact represent what the production you're doing for that year is.  
 When Mr Cook was given the agency agreement which had updated the  
 production to 103 and the shares to match, it was Mr Cook who said: "I'm not  
 sure that's right." So Mr Cook then demurred and didn't sign off on that bit with  
 10 Mr Daly and it was that point that was allowed to slip so we aren't continuing  
 the deceit argument but it was that point that was just left to lie.

**KÓS J:**

So the 103 was a figure established by the dairy company at some historical  
 point which didn't vary, is that what you're saying?

15 **MR KALDERIMIS:**

No, Mr Daly himself updated in the CRT brochure the shares are 95, in the  
 Routhan prospectus they're 103. It was Mr Daly who made that change.

**WINKELMANN CJ:**

So presumably the Judge made a finding about the reasonableness and  
 20 reliance up to 2014 in her discussion part because you're taking us...

**MR KALDERIMIS:**

Yes, so let's look at paragraph 75 first.

**GLAZEBROOK J:**

I'm still having some difficulty understanding what you say happened with the  
 25 number of shares.

**KÓS J:**

I mean what shares did they get when they actually became farmers?

**MR KALDERIMIS:**

They got 103 shares so they were – let me take you to the documents. That will make it –

**WINKELMANN CJ:**

- 5 Wouldn't that – didn't that – there may be evidence on this, wouldn't it follow from that that Mr Cook knew that that was the representation if that was the number of shares they were expecting to get?

**MR KALDERIMIS:**

- 10 Well Mr Cook's evidence is he did not realise that any production representations had been made so.

**GLAZEBROOK J:**

So he knew he was handing over 103 shares but on the basis of no representations exist?

**MR KALDERIMIS:**

- 15 That's right because he said: "I didn't make any representation" so –

**WINKELMANN CJ:**

But why would he accept, hand over a higher number of shares which he'd have to take off his existing farms, other farms?

**MR KALDERIMIS:**

- 20 This was then dealt with through the documentation. If you look at perhaps document 19 in the bundle, he does sign a share transfer form later. I'll just give you the reference. There's no need to turn to it. It's 305.2912. You can look at it in due course. So 305.2912. So Mr Cook is –

**ELLEN FRANCE J:**

- 25 Sorry what was the number? 305?

**MR KALDERIMIS:**

305.2912. So Mr Cook is aware that shares corresponding to 103 are being transferred but hasn't made any representations as to what the last few years' production have been.

**ELLEN FRANCE J:**

- 5 But he does know it doesn't all relate to one property?

**MR KALDERIMIS:**

Well this – he's got a block of different properties so this 103 has sort of come out of his various properties.

**KÓS J:**

- 10 So he's got more than 103,000 shares?

**MR KALDERIMIS:**

He's got many more than 103,000 shares.

**KÓS J:**

Yes.

- 15 **MR KALDERIMIS:**

So this block has been allocated and I accept that Mr Cook knew that that amount had been allocated but Mr Cook's evidence was that he hadn't made any representation about this and that this was just a sort of downstream –

**KÓS J:**

- 20 Well why aren't the shares a representation?

**WINKELMANN CJ:**

It's very hard to follow that.

**MR KALDERIMIS:**

Well –

- 25 **GLAZEBROOK J:**

Well I suppose the short answer is he's not, he wasn't sued.

**MR KALDERIMIS:**

Yes, he wasn't sued, he wasn't a part of the prospectus and what is important about the prospectus, as I'm trying to get to in the context matters section, is  
 5 it's not just the figure, it's the way the figure is derived. So if I can please explain this which is a point that my learned friends take issue with in their road map, what they call issue 2. It's very important to understand the facts on this. So the clearest way to see it is to look at the evidence of someone called Mr Davis. Now he was, I said that there was only one farming expert for PGG, and that is  
 10 true, but there was one farming consultant who had done work for Mr Cook who gave evidence from PGG, and he wanted to give pseudo-expert evidence as well. If you look at his paragraph 19 and blow that up please. He says it better than anyone else. This is what I've said before. "Production levels on their own do not mean much." What you need to do is "understand the farming system  
 15 behind" them, all of these inputs, because with the right inputs the farm can do nearly whatever you want. Now that is all, everyone vigorously agrees with that proposition. Why is that important? It's important because the inputs were provided on the sheet in the prospectus. So in other words, the representation was not this farm does 103. The representation was, this farm does 103 from  
 20 this farming system.

**WINKELMANN CJ:**

So it's said against you that there's no finding that there was a misrepresentation in respect of the farming system, and that the only misrepresentation you pleaded and proved was of the milk fat level.

25 **MR KALDERIMIS:**

Well there are factual findings as to what the facts were. So your Honour is right that there was no separately pleaded claim, and you also misrepresented all of these other things, but there didn't have to be. There were factual findings that the farm did not do 103 from this system. It didn't do 103 from that fertiliser,  
 30 which was the recommended programme. It didn't do 103 from that supplement regime, but it brought on new supplements. It didn't – and it rotated the cows

through many different properties, and all of those findings of fact are in the High Court judgment. It is of the essence of our case that that is not a separate collateral matter requiring a different negligence misrepresentation to be litigated and pleaded. That's not why it was in the case. It's of the essence of our case, and there is actually some degree of, passing in the night that you can see in the Court of Appeal's judgment that that simply was not, with respect, grasped. The essence of our case is that everyone in the whole stratosphere of this case agreed, you can't just rely on 103. You can only rely on 103 in a context, and so the context here that we were told related to the 103, was that, and the Judge describes it reasonably accurately when she refers to a low input orthodox farming system, and that's important because it goes also to revenue. This was a 103 that a husband and wife farming team could put together. You didn't need industrial quantities of fertiliser, didn't need to have four other properties, you didn't need to bring in heaps of supplemental feed, it was 103 that just came out of these inputs. Now as I say I'm not going to take your Honours through the legal authorities, but especially in an FTA case we simply can't ignore this type of context. I'd like to go to one –

**WINKELMANN CJ:**

So you were taking us, because we keep on going, we've been taking you all over the place Mr Kalderimis, so if we regroup you were taking us to measure of loss before you took us somewhere else?

**MR KALDERIMIS:**

Yes, I'm in context, paragraph 11. In context paragraph 11, and the authorities that I ask your Honours to read, and your Honour Justice Miller will remember the *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611, which was about an advertisement to the public that we say the importance of context doesn't apply only to headline advertisements to the public and the *Bisset v Wilkinson* [1927] AC 177 (PC) case is a famous case about how you find out what a misrepresentation is really meaning.

It's a bit like the Investors Compensation Scheme of misrepresentation cases and I was just looking at Davis, 19 on the right-hand side, but I just wanted to go to a couple of other important references because I know that my learned friend will be spending time on this tomorrow. The first is if we can go to please  
 5 202.0059, if you go to the road map one can find it there under point 11, and in fact let's go to 203.0822, that's in fact the cross-examination, so 203, that's the one, thank you very much Mr Neas.

So this is Mr Lewis, one of the two farming experts for the Routhans being  
 10 cross-examined by my learned friend Mr Parker, and we say this is a very important passage for anyone running a case that PGG is running that somehow context can be excised from the case. We're beginning at line 8 please: "And are the production figures by themselves enough to assess the production capability of a farm?" A request for clarification. "If you just had  
 15 production figures shown to you...is that enough to assess the production capability of that farm?" "... no because you would (have to understand)...what inputs into the farm." "Right, and yes, that's – so you use the word inputs.

That in my simple lay person's way of looking at it, behind a production figure  
 20 you need to, if you're going to get a very good grip on what you're purchasing, you need to drill down and find out what the inputs are, what the farm management system comprises of. So it's an indicator, the production figure, but it's not the complete answer by any means?" "It's a start." "It's a start. And you'd then want to know perhaps and tell me if I'm right on this, the type and  
 25 quality of the stock, the inputs into the pasture" et cetera and then at the bottom of the page: "And the ultimate outcome of looking at all of those things would be to see whether a purchase such as this was going to be profitable."

Then over the page it's the same thing: "But isn't that the ultimate outcome is  
 30 am I going to buy this business and is it going to be profitable for me to buy it?" "Yes, but there's some important steps along the way." And the lines persisted and at 19 and 20: "Yep, so understanding those pieces along the way, quite important to then understanding profitability." "I totally accept that. So, you've

to go through that exercise, work those things out..." and look at whether it's going to be a viable proposition.

**WINKELMANN CJ:**

5 So if the fact of 103 had been correct but the other statements had still been in there as to the fertiliser plan and as to the number, and as to the wintering off, you would say that was a misrepresentation?

**MR KALDERIMIS:**

That's right because this is not 103, this is 103 from, 103 from these inputs, just as the CRT brochure was. 103 –

10 **WINKELMANN CJ:**

But isn't that – aren't those actually independent misrepresentations then because you're saying that's not just context, it's actually other false information?

**MR KALDERIMIS:**

15 Well we say it is just context if you're looking at it from the lens of the 103. The 103 was not from those things. The 103, if someone sells a business and says: "I'll make this much revenue from" you know, maybe it's got four units, "I'll make this much revenue from unit 1" but they actually – and they state the revenue figure correctly but the revenue actually comes from units 1, 2 and 3  
20 put together, that's a misrepresentation about the revenue because it didn't come from those units, it came from only – well that unit alone, it came from all of those units and that's the same thing here. This is a production misrepresentation, always made in context and all FTA cases are considered by looking at the information in context. This was not the revenue that the farm  
25 produced from these inputs as was represented.

**WINKELMANN CJ:**

On your case though it probably wouldn't be a material misrepresentation if they had said: "We've produced 103,000 kgs of milk fat by spiking production in an

unsustainable way” because – so if they'd actually put in – I think your case is that they had spiked production in an unrepeatable way?

**MR KALDERIMIS:**

Yes.

5 **WINKELMANN CJ:**

If they'd put in the spiking production, the milk fat would be neither here nor there because you'd see immediately that this was not replicable?

**MR KALDERIMIS:**

That's true but we say that's one of two ways in which this has been  
10 misrepresented. So you're right. Then the literal difference would be led, would be outweighed by the contextual difference which they would have corrected. They would have got the context right but the literal figure wrong. Here they got both of them wrong. That's our point. They got both aspects wrong. They literally got the production, the historical production wrong and they got  
15 the production wrong in context. And it has to be said that that context was firmly, squarely a part of what everyone was talking about in the case. That's what Mr Parker is putting to Mr Lewis. If we look at the joint expert report which is on the road map –

**GLAZEBROOK J:**

20 Is a way of putting it that the misrepresentation was that you got 103 from these inputs.

**MR KALDERIMIS:**

Yes.

**GLAZEBROOK J:**

25 And that both aspects of that were incorrect and negligent?

**MR KALDERIMIS:**

That is the case, your Honour.



**MILLER J:**

Perhaps more to the point, all of the things in the prospectus were within the scope of the risk that Mr Daly was taking on?

**MR KALDERIMIS:**

- 5 Yes, that is right and there are two ways of thinking about that, your Honours, and I want to be very clear about both of them because of the importance of this point. The first one we've discussed. One way it's important is that, as her Honour Justice Glazebrook has put better than I was putting, this was a misrepresentation of a number from inputs and it wasn't that number from those
- 10 inputs so it was wrong. The second point, and this is what his Honour Justice Miller put to me, is that when you look at the statement of claim you might think it's somewhat extravagant but then the Routhans were legally – were representing themselves for some time, there are five causes of action pleaded. So we'll leave out the deceit cause of action. That leaves four.
- 15 One of them is FTA. That leaves three. There are three negligent causes of action. Take out negligent misstatement. That leaves two. One is direct liability, one is vicarious liability but they're process failure.

- So I've laboured the process that we've gone through that had to be gone
- 20 through but two aspects of this negligence claim, two independent causes of action is that this brochure was produced in a way that didn't follow the requisite process and was therefore produced without reasonable care and those process failures naturally by definition apply to the whole prospectus. In a way, your Honours, it's a very strange argument to be arguing that the SAAMCO
- 25 case should somehow protect a professional by reducing their liability that would otherwise come out of this full prospectus that is the scope of duty that this prospectus would imply and simply focus on just one part of it without any context. No one has ever used the SAAMCO case in that kind of way to effectively allow a professional to exonerate themselves. The scope of context
- 30 can't be narrowed by the context here. It can only be widened or –

**WINKELMANN CJ:**

So you are telling us what was, you know, if we take you back to tables, you were answering a question by taking us to the tables, but tell me where I was wrong about what you were claiming?

**MR KALDERIMIS:**

- 5 Thank you, I am grateful, your Honour. So I think I was asking a question from...

**WINKELMANN CJ:**

Me.

**MR KALDERIMIS:**

- 10 The bench, yes, about –

**WINKELMANN CJ:**

I wrongly asserted that you were claiming something and you were putting me right.

**MR KALDERIMIS:**

- 15 Yes, so just to get the tables clear, so if we put the diagram and table 1 there. I was just going through table 1 and I was just simply trying to say that on the tortious measure of loss, left-hand column, work presented numerically in table 1, our case is that in the counterfactual world, whether we purchased the alternative farm that we mention, or as in the *East v Maurer* [1991] 1 WLR 461  
20 (CA) case, Lord Justice Mustill, as he then was, a notional alternative business or we just put money in a bank, we wouldn't have lost our equity and the experts sweated over this and the figures show up. So it wouldn't have been deeply profitable, farming isn't deeply profitable but we're not running a loss profits claim. We just wouldn't have lost the equity.

- 25 1240

Is all of the loss, that lost equity, the money that we actually did lose by 2015, within the *SAAMCO* risk principle? We finally get to the fourth column. Now this is not how we're putting our loss calculation together. Remember the *SAAMCO*

counterfactual is not your lost claim. It is a heuristic to construct the position you would have been in had the representation been true. But we all know that you can't in a tort claim, claim damages to put you in the position you would have been had you got the bargain because under both tort law and the FTA

5 you don't get the benefit of the bargain.

**WINKELMANN CJ:**

So it would be helpful to me if you just explained these columns, if you just talked us through the columns.

**MR KALDERIMIS:**

10 Yes. So just going from left to right again –

**WINKELMANN CJ:**

No, I mean these columns as opposed to the conceptual level as to what you've actually put there or do these not relate to the bigger picture?

**MR KALDERIMIS:**

15 Yes, yes, they do. Sorry, I'm starting – can I start with column 4 on the diagram.

**WINKELMANN CJ:**

Right. Perhaps your brain just operates differently to mine Mr Kalderimis so we'll go your way.

**MR KALDERIMIS:**

20 Thank you, I'm grateful, your Honour. I will come to the tables immediately afterwards. Column 4 is intended to show that we have run a careful SAAMCO counterfactual that had the 103 representation really been true, and you could get 103 from those inputs, then here's the better position we would have been in. We would have an increased asset value of 480,000. By the end of 2015

25 we'd have increased revenue of 500,000 and I have quotes that I have to get us to 2015 but that's what we'd have. We would have avoided expenditure. Not all of –

**GLAZEBROOK J:**

And where does the extra revenue come in that isn't brought into the discounted revenue?

**MR KALDERIMIS:**

- 5 That assuming we were locked into the farm and we didn't have a reasonable opportunity to extricate ourselves from it until 2015, that's the revenue that we are – we're not claiming that revenue is damages but that's the revenue that is attributable, that we would have got under the 103. So in a SAAMCO counterfactual world, I'm building the 103 scenario to show that all of our losses  
10 wouldn't have happened if we'd made 103.

**KÓS J:**

Is this the same as the 498,056 on the next table?

**WINKELMANN CJ:**

- So I think Mr Kalderimis what Justice Glazebrook was asking, well she may not  
15 be, this may be me asking you, the increase for asset value is what the farm would have been worth?

**MR KALDERIMIS:**

Yes.

**WINKELMANN CJ:**

- 20 And then is the extra revenue, are you not double counting it –

**MR KALDERIMIS:**

No, I've –

**WINKELMANN CJ:**

Are you not shifting from one method of claiming your loss to another?

- 25 **MR KALDERIMIS:**

I've thought very carefully about that. I submit to your Honours that it's not double counting. I'm just – if you can just imagine the Routhans in a world for

this counterfactual, which is not our loss calculation, but just what would have happened in a 103 world? The Routhans would have had a farm that wasn't worth 2.4 million, it actually would have been worth the 2.8 and so if they'd chosen to sell it the next day, that's what it would have been worth. That would

5 have been what they had in their hand. They also would have had by 2015 four years of profits because they had a farm that could produce that much. That they would have had both the capital increase and the revenue that was implied by that capital increase. That's what would have been in their hands by the end of 2015, just like with any business.

10 **KÓS J:**

So answering my question?

**MR KALDERIMIS:**

Yes, so your question, your Honour, the table 1 figure is not that figure, the table 1 is just the straight difference between the counterfactual and the actual.

15 What I'm doing is demonstrating that all of the table 1 figure fits within the right-hand column. So we are within a SAAMCO counterfactual cap if you want to think of it that way. We are showing that the loss we suffered was not, if you look at proposition 9, "caused by declining milk prices, rising interest rates, property market crash, or anything else extraneous." We are demonstrating by

20 reference to the better position we would have been in at the 103 that what caused the deterioration of our position wasn't these external factors. It was intrinsic factors and so –

**WINKELMANN CJ:**

So going back to your chart and so you've got your, you say, non-double

25 counting, first two blocks, then you've got the avoided expenditure which is what?

**MR KALDERIMIS:**

Which is...

**WINKELMANN CJ:**

Is the investment in the pasture?

**MR KALDERIMIS:**

Yes, the investment in the pasture and in relation to that, let's just look at  
 5 Mr Routhan's evidence so that we can remember what it is. If we just go to the  
 table of contents and look at Mr Routhan's brief and go to paragraph 76.

**MILLER J:**

I think they spent 150,000 on pasture, didn't they?

**MR KALDERIMIS:**

10 I believe that figure is correct, your Honour. Let me just doublecheck in the  
 submissions. Yes, your Honour, if you turn to paragraph 67 it's double that in  
 fact, it's 300,000, 67(b) of our submissions.

Now I was just going to Mr Routhan's evidence about how this came about. So  
 15 I'm looking at 67(b) and you can see the calculations there and also the  
 agronomist letter. So if we just click both of the links at footnote 153, starting  
 with the right-hand one, further right. So this is the letter that was written in  
 2011 by PGG Wrightson Seeds to explain that what the Routhans needed to  
 do because, to come back to the narrative, the Routhans discovered soon after  
 20 buying the farm, as Mr Routhan explains in his brief from 76. So I've shown  
 you that letter. If we go back to the brief you can read it more easily at the  
 previous page. So it's that heading there. "Within a month" paragraph 77 "we  
 noticed production was down." But they were using the same farm manager as  
 Mr Cook had been using and they were seemingly putting the same inputs on.

25 **WINKELMANN CJ:**

Sorry what date was that advice?

**MR KALDERIMIS:**

2011.

**WINKELMANN CJ:**

Thank you.

**MR KALDERIMIS:**

And if we go to paragraph 83 you can see a reference to it that – with their, they  
 5 had farm consultants as well as the farm manager from Mr Cook.  
 They engaged Chris Tibbotts from PGG Wrightson –

**WINKELMANN CJ:**

So they were using the same farm manager as Mr Cook had used but not the  
 one who'd done the spiked production?

10 **MR KALDERIMIS:**

That's right and I mean he left after I think six months or so into it but they  
 certainly to finish off the dairy season were using it, and so you can see that  
 they went and got advice from PGG and PGG said "what you need to do is  
 re-pasture it" so they did. So if I come back to –

15 **WINKELMANN CJ:**

Did PGG come and see it before they gave that advice?

**MR KALDERIMIS:**

Yes, Mr Tibbotts did come and see the pasture and there were in fact two  
 different specialists involved. One of them gave evidence in the cow lease  
 20 arbitration and so there was further information there but there's no controversy  
 about the fact that that evidence was given and was detailed and led to a  
 significant purchase.

So if we come back to our submissions so I can be clear on the expenditure  
 25 that we're talking about and just stop there at 67. We are claiming just those  
 things. So we say PGG said "what you should do is re-pasture" so they did.  
 They also incurred, it seems hard to argue with this, fertiliser, re-grassing costs  
 and supplemental feed. All of those figures were demonstrated in the case and  
 you can see –

1250

**WINKELMANN CJ:**

So that block, avoided expenditure, 570,000 explanation can be found at 67(b), 67 –

5 **MR KALDERIMIS:**

67 overall. So I've looked at (b) first and I just note for her Honour Justice Glazebrook's benefit that you can see in footnote 152 and 154 references to the High Court judgment that show that this, these steps were reasonable and appropriate. So I've got the references there, I'll say it again, footnotes 152 and 10 154. So the High –

**GLAZEBROOK J:**

I suppose there wasn't a representation that the pasture was good though, was it? Because it turns out if Wrightsons are right that the pasture was full of weeds and not very good and coming to the end of its life. So it's possible you could 15 have 103 as long as the pasture, on the pasture as it was at the time.

**MR KALDERIMIS:**

In theory that might be –

**GLAZEBROOK J:**

I mean I know that doesn't happen but –

20 **MR KALDERIMIS:**

Yes, in theory that might be true, your Honour, although one would think that if it had been – remember that the representation was, from CRT, it had done 103 as an average for three years in a row and then when you add the fourth season and you get the representation repeated, it's still 103 which makes it very 25 consistent. So it didn't suggest that there was anything wrong with the pasture, but that was what PGG said and so Mr Routhan took advice and of course would've been criticised in the case if he hadn't taken advice and hadn't done what PGG had suggested.



The other element of the expenditure that is claimed, if you look up at (a), is the cow lease arbitration and that's been addressed by the Court, the High Court, and I know that one of the questions from this Court would be, well, why should

5 PGG pay for the Routhans pursuing the arbitration with respect to the cows, surely that's not within their scope of duty, but if you look at it in context you can see why that was a reasonable and entirely understandable recourse for the Routhans to take. Remember that the question the Court wanted answered this morning is why didn't the Routhans do something when they discovered

10 that the production was down, and Mr Routhan, as we've just seen, saw the production was down soon after taking over and very quickly did something, said, well, what's changed? It's 103, I've got everything else the same, I'm doing the inputs, it must be the cows, and so went and pursued what he thought was the, and Ms Routhan thought were the appropriate avenues to fix the

15 production and get themselves out of the hole they were in, but turns out it wasn't the cows, but it only turned out that it wasn't the cows during the cow lease arbitration itself. So one of the things that is important is that one, as the High Court Judge says, that we don't apply hindsight to all of this. I will just go to some –

20 **KÓS J:**

I keep trying to find this \$500,000 figure of yours in block 2.

**MR KALDERIMIS:**

Yes.

**KÓS J:**

25 Is that the 482,064 in paragraph 66, year ending '15 or thereabouts?

**MR KALDERIMIS:**

No, your Honour, but let me explain this now, we'll now finish these tables and be as crystal-clear –

**KÓS J:**

Thank you, because we do need to pin that one down.

**MR KALDERIMIS:**

I'll be as crystal-clear as I can do. You can link table 1 and all the figures in  
 5 table 1 to the left-hand loss calculation because in table 1 we're comparing  
 where the Routhans would have been, which is that they would've had an  
 alternative farm or something and they wouldn't have lost their equity with  
 where they were. We are, and we're simply doing that arithmetically. You can  
 see the references along the right-hand side of table 1. They're all to the net,  
 10 to the sort of accumulated trading losses along the way, so –

**WINKELMANN CJ:**

So table 1 is a blow-up or expansion of the right-hand column?

**MR KALDERIMIS:**

No, no, table 1 is all about the left-hand column. Table 1 has nothing to do with  
 15 the right-hand column.

**WINKELMANN CJ:**

Table is, the left-hand column, sorry.

**MILLER J:**

Sorry, when you say the left-hand column, what –

20 **MR KALDERIMIS:**

The loss difference between counterfactual and actual position. So table 1  
 simply –

**GLAZEBROOK J:**

You don't actually have the figures in this?

25 **MR KALDERIMIS:**

Exactly because it doesn't matter where we're showing that in the actual world.  
 In the counterfactual world they wouldn't have lost the money. In the actual

world it's manifest that they lost \$5 million but we are able to show that by 2015 they'd lost all of their equity. All of that was gone. Everything after 2015 was effectively the bank's money and other money as they tried to – well I mean at this point the farm was irrecoverable but it was just a question of how and when to sell. Everything else, tables 2 and 3, table 4 relates to my learned friend's submissions on the cross-appeal.

**WINKELMANN CJ:**

So table, so A is what you say is the conventional tort recovery principle?

**MR KALDERIMIS:**

Correct. Table 1 is conventional tort recovery equations so that your Honours can see that all that we are claiming had been lost by 2015. So we are not trying to claim for loss recovered through 2016, '17, '18 and '19. It had all been lost by 2015. That's what we're trying to show with table 1. Tables 2 and 3 do relate to providing further detail on the figures on the right-hand side which are not what we lost but are there to prove that we wouldn't have lost what we lost had 103 been able to be produced. And so to go through each of them in turn, table 2 is how you can see the increased revenue that would have been there as well as the purchase price would have represented real value because –

**GLAZEBROOK J:**

So is that your extra revenue?

**MR KALDERIMIS:**

That's the extra revenue, you're right.

**GLAZEBROOK J:**

And I think I understand why now you say it's not double counting but the fact it's not double counting is dependent on it being measured as at 2015?

**MR KALDERIMIS:**

Precisely, precisely. And so just to explain the tables, you can see if you look at the green milk revenue boxes in table 2, the far right column, is accumulated

extra milk revenue. Each year that's over and above what we actually did get and you can see the further right you go, that's the further down the balance sheet you go, and it all compounds and gets worse because for every dollar of milk revenue you don't get, your cash operating result gets worse, your trading  
 5 result net of debt gets worse and your net trading result gets worse so it all sort of compounds down. You might be wondering where the exact 500,000 figure comes from. If you just look between year end '15 which is mid-2015 for the dairy season and year end '16 which is mid-2016, you go from 480 to 55. In the accumulated extra milk revenue we've said that's 500,000 by 31 December.

10 **KÓS J:**

Why is it not the 482 which is year end '15?

**MR KALDERIMIS:**

Because that's mid, that's mid-2015, that's 30 June 2015.

**KÓS J:**

15 I see.

**MR KALDERIMIS:**

Sorry, year end is an ambiguous term to use, dairy season year end. Paragraph 66 of our submissions explains that in more detail. And so then finally table 3 is the avoided interest column or table. That relates to the fourth box in the  
 20 right-hand column that we would have avoided \$250,000 of interest and again we've shown you where we get all of that from. Each of our expert, Mr Lewis, PGG's expert, not a farming expert but an accountant, Mr McAra produced spreadsheets and you can see that again we are straddling the divide between year end '15 and year end '16 and we've taken 250 as that amount and you  
 25 can see that's a fair average of those figures.

So if we return to the right-hand column we say, not as part of our loss calculation but just as part of our SAAMCO counterfactual, had 103 really been what you could get from ordinary inputs on this farm well then the Routhans  
 30 would have been better off to the tune of an increased asset value by the end

of 2015 extra revenue, by the end of 2015 avoided expenditure, by the end of 2015 avoided interest and that amount would have subsumed the loss that they're claiming. The logical inference we ask your Honours to draw from that is if you think a SAAMCO counterfactual is useful in this case, and it might not  
 5 be, but if you think it is we have done what reasonably can be done by a litigant to show that it's not these extraneous factors that have caused the loss. It's all connected to not getting the revenue that the production implied because you overpay on the purchase, you lose revenue on the subsequent years, you reasonably incur expenditure and reliance and you have spiralling interest costs  
 10 all entirely predictable.

So after the break I propose to round off my part of the submissions and then hand down to Mr Nelson to deal with the cross-appeal. So I'm conscious of giving my learned friend enough time and I'll try and telescope everything  
 15 together so that I've covered what I need to and giving your Honours a chance to –

**MILLER J:**

Are you going to take us to where the Court of Appeal got this analysis wrong?

**MR KALDERIMIS:**

20 Yes, I will.

**WINKELMANN CJ:**

And what time are you planning to finish by? Not the clock.

**MR KALDERIMIS:**

Yes. Quarter past three is my aim.

25 **WINKELMANN CJ:**

Okay, thank you. That's you and Mr Nelson?

**MR KALDERIMIS:**

No, Mr Nelson then would have 15 minutes at that point.

**WINKELMANN CJ:**

All right, and so we'll hear from Mr Taylor before we finish today?

**MR KALDERIMIS:**

Yes, that is my aim.

5 **WINKELMANN CJ:**

We'll retire now.

**COURT ADJOURNS: 1.01 PM**

**COURT RESUMES: 2.17 PM**

**WINKELMANN CJ:**

10 Mr Kalderimis.

**MR KALDERIMIS:**

Thank you your Honour. By a slightly indirect means, we have made our way through most of the propositions in the road map. There are only four to go. They are numbers 7, 8, 10 and 12. I propose to deal with 10 and 12 first, and  
15 then look at 7 and 8. If we start with number 10, this is the reasonable discoverability point. I apprehend that a core theme of the questions, and indeed an acknowledged aspect of the analysis here is whether the Routhans ought to have discovered the lower production, or the false production representations earlier, and what I was asked before the break is whether I  
20 could show you the paragraphs in both judgments below where that's been dealt with. So if we begin with the High Court judgment, we start with paragraph 75.

The conclusion of the Judge is in the third sentence. In the second sentence  
25 she concludes it wasn't reasonable to make other enquiries, and the reason given is the third sentence: "Because they believed they had obtained this data directly from the vendor and through proper processes, they could not

reasonably have been expected to question it, even when they were not achieving the same results.”

That’s developed as indicated from paragraphs 105 through to 110. If you look at the last sentence of paragraph 105: “Given the Routhans knew Mr Daly had gone to the vendor directly to obtain the information they had no reason to undertake any other enquiry on this issue.” The evidence is then set out through to paragraph 110, the bank relied on it as well. If we go to paragraph 219 –

10 1420

**WINKELMANN CJ:**

So when is she, what point in time was the Judge, in the narrative, pointing, speaking at paragraph 105?

**MR KALDERIMIS:**

15 Let me go back to 105.

**WINKELMANN CJ:**

Because it might be so, at the point of time...

**MR KALDERIMIS:**

Yes, that’s right. Paragraph 105 to 110 are probably more focused on the immediate point in time afterwards, but remember the scope of the finding at –

20

**KÓS J:**

I think that actually beforehand. It’s the purchase decision they address.

**MR KALDERIMIS:**

That maybe right. The paragraphs I was going to are paragraphs 219 and 220, which support the conclusion at paragraph 75. So this is after the submissions that we saw earlier which begin at paragraph 217 and 218 that the Routhans did act reasonably in the years that followed through to the years 2014 and

25

2015, and then the Judge says at paragraph 220 that the criticism PGG has was “with the benefit of hindsight” and goes on to explain that in paragraph 221.

**WINKELMANN CJ:**

Would you accept though that they had an obligation to work out why.

5 **MR KALDERIMIS:**

Yes I mean –

**WINKELMANN CJ:**

So what was the instruction to PGG that led to that?

**MR KALDERIMIS:**

10 The instruction was to come and inspect, so this was on the premise that a reason why they weren't achieving the production, everything being equal, is that possibly the pasture has deteriorated somehow, maybe they need to care for it better. So they go and make reasonable enquiries and find out what the advice is, and the advice is you should re-pasture, and so they do that.

15 **GLAZEBROOK J:**

If you could just go back to paragraph 219, there is the finding there that they reasonably thought it was their farming methods I think at the end?

**MR KALDERIMIS:**

Yes, that is quite right, thank you your Honour. I'm obliged.

20 **KÓS J:**

Although that does seem to relate to the very first year. I mean the problem here for you in many respects, Mr Kalderimis, is that four years seems an extraordinarily long period.

**MR KALDERIMIS:**

25 What they didn't do was sit on their hands for those four years, so what I say in response to that, Sir, is that the cow lease arbitration was just the sort of thing that if they hadn't done it, they would have been criticised for not doing it.



without the benefit of the hindsight, by far the most likely candidate for why they are getting diminished production, is that the cows are not capable of doing the production that the previous set of cows were. Now I know my learned friend says that they put 300 cows on and there used to be only 260, but the 300 cows  
5 they put on were smaller and different in breed than the 260 cows and so the expert evidence was that you were basically having the same weight of cow in your paddock as you had before, and holding everything equal. That was by far the likely culprit. The cows weren't the right cows and they were leading to the lower production. So they do in earnest sue Mr Cook, or actually they  
10 returned the cows and Mr Cook sues them, but they try and mitigate their loss by replacing, in breach of their obligations under the leases as it was found, the cow herd.

**ELLEN FRANCE J:**

Sorry just remind me, what was the date when they increased the number of  
15 cows?

**MR KALDERIMIS:**

They went on with, I think, the 300 cows to start with.

**ELLEN FRANCE J:**

Oh right.

20 **MR KALDERIMIS:**

So they got the smaller –

**ELLEN FRANCE J:**

So right from the start.

**MR KALDERIMIS:**

25 They got a smaller breed of cows, but went on with a slightly higher number of them, and all of that was ventilated in the expert evidence through the case and –

**WINKELMANN CJ:**

So the Judge allowed damages calculated on losses that occurred up to 2015?  
Beginning of 2015?

**MR KALDERIMIS:**

- 5 The Judge allowed damages all the way through to effectively 2021, that's why she allowed the form in value. That is not the way we are seeking to –

**WINKELMANN CJ:**

Did she clearly address at any point when she was making the finding that there was no, that it wasn't reasonably discoverable?

- 10 **MR KALDERIMIS:**

Yes, I thought I had been to those paragraphs.

**WINKELMANN CJ:**

No, I'm just, that's imprecise, it looks like, when you read it, it looks like immediately after it, during the first year or so.

- 15 **MR KALDERIMIS:**

If you look back at paragraph 75 there's a date there in the first sentence.

**WINKELMANN CJ:**

Paragraph 75?

**MR KALDERIMIS:**

- 20 Paragraph 75. Production levels actually discovered in late 2014. "I address whether it was reasonable for the Routhans to make any other enquiries earlier than this...and conclude it was not."

**WINKELMANN CJ:**

- 25 Well we know that they were making enquiries, they just didn't make the right enquiry.

**MR KALDERIMIS:**

Well enquiries as to production, historic production levels.

**KÓS J:**

What was the evidence about the availability of the starter from Westland Dairy  
5 Limited?

**MR KALDERIMIS:**

That was very clear. So in the trial it was alleged by PGG that the Routhans  
could have found out just by looking at the dockets they received from  
Westland Milk and that would tell them the production levels. There is a  
10 document in the evidence, in the bundle which we've provided, which is an  
email exchange and it shows that isn't so and that was addressed also in the  
evidence. Let me just find it.

**GLAZEBROOK J:**

And by the Judge?

15 **MR KALDERIMIS:**

Yes, I believe by the Judge. Let me just find them one by one. Yes, here we  
are, so it's addressed in Mr Routhan's brief at paragraph 78, and I just recall  
seeing the actual email in the bundle but perhaps it is not and I'm just  
remembering it from Mr Routhan's brief. But the docket, the evidence was  
20 clear, that the docket did not disclose...

**KÓS J:**

Yes, but then you see that, there's that last sentence of paragraph 78 that I'm  
resting with: "I understand that it is generally Westland policy not to share the  
production history..." The question is, did they ask?

25 **MR KALDERIMIS:**

They could not get it without Mr Cook's approval and so that is, that came up  
and Mr Cook would only give his approval in the context of the cow lease  
arbitration.

**WINKELMANN CJ:**

But did they ask?

**MR KALDERIMIS:**

No, they didn't specifically ask Mr Cook earlier. Well they asked him through  
 5 the cow lease arbitration, so they did ask earlier because it took some time for  
 Mr Cook's approval to come up. His approval's at 303.1713, and you can see  
 the information comes through the cow lease arbitration at 303.1715.

The way it was reasoned in the court below, and we address it in one of the  
 10 paragraphs in our submissions, is that when someone makes a representation  
 to you that they've done something appropriately, you are entitled to rely on the  
 fact that that is what they had done. So the Routhans did not, without the  
 benefit of hindsight, clock that the thing they ought to have pressed on was  
 have they been misled by PGG as to the production. They instead looked at  
 15 the pastures, looked at the cows, looked at their own farming practices, did  
 everything else to bring the production up to 103 and then it came –

**KÓS J:**

There has to be a time limit in terms of PGG's assumption of responsibility.  
 It cannot have been the entire life of the farm.

20 **MR KALDERIMIS:**

No, and nor is that the claim, so –  
 1430

**KÓS J:**

I appreciate that, but I mean the question is where does it stop?

25 **MR KALDERIMIS:**

Well the Court of Appeal addressed this in paragraphs 91 to 94, because  
 exactly the same argument was made to them. At paragraph 91 the Court  
 said, so the Court quotes the Judge's finding from paragraph 75 that we've  
 looked at, and in the second sentence of paragraph 91: "The Judge considered

the Routhans had no reason to undertake any other enquiry before that date.”  
That’s at paragraph 105, we’ve looked at that as well. It was submitted in  
the Court below that that was wrong. In paragraph 93 you have our contrary  
submissions. The Court of Appeal’s finding was to accept our contrary  
5 submissions, because this related to a limitation defence.

**WINKELMANN CJ:**

So what paragraph are you at?

**MR KALDERIMIS:**

Sorry paragraph 91 through 94. So paragraph 91 are the Judge’s two findings  
10 that the Court of Appeal recorded. Paragraph 92 is my learned friend’s  
submission that they ought to have done, they ought to have asked about the  
production earlier. Paragraph 93 is our contrary submission, which I’ve just  
made to you, and at paragraph 94 you have the Court of Appeal’s finding. “We  
accept Mr Kalderimis’ submission on this issue.” This related to the FTA  
15 defence on which there has been no leave to appeal. We haven’t been  
persuaded the Judge was wrong to reject it.

**WINKELMANN CJ:**

What date does that take you to?

**MR KALDERIMIS:**

20 2014.

**WINKELMANN CJ:**

So the limitation defence sort of succeeded –

**MR KALDERIMIS:**

Sorry, 2016 I believe, because that’s when the limitation defence would have  
25 kicked in. “The Trust was entitled to rely, and did rely, on the correctness of the  
information it was given by PGG. Its focus post-settlement was on the cases  
of the evident underperformance, not realising –

**WINKELMANN CJ:**

That can't be right. It can't be 2016 because they did discover before 2016.

**MR KALDERIMIS:**

5 Yes, the standstill was entered into in 2016. So, yes, it must be 2000 and – let me clarify the exact date, so I will come back to you on the exact date that the limitation defence was alleged to have kicked in. You can see a reference to it, you can see that's where I got the 2016 number, at the end of paragraph 93, but that does into account the limitation standstill two years later. So I believe it's 2014 that is –

10 **WINKELMANN CJ:**

If this is the FTA limitation, is it, which is shorter.

**MR KALDERIMIS:**

15 Yes, the FTA, shorter limitation. So they are the findings of the Court below on this point on which there hasn't been any appeal to this Court, and that is our proposition 10 in the road map. While I'm dealing with the judgments, let me address just –

**WINKELMANN CJ:**

So you say you've got findings of fact in your favour, that the representation –

**GLAZEBROOK J:**

20 Concurrent in fact.

**WINKELMANN CJ:**

Concurrent in fact that there was no, that the misrepresentation was not reasonably discoverable before the end of 2014?

**MR KALDERIMIS:**

25 Yes, that is what we say we have.

**KÓS J:**

I'm not sure that completely answers the issue about scope of duty, risk principle and remoteness.

**MR KALDERIMIS:**

- 5 Let me submit that it does, and explain my reasons why. If we think back to proposition 4 and 5 of the road map, really 2 to 5 of the road map, the scope of duty analysis is actually reasonably straightforward here. This was revenue data and the scope of duty is really measured in a *Hedley Byrne* style manner by the risks against which the assumption of responsibility was imposed to
- 10 guard against. What was it that made the conduct tortious, and here it was the risk that the, as the Chief Justice put earlier, that the purchasers who had relied on Mr Daly for this advice would go and rely on it as if it was verified and therefore correct, and it was entirely within the sorts of things one ought to have contemplated by a narrower test, not just objectively foreseeable in a
- 15 *Wagon Mound* test but entirely the sort of thing that the duties imposed on that you'll be short of revenue in the subsequent years. So therefore the issue telescopes down to one of reasonable discoverability or mitigation should, as really all questions for at least four of your Honours have suggested that there really ought – we must be right on our, on the answer to the key issue here,
- 20 there ought to be no bar in principle to continuing loss, the question is how far it goes, and so it's not in our submission a scope of duty question, it's plainly within the scope of PGG's duty. The question is, did the Routhans reasonably discover this in 2014 or ought they have discovered it earlier, and my answer to the Chief Justice's question just before, is that we have findings of fact from
- 25 both Courts below that they ought not to have discovered this issue earlier, that we were – the Routhans were going down reasonable paths without the benefit of hindsight to address their problem. They weren't sitting on their hands –

**WINKELMANN CJ:**

- Obviously that's the next step, isn't it, that the paths they took were reasonable,
- 30 or another way of formulating it is that it's the sort of risk that Mr Daly would have been contemplating reasonably foreseeable to him, it's within the scope of the risk he took on, that –

**MR KALDERIMIS:**

Yes, and I'm happy to accept that that's a sub-branch of that inquiry but say that the –

**WINKELMANN CJ:**

5 It's a different inquiry, isn't it, to reasonable foreseeability? We now...

**MR KALDERIMIS:**

I'm trying to agree that that is a relevant part of the analysis, perhaps if I put it that way, but that it is very clear from the same factual findings that led to them not reasonably needing to have discovered this earlier that what they were  
10 doing, the other inquiries they were doing, were reasonable things they were doing. The re-grassing, the cow lease arbitration were, without hindsight, reasonable ways to get to the heart of the problem because they shouldn't sit on their hands and they had to do something.

**WINKELMANN CJ:**

15 So that's different I think, that is quite a different thing because you're operating in the field where it's not mitigation because they don't – on this they don't know yet what the misrepresentation is but the question is whether it's within the scope of risk that Mr Daly took on that they would – that the misrepresentation would continue to operate and they would make effectively futile and  
20 wrongheaded attempts to save the situation, waste capital because of the misrepresentation?

**MR KALDERIMIS:**

Yes, and we say that's a fair way of putting it, futile and wrongheaded expenditure in reliance on the representation you've been made and we say  
25 yes that is exactly within the scope of duty. So we say it's exactly the sort of thing you ought to have contemplated, and Lord Sumption's words as counsel in *SAAMCO*, if we come back to the words in brackets in proposition 4, exactly the sort of thing that you would contemplate is that you'll overpay and then there'll be a risk of continued losses and there are three species of that.  
30 We've put the trading deficit, you'll make less revenue, you'll have increased



interest costs and you'll do something to fix the problem but it might not be the right thing, futile expenditure.

**WINKELMANN CJ:**

You see I would have thought you would reasonably contemplate that you'd try  
 5 and work out – you'd get some expert assistance as to what the problem was  
 and you wouldn't get poor quality advice and poor quality solutions.

**MR KALDERIMIS:**

Well I think it was reasonable expert assistance. No one is suggesting that  
 Allan Bradley, who was the farm manager they had didn't – well certainly –  
 10 perhaps I'll put it this way. The evidence didn't show that Allan Bradley didn't  
 know what he was doing. He gave the reasonable advice. His view is that it  
 was the cows. They took that advice and in the context of the production data  
 they'd been given that was a reasonable thing to do. Where this is orientated,  
 I suppose, is that's exactly the sort of risk you run if you give someone mis-  
 15 stated production data in context. They will go down a wrong pathway as they  
 discover the right outcome. They didn't do this for a decade. They did it until  
 through the cow lease arbitration this came out.

**GLAZEBROOK J:**

Can I perhaps just rephrase the first part of your submission which is basically  
 20 that it was in the reasonable contemplation when that misrepresentation was  
 made, not only that it would influence the actual purchase but that once  
 purchased the Routhans would continue to farm that and therefore any losses,  
 while they were continuing to farm that, reliant on that representation would be  
 within the contemplation and part of the assumption of risk?

25 **MR KALDERIMIS:**

Provided what they were doing was reasonably directed to –

**GLAZEBROOK J:**

Exactly.

1440

**MR KALDERIMIS:**

Yes, that's fair enough as well. But certainly we've been even more specific than that because we've identified specific items of futile expenditure, plus  
 5 revenue and, foregone revenue, and interest costs and we submit that unless this Court is to be excessively defendant-friendly, those are just the sort of things that you would expect are going to befall, they're the sort of risk that will befall the purchaser if you give them this prospectus and that is mis-stated. So –

10 **WINKELMANN CJ:**

Did you find any authorities, because you'd have to say you'd expect this sort of thing to be reasonably common where there's a misrepresentation as to the value of business. I suppose most of them aren't like this, most businesses aren't like farms where you're producing something, most have turnover type  
 15 scenarios...

**MR KALDERIMIS:**

Well that maybe brings us to proposition 7, so I said there were four to go. Proposition 7 is that the *SAAMCO* cap as remember one of our three methods for checking that the loss that's been suffered is within the scope of the  
 20 defendant's duty. The *SAAMCO* cap is the most rigid and most, and least nuanced of the methods, and it's the one that doesn't work in continuing loss cases because it excludes a priori all of the continuing losses. What we say in proposition 7 is you don't apply the *SAAMCO* cap in what I call extrication cases. So you can see there the *SAAMCO* references to a paragraph we've  
 25 already been to where Lord Hoffmann says the same thing, you know, there may be other types of cases where you are continuing to rely on the representation to do things and the *SAAMCO* cap doesn't apply there.

If we go to proposition 8, that gets us into those kinds of authorities, your  
 30 Honour. We've married this with the discussion we have at the end of our submissions about the sub issue here about whether the so-called normal

measure of diminution of value at transaction date isn't the invariable rule, and that of course was laid down in the *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 case.

5 In a contract sense, and I'm not saying that contract damages are the same as tort damages, but what this Court decided in *Altimarloch*, and we've given paragraphs there from each of the majority judgments, is that you can have consequential losses that won't be caught by the normal measure in a contract case, and there it was the costs of repairing in order to bring themselves up to  
10 the warranty and there's no reason in justice why you would just exclude them, and we say by parity of reasoning, these are in our submissions, paragraphs 69 to 78, the same is true in tort law. There are species of cases out there which are consequential loss cases where you do, in reliance on the misrepresentation by a business and what you seek by way of damages,  
15 applying the tort measure of putting yourself back into the position you would've been in, includes the diminution of value but not all, you also get consequential losses.

We've given you a vast wedge of *McGregor* which basically says that. It's really  
20 interesting, one of the things *McGregor* says is that the normal measure in contract and tort's basically the same formula, and there are historical reasons for that, but that's why the consequential loss cases and the intuition of justice in *Altimarloch* are so important. If there are consequential losses, then you should get them.

25

Now there are four cases, four authorities in answer to the Chief Justice's question.

**WINKELMANN CJ:**

Which are reasonably foreseeable — consequential losses which are  
30 reasonably foreseeable.

**MR KALDERIMIS:**

Yes. Yes, and I also accept whether the scope of duty, so they have to be those kinds of consequential losses, but there's no bar, in principle, to them.

- 5 In terms of your Honour's question, well are there cases of this type, the four that we've given you are three listed down the right-hand side, *Esso*, which we've discussed, the *Downs v Chappell* [1997] 1 WLR 426 (CA) case, *Cemp Properties (UK v Denstply Research and Development Corp (2)* [1991] 2 EGLR [197] (CA), or *Cemp Properties*, and also the *East v Maurer* [1991] 1  
10 WLR 461 (CA) case, all in our authorities.

We've quoted the relevant passage from *Cemp Properties* in our cross-appeal submissions, but I might just take you it because it's a very clear articulation.

**WINKELMANN CJ:**

- 15 For my part I see *Esso* as a reasonably high watermark case.

**MR KALDERIMIS:**

Yes, well everything else is within that watermark and so I suppose I'm going to this so that it's clear it's not, it is not *Esso* against the world, as it were.

**WINKELMANN CJ:**

- 20 So which case are we going to?

**MR KALDERIMIS:**

- So *Cemp Properties* at page 201. So that's in, and if you just allow me to catch up with the road map, I will get there as well. So we hear in Lord Justice Bingham's judgment, the text is offensively small, I apologise for  
25 that.

**GLAZEBROOK J:**

It might be easier perhaps, are you just going to refer us to the quote in your –

**MR KALDERIMIS:**

Yes, I'll just refer you to it. The relevant bits to read are just the top of the right-hand column at 201, the normal measure is being spelt out by Lord Justice Bingham as being what he calls the market value loss and then at L: "Had the

5 true facts become known to the plaintiffs on the morrow of their contract with the defendants, their damage would have been confined to this market value loss. But the true facts did not become known to them for a period of about eight months." Our finding of fact isn't until 2014. "During that period the effect of...misrepresentation continued and the plaintiffs incurred expenses and

10 entered into contractual commitments which they would not have done...To deny the plaintiffs compensation for this loss would, in my judgment, be to undermine the cardinal rule of damages in this field that the plaintiff should be put in the same financial position as if the misrepresentation had not been made. The plaintiffs are not compensated for this damage by reimbursement

15 of their market value loss, because that is a loss they sustained at the moment of contract and this is additional loss which accrued only as a result of the continuing effect of the uncorrected misrepresentation. In my opinion..." they can recover both.

20 And it's put beautifully by Lord Justice Nolan just over the page where he says that, if we just look at the very bottom of the page and stop there, it begins, his very short judgment: "As a matter of principle, it seems to me to be clear that the plaintiffs were entitled to be compensated for two separate and identifiable items of loss. One was the excess of the price... The other was additional

25 expenditure incurred by the respondents, which would not have been incurred had the true facts been known and which secured no countervailing benefit. The respondent needs to be compensated in respect of both items" to get the *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at p 39 measure. "In other words, in my judgment, the correct basis of the respondents' claim was

30 the hybrid basis."

Now this is obviously to the same effect. *East v Maurer* is worth briefly looking at. That's a deceit case but this principle is common whether it's negligence or a deceit case because we're not talking about here whether there ought or

ought not to be a scope of duty limitation. We're perfectly prepared to accept that in a negligence case there should be but it's about the continuing loss aspect for which there's no relevant difference between the two and Lord Justice Mustill at page 739 –

**5 WINKELMANN CJ:**

Mind you the law has always recognised far more permissive recovery of damages in relation to deceit and fraud limit misrepresentation, hasn't it, without the limitations –

**MR KALDERIMIS:**

10 That's true and I'm not cavilling with that, your Honour. What I'm referring to Lord Justice Mustill's judgment for is just the clarity of logic that he applies here, which I say is not different if you have a continuing loss case as we have here. If we look at 739, sorry I must have a different version. If we just go to Lord Justice Mustill's judgment which is at the very end of the case, probably  
15 the last page. Here it is, if you can just stop there, thank you: "I also agree. In my judgment the best course in a case of this kind is to begin by comparing the position of the plaintiff as it would have been if the act complained of had not taken place with the position of the plaintiff as it actually became." This was a purchase of a hairdressing business with a covenant that the seller was not  
20 going to keep operating in the other hairdressing business that the seller continued to own but the seller did keep hairdressing there and it dramatically reduced the viability of the business that was bought, and if you look at the bottom of, if we just go down and look at the sentence, stop there, thank you, and look at just under E: "Thus, by the time the writ was issued they would have  
25 had the capital asset constituted by the new business" this is in the counterfactual "plus the profits made by that new business in the intervening period."

1450

30 And that's what they're entitled to be compensated for in the event the plaintiff's position is that they have no business. They're out of pocket for legal fees, improvements, accumulated losses, but they managed to sell the business,

they're out of pocket by that, and then they're all compared together. So what this is saying if you look towards the end is that where, just under H, we're trying to compare the position to a hypothetical profitable business, and strip out the things that make it different, and in this case, as in our case, some of those things are futile expenditure. Monies that wouldn't have been spent. So it's a causal question. It's not only foreseeability, it's also scope of duty.

**WINKELMANN CJ:**

Yes, my point is I don't know if this is on point because it's the deceit cause. It's a deceit judgment and different rules apply.

10 **MR KALDERIMIS:**

It is a deceit judgment. It is true that different rules apply, but this is not one of those different rules.

**WINKELMANN CJ:**

Okay.

15 **MR KALDERIMIS:**

Continuing loss is, as *McGregor* says, consequential loss entirely allowable in negligent –

**WINKELMANN CJ:**

But you said there's not the limitation of reasonable foreseeability is there?

20 **MR KALDERIMIS:**

Yes, but, and I accept that that is true, but what I'm going to this case for it not to argue that reasonable foreseeability ought not to apply, but to contend that if you have a continuing loss case, I would call this a sort of extrication case, if you are trapped in some way by the continuing fact of the misrepresentation, your consequential losses, because you are in that position, are recoverable, and I submit that is, in fact, an uncontroversial legal submission that's backed up by *McGregor* citing *East v Maurer* and not only in a deceit context.

Now the case that deals with it in both contexts is the case of *Downs v Chappell*. There there were two causes of action. One was a deceit and one was in negligence misrepresentation, and if we just go to the pages that are in the road map, 443. So that passage from about D. "In a misrepresentation case, where  
 5 the plaintiff would not have entered into the transaction, he is entitled to recover all the losses he has suffered, both capital and income," so that's the same sort of distinction we saw in *Cemp Properties*, "down to the date that he discovers that he had been misled and he has an opportunity to avoid further loss. The diminution in value test will normally be inappropriate." It's not sufficient.  
 10 You need to look at all of the losses. Now my learned friend has submitted –

**WINKELMANN CJ:**

What page is that on sorry?

**MR KALDERIMIS:**

I'm sorry, page 443 of the case. Just stay there in the case please and I'll make  
 15 a submission about the words that appear just before G. My learned friend has submitted that this Court ought not to rely on *Down* which my learned friend says at paragraphs 99 to 100 of his submissions, or synopsis of submissions, that *Downs* was disapproved. Was, in fact, held to be wrongly decided on this point by the Court in *Smith New*. But that is not so, and there are two things I  
 20 want to tell you about about *Downs*. The first is that qualification requires reading in full. So from the bottom of G down to the same point on the following page 444. If you look at just around B on 444: "I consider that the appropriate way to give effect to these legitimate concerns," what concerns? *SAAMCO* concerns. "... is to compare the loss consequent upon entering into the  
 25 transaction with what would have been the position had the represented, or supposed, state of affairs actually existed. Assume that there had been no tort because the represented, or supposed, facts were true. If on this hypothesis the claimant would have been no better off than in fact he was, this will suggest that the proposed award will lead to an overcompensation." So you need to  
 30 make that adjustment.



Now this case was decided after the Court of Appeal case in *SAAMCO*, but before the House of Lords decision, and Lord Hoffmann in *SAAMCO* says because it's so recent and it hadn't been addressed during oral argument, he preferred to express no view about *Downs v Chappell* but I submit what

5 Lord Justice Hobhouse was doing in that case is what you would expect.

1455

It's a very thoughtful judge applying the same developed judicial instinct that other judges have applied, reaching the same basic conclusion. That there's a

10 risk principle here. You can't make the defendant liable for all of the losses that flow. You have to relate them to –

**WINKELMANN CJ:**

I've lost you Mr Kalderimis. What part of *Downs v Chappell* are you referring to?

15 **MR KALDERIMIS:**

I'm sorry.

**WINKELMANN CJ:**

Don't apologise, it's my fault.

**MR KALDERIMIS:**

20 I'm referring to the first two sentences of page 444 please, around B, so the first full paragraph. So the problem Lord Justice Hobhouse is trying to address is the risk of overcompensation. If you just give every, someone all the but for losses, and he's saying all the but for foreseeable losses. He's saying that's not good enough, there's a risk of overcompensation, and I suggest to this Court

25 that what Lord Justice Hobhouse is doing in those paragraphs I've read out, beginning "I consider" and ending in the word "overcompensation", are effectively the *SAAMCO* risk principle idea. Lord Justice Hobhouse just stumbled upon it in his own way. It shows that there are different judicial routes to the same insight. Now it's not an idea that says that you can't get both capital

30 and income, or that you can't get consequential losses, or you can't get

continuing losses, it's that once you've added them all up you need to stand back.

**WINKELMANN CJ:**

Yes, but isn't he just standing back to say I'm just checking to say that by  
5 allowing you the loss on the transaction that I'm not overcompensation you?

**MR KALDERIMIS:**

Yes, but that's the *SAAMCO* risk principle test. That's exactly what one should be doing, and I was coming to the way *Smith New Court* treated *Downs*. *Smith New Court's* critique of *Downs*, which is at page 283 of my learned friend  
10 has what I believe is an incorrect reference in the submissions, but at page 283 of *Smith New Court*, and there's no need to go to it, what Lord Steyn said in that case about *Downs* is that *Downs* could be criticised for not applying the fraud exception to a case of fraud or deceit, because there was a deceit clause in *Downs*. So the critique wasn't that Lord Justice Hobhouse didn't do enough  
15 to pare down the damages. The critique was that in a fraud case you don't pare down the damages. So I submit that *Downs*, as it's treated in *McGregor*, is a good authority for how you calculate damages in a negligent misrepresentation case. It has the *SAAMCO* instinct in it of relating the loss to the scope of duty of checking you don't have overcompensation. It correctly recognises that  
20 when you have a continuing loss case you can't use a *SAAMCO* cap type analysis, and that both capital and income or wasted expenditure can be recoverable, and the, Lord Hoffmann didn't disapprove of it in *SAAMCO*, just left it, and *Smith New Court* didn't say it was wrongly decided on this point. It said it was wrongly decided by not making the fraud damages bigger than the  
25 negligent mis-statement damages.

**WINKELMANN CJ:**

It came out just slightly before *Smith* and *SAAMCO*, didn't it?

**MR KALDERIMIS:**

Yes, that's right, between – let me show you the relevant part of *SAAMCO* so  
30 you have that. So if you go to *SAAMCO* at page 216, and just under B. "We

have received written representations on *Downs v Chappell*,” which and cited the Court of Appeal’s judgment, “which was decided after the conclusion of the oral judgment, but since the issue in that case is not before the House, I prefer not to express any concluded view.”

5

Now just to restate again so we’re perfectly clear on the point, although Lord Justice Hobhouse applied the Court of Appeal’s approach, which was to say effectively all foreseeable losses are recoverable, his qualification says that’s not enough, you need another lens, and I submit to this Court that other lens is functionally indistinguishable from the lens that Lord Hoffmann and Lord Sumption effectively between them came up with in *SAAMCO*. I submit that all judges with a refined judicial sense for justice will have some way of applying that lens, but Lord Justice Hobhouse’s judgment in another revenue producing business case, rather like this one is a good template to follow, and the case is worth reading in full for that reason.

10

1500

**KÓS J:**

While we’re setting our lenses, can you remind me, because I don’t think I’ve seen it, what the agent’s commission in this case was?

20 **MR KALDERIMIS:**

\$56,000 I believe it was. Let me find the detail.

**KÓS J:**

A little bit more than –

**MILLER J:**

25 And it was reduced to 2%, wasn’t it?

**MR KALDERIMIS:**

Yes, it may have been. Let me go to the documents.

**KÓS J:**

It's a little bit more than the surgeon's fee would've been for checking a mountaineer's knee.

**MR KALDERIMIS:**

- 5 Yes, and that is not an irrelevant consideration in this case, I did stress at the beginning, and it's worth just mentioning again here now, that the work that Mr Daly and PGG had to do was not significant here, they weren't being paid to find a buyer or to do marketing, they were being paid to get the proper process right so the information could be reliable, and if we go to the agency agreement  
10 which is at 302.1075 you can see on page 302.1079 in the final box the commission. That's the 56,000 plus GST.

**KÓS J:**

Thank you.

**MR KALDERIMIS:**

- 15 So I have what I apprehend are 15 minutes to go, let me tell you what I propose to do with them. I propose to point out in answer to Justice Miller's question the paragraphs that I want you to understand about where the Court of Appeal erred in our submissions, and there are just one or two High Court paragraphs I will point out. I need to address the Bishop point, and that has some complexity to  
20 it so I'll do that quickly, but I advise the Court that there'll be some descending into detail there, and then I'm going to stand back.

- So if we go back to the road map, point 11. The other paragraphs of the High Court judgment I would ask the Court to read are those in the final bullet  
25 point on the right-hand side of 11, and if we just click on paragraph 140, that's the only one I'll go to. This is about the so-called other misrepresentations. "A complicating fact in the present case is that the pleaded misleading conduct...relates only to the statement about production levels." The other matters "were not pleaded". "Nevertheless, they formed the context in which  
30 the misleading statement as to production levels was given and cannot be ignored when assessing the effect of that statement," and I've given you in that

bullet point from 12 through to paragraphs 174, 176 the other relevant paragraphs that address context and show it was very carefully thought through.

**WINKELMANN CJ:**

5 Was that the High Court judgment you just –

**MR KALDERIMIS:**

That was the High Court judgment, yes, and I will just add that in the High Court judgment, the other relevant paragraphs to read are 116 to 117 and 182. I've already taken your Honours to paragraphs 219 to 228, but paragraphs 116  
10 to 117 and 182.

**GLAZEBROOK J:**

Sorry, I missed the last one.

**MR KALDERIMIS:**

Paragraph 182, sorry.

15 **GLAZEBROOK J:**

Is that in the High Court judgment?

**MR KALDERIMIS:**

In the High Court judgment, thank you. So that's all I want to say about the High Court judgment. Turning onto the Court of Appeal judgment, and it's errors  
20 in our respectful submission. If we turn to paragraph 104, this is an error I just want to note that at paragraph 104, one-zero-four. Sorry, the technology may be –

**GLAZEBROOK J:**

Doesn't seem to want to go there.

25 **MR KALDERIMIS:**

Maybe just thinking about what it wishes to do.

**WINKELMANN CJ:**

It's not responding. What paragraph of the Court of Appeal judgment was it?

**MR KALDERIMIS:**

Paragraph 104. Now while –

5 **WINKELMANN CJ:**

We can get it on our own screens.

**GLAZEBROOK J:**

We have it in front of us.

**MR KALDERIMIS:**

10 Thank you. So what the Court is saying there is that the Judge, if you look at  
the last sentence, the Judge was aware that there were all of these other  
matters, and I've given you in the context section references to the joint expert  
report which show how all of the experts were engaged in this issue. That's at  
202.0612, and just above it in the "context matters" section I've also given you  
15 a reference to Mr Savage's cross-examination which is in the notes of evidence  
at 714 to 715. That's the so called chain of causation passage where PGG's  
own expert agreed that if you had been told that the production average had  
dropped to 98, you would have asked why the production had dropped to 98  
and what the most recent season was and when you saw the most recent  
20 season was 90 so it went 107, 97, 90 you would ask, why it had dropped to 90,  
what difference had happened and where is it going today, which was 85 as  
you can see from the Court of Appeal's judgment. And if you'd asked all of  
those questions, you would have realised that what was behind the  
representation that this was 103 from these inputs was that it wasn't 103 from  
25 these inputs and it wouldn't have suited the Routhans.

So all of that was cross-examined on and revealed and what the Court of  
Appeal says at 104 is the Judge got it. She understood that her focus was  
appropriately confined as to whether the purchase would have proceeded had

the Trust been given correct information about historical production. So that's on the good side of the ledger.

At 115 to 116 we say the errors come in. Now at 115 what the Court of Appeal  
 5 is doing is trying to identify what is the risk because it's from the risk that you  
 derive the scope of duty and if you look at the first four sentences at 115 you  
 can see what the Court of Appeal thinks that risk is: "The Trust asked PGG to  
 provide updated production information as this was plainly important to its  
 purchase decision. The information was relevant to the expected return from  
 10 the farm. Importantly, it would show how production for the most recent year  
 compared...whether production was declining, being maintained, or increasing.  
 The risk the information was intended to address was that the Trust would pay  
 too much for the farm."

15 And at 116, three sentences down, fourth sentence: "In particular, we do not  
 consider PGG can be held liable for the losses occasioned by the dramatic fall  
 in the milk price..." we say not relevant because that's not what we're doing  
 "and reduction in revenue which resulted in the decline in the value of the farm,  
 the Trust's inability to service its increasing level of borrowings...and the  
 20 consequent erosion of equity."

Well let's stand back and look at that analysis. Think about the chain of inquiry  
 cross-examination of Mr Savage. The 98 really revealed the 90. The 90 really  
 revealed it was on track for only 85. The 90 also revealed something had been  
 25 changing and not for the better and the further questions would have indicated  
 that the 103 wasn't from all of the inputs that were advertised but from other  
 non-advertised inputs. Once you see that, why is it the case that the risk the  
 information was intended to address was simply an overpayment in purchase  
 price. Why is that the limit of what it was intended to address? Why is it that  
 30 entirely foreseeable direct consequences of getting the revenue protection  
 wrong is that you will have a reduction in revenue, you'll be unable to service  
 your borrowings and your equity will erode. Why is that not within the risk?  
 None of that's explained. That is just asserted and it's submitted it's actually

inconsistent with the Court of Appeal's own reasoning which we say stops half way through. If we go to paragraph 134 –

**WINKELMANN CJ:**

Is your fundamental point, because I mean what you're saying would apply to any kind of going concern scenario, wouldn't it? Most going concern scenarios, if you abide with a misrepresentation as to a fundamental aspect of its productivity, say it's a going concern which is in the productive industry, wouldn't this analysis you're applying cross right over?

**MR KALDERIMIS:**

Yes, which is what cases like *Downs v Chappell*, *East v Mauer* and *Esso* –

**WINKELMANN CJ:**

So the analysis where you're just looking at the diminution of value is fine for a static asset such as, well something that's a capital asset that you might hold and sell on, live in and so on –

**KÓS J:**

A building for instance.

**WINKELMANN CJ:**

Like a building.

1510

**MR KALDERIMIS:**

Exactly or like in *SAAMCO*, why did *SAAMCO* not have to grapple with any of this? Because once the banks had lent their money that was it. None of them were lending another dollar after the valuation had come in and they decided to lend. So while their loss hadn't, I use the word "crystalised" in the road map, I don't mean it had crystalised as in it had fallen due at that point, it might not have been any loss, but the amount they could blame the valuer for was crystalised, it wasn't going to get any bigger, there wasn't going to be another dollar that come through the door, but in a going concern business there's



always that risk. So we do accept that you have to think about questions of reasonableness and whether the Routhans then acted appropriately, but we say there are findings of fact below, but the issue can't be a sort of *SAAMCO* bar on the top of it.

5 **WINKELMANN CJ:**

So you're saying it's enough if it's really, the risk is that the purchaser will buy a farm which is less profitable, but you would impose more risk on the real estate agent, which is that they will buy a farm which is less profitable and then, unbeknownst to themselves, waste capital trying to make it more profitable?

10 **MR KALDERIMIS:**

Not – trying to get, trying to –

**WINKELMANN CJ:**

Achieve the representative profitability.

**MR KALDERIMIS:**

- 15 To achieve the representation. Not because they've got a warranty, not because that's the bargain you've promised them, but that's because that's the obvious thing they'll do in the circumstances, they are – you've put them in the corner, as it were, you've stepped in the area, you've put them in the corner, now they're stuck in the corner –

20 **WINKELMANN CJ:**

So you're saying the risk is not only that, the risk that you're measuring against is not only that the person – the real estate agent should be aware is taking on the risk that not only the party will be buying a business that's less profitable and therefore have less profitability, but also that they will take unsuccessful

- 25 mitigatory steps to try to achieve that profitability?

**MR KALDERIMIS:**

Yes, unsuccessful, reasonable mitigatory steps. That's all something that might well happen, it ought to be within your contemplation, it's something that you assume when you provide that information.

5

So the Court of Appeal made two *SAAMCO* deductions. The first one is that it kept damages to the diminution in value. So it applied a *SAAMCO* cap even though this was a continuing loss case, I don't need to say anything further about that. I note for you to go back and read, if you wish, paragraph 134 of the Court of Appeal's judgment where the Court refers briefly to *Esso and Downs v Chappell* but says that this is a really different type of case. But we say it really isn't, it's just that sort of case. So I don't have anything more to say on that. The second error –

10

**WINKELMANN CJ:**

Does your case really result, depend upon it being an unachievable level of productivity, that it was in fact a spiked productivity?

15

**MR KALDERIMIS:**

Yes, it depends upon that what the Routhans had bought was the representative production in the context and that acting reasonably, they were never going to get that production because that wasn't the context, that wasn't what the farm had been doing, you couldn't get it for what, for replicating that context, and that was the evidence.

20

The second error the Court of Appeal made, and this is the last point in the road map before I just briefly discuss the Bishop issue, is at paragraph 12, so this is proposition 12 of the road map rather, where the Court imposed a second compounding *SAAMCO* cap. You could almost call it *SAAMCO* squared. We've called it double *SAAMCO*. So the first *SAAMCO* limitation is that all the Routhans were entitled to was the diminution of value, not a dollar of their continuing loss counts.

25

30

**WINKELMANN CJ:**

Is that at paragraph 155?

**MR KALDERIMIS:**

Let me look.

5 **WINKELMANN CJ:**

What paragraph is their first – where they apply the SAAMCO limitation?

**MILLER J:**

It's paragraph 115.

**WINKELMANN CJ:**

10 Yes, paragraph 115, yes, it was paragraph 115. The second one is –

**MR KALDERIMIS:**

The second SAAMCO cap is that within that limitation, a further limitation is superimposed. So if you look at paragraph 136 you can see that they adopt Mr Hancock's valuation, and Mr Nelson will briefly address you on that  
15 imminently, that's the 480,000 diminution, and at paragraph 145 what the Court does is it pares that down to 300,000. Why does it do that? If you go up to paragraph 143 you can see that what the Court says is that well the thing that they were really entitled to expect, they look through the 98. The 98 average isn't where you stop, you have to look through the 98, and if you look through  
20 the 98 you see it's 90,000.

**GLAZEBROOK J:**

Sorry, can I just check what paragraph you're on?

**MR KALDERIMIS:**

Paragraph 143. So this is why they reject the so-called \$50,000 figure.  
25 They look through the 98 average –

**WINKELMANN CJ:**

What is the \$50,000 figure?

**MR KALDERIMIS:**

That is a figure that my learned friend will contend for in his cross-appeal, is the right damages analysis.

**WINKELMANN CJ:**

5 Right.

**MR KALDERIMIS:**

That came from the other valuer Mr Hines. But the important point is the reasoning following that. It's not about the 50,000 figure. You look through the average. You see that really the most recent season is 98 – is 90, and what  
10 the Court does at 145 to 147 is it, and you see it most clearly in 147, is it pares back the 48,000 to 300,000 by effectively putting a SAAMCO cap on of the diminution of value, the SAAMCO flaw as it were, of, but only down to 90, and we submit that that reasoning is incoherent and, with respect, contrary to and inconsistent with the way the Court of Appeal reached its conclusion in the first  
15 place, and I can illustrate that by just two paragraphs. The first is paragraph 137. In finding that Mr Hancock's valuation was the right valuation, what the Court said is that his valuation was based on good sense, this is the third paragraph, because "it is possible to drive high levels of production, well above the average... by various farm management methods including stock  
20 management practices and... fertiliser application. This at least partly explains the significant disparity between the production achieved by Cooks... and that achieved by the Trust. It also underscores the historical production figures form only part of the relevant picture and cannot be relied on as an accurate predictor..."

25 **WINKELMANN CJ:**

What paragraph of the judgment are you there?

**MR KALDERIMIS:**

Paragraph 137. In themselves. And that's exactly the point that Mr Parker, my learned friend, was making in his cross-examination of Mr Lewis. Then when  
30 we come to paragraph 144 you can see that their critique of Mr Hancock's

figures at the bottom of paragraph 144 is that it assumes that the real production level is 84, which it was, but the second to last sentence: "The Trust did not make any enquiry about the average efficient production... nor did it ask Mr Cook about his farming methods or how he had achieved the historically high production levels he did in fact achieve." But if we stand back and we understand context, you can see that reasoning is flawed and incomplete. In paragraph 137 the Court of Appeal is saying, you can't just look at the 103, you have to look at the 103 in context, and then they criticise the Routhans for not asking enquiries about the farming system, but it's all there, and there's no reason why the chain of enquiry that the Court of Appeal says would have continued from the 98 average, to seeing the most recent season was 90, would have stopped there. Mr Savage in cross-examination didn't stop there. He said, no, I wouldn't stop at 90. He'd ask what they're doing for the most recent – what, you know, if it's already 90, where's it going now, and more importantly, if it's already 90 and it's going to 85, why is it going to 85, and once you find all that out, you realise the 103 hasn't come from these inputs. It's not right. It's not a farm that you could purchase. So this –

**WINKELMANN CJ:**

Aren't they really talking about here, though, that valuers don't just look at one isolated figure. They look at what's going on in the district to work out what's likely to be produced on a farm. They say the good sense of this approach is supported by, possible blah blah blah, well above the average achieved in a particular district, so you can actually have production spike.

**MR KALDERIMIS:**

Well yes but what they're saying is, you've got understand that in a system, that's what they are saying. They're saying that the Cooks achieved it in one system. You were trying to apply another system but the Court of Appeal is not acknowledging that we were represented, the production levels, within the system that we were capable of using, and which wasn't the system that Mr Cook had achieved his production from. The Court of Appeal –

**WINKELMANN CJ:**

I've lost the point of why you were taking us to paragraph 137, because it was to point out the reasoning in 145 is incoherent, is it?

**MR KALDERIMIS:**

- 5 Yes, let me start again for this is important. In 145 what the Court of Appeal does is it says you can recover diminution in value but only between a floor of 90 and a height of 103. Any lack of production below 90 is not something you can recover and the Court gets there by saying well the misrepresentation that was made wasn't just the average of 98, it was they effectively misrepresented
- 10 to you that the most recent season was higher than 90 when the most recent season was only 90, and then the Court of Appeal says but you'd asked questions, you would have understood that farming systems differ and you really can't tell anything beyond that point of 90. But the evidence that came out was contrary to that. The evidence was very clearly that once you discover
- 15 the most recent season is 90, you also discover that you're on track for less than 90 and you also discover that the 103 hasn't come from the right inputs.

**WINKELMANN CJ:**

- Isn't your simple answer to that proposition at the bottom there though that the Court of Appeal is effectively placing a due diligence obligation on them which
- 20 they say they didn't undertake that due diligence, they didn't go and look at the average efficient production level to check out whether this one was spiking unusually in the region –

**MR KALDERIMIS:**

Yes, I –

25 **WINKELMANN CJ:**

– and that they also didn't ask if this was, if Mr Cook had spiked the production for sale, so they've therefore – it's a contributory negligence finding and you're saying what about that?

**MR KALDERIMIS:**

Well, firstly, that it's unjustified and improperly reasoned but most significantly I'm saying it can't stand with, once you understand the context, they weren't being told it's 103 but we can't tell you anything about the conditions under  
 5 which you will produce 103. They're being told it's 103 that you can get for ordinary fertiliser, for not bringing supplements onto the farm, for not having a whole lot of other farming properties, just half the herd wintered off.

**WINKELMANN CJ:**

So that deals with the second half of – that deals with the second half of their  
 10 point which is that but it doesn't deal with the point about, you know, anyone would check –

**MR KALDERIMIS:**

Yes, but the Court of Appeal –

**WINKELMANN CJ:**

15 – and I think, you know –

**GLAZEBROOK J:**

But don't you have findings that they did do adequate due diligence?

**MR KALDERIMIS:**

Yes, the Court of Appeal had already itself found that they didn't have to check  
 20 that they were acting reasonably in trusting PGG. Both the Court of Appeal and the High Court had already found that.

**WINKELMANN CJ:**

Found what?

**MR KALDERIMIS:**

25 That the Routhans acted reasonably in relying on what PGG told them about the production and that they shouldn't have needed to look behind it and find out all of these things.

**WINKELMANN CJ:**

That was that their continuing reliance was still reasonable but that's not a finding that there isn't some sort of contributory negligence is it and that doesn't exclude a reliance –

5 **MR KALDERIMIS:**

No, no, the High Court Judges' findings, I don't have time to go through all of the paragraphs, but they were very clear that there was no negligence, no lack of due diligence.

**WINKELMANN CJ:**

- 10 So I mean what is this? I'm asking you, help me with it, is this a finding of contributory negligence? I mean what is it?

**MR KALDERIMIS:**

It is a finding that it is beyond the scope of PGG's duty to recover any production, whether as part of the purchase price or otherwise, below 90.

- 15 So the bit of the purchase price that's attributable to production below 90, the Court of Appeal excises that.

**KÓS J:**

It seems to be a scope of duty.

**MR KALDERIMIS:**

- 20 Scope of duty point effectively.

**MILLER J:**

You're just dealing here with the diminution in value point.

**MR KALDERIMIS:**

Yes, that's all I'm –

- 25 **MILLER J:**

Can we go back to your first complaint which is that the Court of Appeal has adopted that cap in the first place?



**MR KALDERIMIS:**

Yes.

**MILLER J:**

Because it seems to me arguable, and this is a point in your favour, that when  
5 we look at 115 and 119 together, and we see the premise of the Court's  
reasoning, is that immediately upon learning of the low production your client  
should have sold the farm.

**MR KALDERIMIS:**

Yes, one can derive that if you add 119 to that.

10 **MILLER J:**

And then if we look at the factual findings that, in fact, and I think the Court of  
Appeal did really adopt these, that it was reasonable for them to press on and  
attempt to make the production that had been represented.

**MR KALDERIMIS:**

15 Yes, and so I –

**MILLER J:**

So there's a – and this, when we look at it, explains why the Court of Appeal  
dismisses all of the things at 116 through to 118.

**MR KALDERIMIS:**

20 Yes, that's right so they take all the continuing loss out for effectively those  
reasons, your Honour, that's right and so –

**MILLER J:**

All right, and you say they were wrong to do that?

**MR KALDERIMIS:**

25 Yes.

**MILLER J:**

Right, okay.

**MR KALDERIMIS:**

And that's not least because the production being represented in the context it  
 5 was represented in, it was entirely achievable by the Routhans farming well,  
 and as the High Court Judge found, they were farming better than average  
 metrics that she quotes towards the end of her judgment. It wasn't their farming  
 ability was the problem, it was that putting ordinary inputs onto this farm was  
 never going to do it. It just wasn't ever going to work because the production  
 10 hadn't been achieved by those sorts of ordinary inputs, and if I just go to that  
 paragraph. That's paragraph 227 of the High Court judgment.

Paragraph 227. You see at paragraph 226 there's a table, that's showing that  
 the Routhans are producing better than the Livestock Improvement Corporation  
 15 averages and then, we looked at this just before: "While I heard a number of  
 subjective opinions about the Routhans' farming experience, in fact, the  
 Routhans were achieving, in some years, average or better... Their difficulties  
 arose because they did not realise this was a reasonable achievement when  
 they were led to believe that for the last four years, on an orthodox farming  
 20 system" – that's the context – "the farm had produced an average of 103."

So we say the short point is the Judge really got it. The Judge really did  
 understand, after sitting through all that evidence, what the relevance of these  
 other points was and it was just harder for that to filter its way through the  
 25 appellate process.

Now with that, your Honours, I really need just to talk briefly about the Bishop  
 point and then cede the floor. This can be most readily done by opening up our  
 cross-appeal submissions, this will be a point that Mr Nelson won't be  
 30 addressing so there's no double up, and looking at paragraphs 16 to 18. Now I  
 regret to say that even done quickly this will take seven minutes, so I'm going  
 to do it as fast as I can.

Mr Bishop is the budget advisor that the Routhans involve so that they can present budgets which go to Rabobank, and there is no dispute of fact that Mr Bishop's budgets did go to Rabobank along with the prospectus, and you can see Rabobank relying on them. If you just look at the points in paragraph 16, Mr Routhan made it clear that he discussed with Mr Bishop the prospectus and that Mr Bishop based his analysis on that figure. Mr Bishop accepted in the end that he may have been given the prospectus. You can see that Mr Bishop prepared three budgets, all with differing milk prices in them, but otherwise being the same, in the days of and following the prospectus being given to Mr Routhan on the 10<sup>th</sup> of September.

The point that is really important, and which I apprehend will be lost unless I explain it to your Honours now, is (c). Mr Bishop's analysis is explicable only by reference to the Routhan prospectus. That was something that I showed you, a paragraph from Mr Dillon's witness statement earlier, that was a witness for PGG. Mr Dillon had said that he saw Mr Bishop's 980 and the Routhans, and the prospectus' 980, Rabobank's 980, as being the same. What does 980 represent? Let's –

**WINKELMANN CJ:**

When you say the Routhan prospectus, do you mean the one that Mr Daly prepared?

**MR KALDERIMIS:**

Yes, exactly, the one that Mr Daly produces. Now what does that 980 represent? A document to go to is 302.1080 and you can probably get there by clicking on the footnote in our cross-appeal's submissions 45, and if you go to the previous page, you see the first page of it, this is the document that Rabobank created on the 18<sup>th</sup> of October based on the Routhan prospectus that Daly had prepared and Mr Bishop's numbers.

1530

30

Now that 980 is explained at the bottom of number 81 and if you just blow that up, sorry bottom of 1080, so previous page, my apologies, thank you, stop

there. If you look under the fourth bullet point tranche 1 purchase property. It's a 105 hectare dairy farm producing 980 kilos of milk solids per hectare. Now the calculation there is you divide 103,000 kgs of milk solids, that's the representation by the 105 hectare property, and you get 980 kgs per hectare.

- 5 If we go back to paragraph (c) of 16 of our cross-appeal submissions, so maybe stay with the Rabobank document but go back to the cross-appeal submissions, you can see that in Mr Bishop's own budget, because there was a dual purchase contemplated at the time, he's not using only the 105, he's using a production base of 245,000 kilos of milk solids. So that's the 103 from Farm
- 10 258 augmented by an amount from Casa Finca which was the other farm, and to show you how that was done, I've put it in the footnote but I'll just look at one of the budgets. So perhaps if we look at budget – if you click on footnote 44, the second one, 302.1048...

**WINKELMANN CJ:**

- 15 Sorry, what footnote are we clicking on please?

**MR KALDERIMIS:**

- Footnote 44, second link. So I've got right to the guts of this just to save time. These are the performance summaries. All of this was covered in the cross-examination so this isn't the only way you can find it but I just wanted to
- 20 show you the figures. So if we just blow this up, this is the only dense thing I'm going to take you to before I stop. If you look at the farm description what you have is an area of 332 hectares. Now you have to ask what is that area comprised of and the answer is it's comprised of four things. It has the Casa Finca area, it has the Farm 258 area, it has in the box called "Leasehold", five
- 25 down, 42 hectares that were leased from Casa Finca and it also has the territory of the run-off, and then if you look further down you can see under "cattle" five lines down there's "milk solids." That's where the 245,000 comes from and what Mr Bishop has done, and he admitted this in cross-examination, is he just divided that 245,000 which he'd obtained –

- 30 **WINKELMANN CJ:**

Hang on, he admitted it, not omitted it?

**MR KALDERIMIS:**

He admitted in cross-examination, sorry.

**WINKELMANN CJ:**

Admitted it.

5 **MR KALDERIMIS:**

Admitted that what he had done is he'd obtained the 245 by effectively applying 103 against the milking platforms of Casa Finca and Farm 103, Farm 258, but then what he did is he added up all of the possible land, every metre of land that wasn't just milking platform, all of the run-off, all of the leased area, every  
10 metre of land, and just divided it by that 738 figure, which is the average milk solids figure for the district, and he did this, as he said in his cross-examination, just as a form of crosscheck because no one thinks that you get the district average of milk solids per hectare production from every hectare of land in the entire farm. You only get it from the milking platform. Mr Bishop knew this and  
15 Rabobank knew it as well. So if we go back to the –

**WINKELMANN CJ:**

So what does that mean?

**MR KALDERIMIS:**

Well it means that while it looks superficially like Mr Bishop is not relying on the  
20 103 figure because you can't see the 103 figure in the calculation, he's relying on it as a form of cross-check because that's exactly what he is doing.

**WINKELMANN CJ:**

So he's not relying on it?

**MR KALDERIMIS:**

25 No, no, he...

**WINKELMANN CJ:**

If it's only a cross-check then he's not relying on it?

**MR KALDERIMIS:**

No, no, he's relying on it and he's cross-checking that it is –

**WINKELMANN CJ:**

So he's cross-checking the district average?

5 **MR KALDERIMIS:**

Yes, he's cross-checking it against the district average.

**WINKELMANN CJ:**

Right.

**MR KALDERIMIS:**

10 So the Rabobank document, and I do explain all of this in the cross-appeal  
submissions, is in (d) so you can see, if you look at the end of (c), firstly  
Rabobank explain how they understood Mr Bishop's calculations. So if you  
look at 1084, for instance, and just click on the right-hand side of footnote 46  
and just look right down at the bottom bullet point "production budgeted at  
15 245,000 kgs of milk solids." Now, what is that? Is that that amount divided by  
all the hectares of the total farm units which would be 336? No. It's 980 kgs  
per hectare divided by the milking platform hectares only. And you can see  
that, if you go up to the third bullet point, the effective milking platform is 250.  
What's the milking platform? Well the milking platform is the 105 from the –  
20 and you can see that at 1082 in the top bullet point under "Dairy Farms." If you  
just go a little higher. So page 1082.

**WINKELMANN CJ:**

So are you actually asking us to just believe your client's witness on this point  
or say he's mistaken?

25 **MR KALDERIMIS:**

No, no, this was my learned friend's witness. So Mr Bishop had been joined as  
a party to this proceeding by PGG, was dropped out as a party two weeks  
before his witness statement –

**WINKELMANN CJ:**

Got it.

**MR KALDERIMIS:**

– was due and then he gave a witness statement for PGG. So I won't go into  
 5 the detail any more because it's there. But the point is that everyone  
 understood, Rabobank understood, Mr Dillon for PGG understood, that what  
 Mr Bishop was doing was confirming the 980, the superlative production figure,  
 and his methodology was a rather unusual methodology, it just crosschecked it  
 against the district average.

10

Now the High Court Judge deals with this very extensively in paragraphs 221  
 and 222 and I invite your Honours to do two things. Firstly, to read 221 and 222  
 carefully with this very short background in mind and, secondly, to look at, and  
 this is the only cross-examination I ask you to read in any detail, Mr Bishop's  
 15 cross-examination which is at page 203.1034, and I ask you to look particularly  
 between pages 414 and 432. So all of this, which sounds somewhat abstruse  
 described quickly now, Mr Bishop was walked through and, as her Honour says,  
 he was an exceptionally unreliable witness and it was clear through the  
 cross-examination that he was supporting the 980 figure, which is a way of  
 20 saying the 103,000 kg milk solids figure from this farm and that is what the  
 Judge understood and she understood that perfectly correctly.

**KÓS J:**

So where did she describe him as exceptionally unreliable?

**MR KALDERIMIS:**

25 There were several reasons for that. If we go to –

**KÓS J:**

No, sorry, where did she do that?

**MR KALDERIMIS:**

Oh, where? 121 to 222, that might – let me go to the exact words in case I am paraphrasing. Let me find her exact words. So paragraph 2 –

**KÓS J:**

5 She found it implausible?

**MR KALDERIMIS:**

Yes, exceptionally unreliable is my addition.

**KÓS J:**

Right.

10 **MR KALDERIMIS:**

His evidence was implausible. I say he was an exceptionally unreliable witness.

**KÓS J:**

Right, you say.

**MR KALDERIMIS:**

15 I say that.

**KÓS J:**

I just wanted to be clear who was saying it.

1540

**MR KALDERIMIS:**

20 Thank you, yes, I accept that, Sir. The other way in which he was implausible, as she sets out in 222, is that Mr Bishop purported to say he didn't realise his budget was going to the financiers when he had several emails saying good luck with the financiers, I look "forward to working with you both in your new venture." So Mr Bishop knew what he was doing, everyone understood it, and  
25 these figures, the 103,000 representation, was relied on by Mr Routhan and the Judge found that correctly in her judgment.



Now your Honours I've gone over my estimate so unless you have any further questions for me, what I will do is seek the floor to Mr Nelson.

**WINKELMANN CJ:**

Thank you.

5 **MR NELSON:**

May it please your Honours. I will address PGG's cross-appeal insofar as it relates to the appeal of the normal measure, and I will explain this very briefly by relevance, by reference to table 4 in our document of diagrams. That's the last one, table 4 valuation comparison.

10 **WINKELMANN CJ:**

Is this this document?

**MR NELSON:**

Yes, the very last table in that document. So the essence of PGG's cross-appeal is that the correct application of the normal measure here is the  
15 difference between what is here as the Hines 97,000 valuation and the Hines 103,000 valuation. These are two valuations completed by their valuation expert with different assumed levels of production and basically –

#### **MICROPHONE ADJUSTMENTS MADE**

20 **MR NELSON:**

So the essence of PGG's cross-appeal is that that is how the normal measure is applied.

**WINKELMANN CJ:**

Is what is how because I must say I didn't hear the first part either?

25 **MR NELSON:**

Okay, I'll just take a step back then. So on our table 4 these are all the valuations data points before the Court. What PGG is saying is that when you

apply the normal measure, what you do is you take the Hines 103,000 valuation, that is a valuation prepared by Mr Hines, their expert witness, on the assumed but incorrect production level of 103 and you subtract his other hypothetical on instruction valuation at 97 and that gives them the number of \$50,000.

5

Now we say that is incorrect and that's for two key reasons. The first is that PGG has fundamentally misstated what the normal measure is in tort. It is price paid minus value received in return. What PGG has done is applied in effect the contract measure. They've taken value as represented, which is their valuation at 103, and they've subtracted what they say, in effect, to be the market value valuation at the 97,000 figure.

10

So that's our first proposition that PGG has misstated what the actual normal measure is in tort, and I'll give your Honour some references on that, but first just to signal my second proposition which is that when it comes to applying the normal measure the second aspect of it, the value in fact received, Mr Hancock's evidence should be preferred. That is the valuation expert for the Routhans. And it's the result of those two propositions, that's at paragraph 3 of our cross-appeal road map which is the price paid 2.8 million minus the market value of the thing in fact received is \$480,500.

15

20

Your Honours on the point that the normal measure in tort is the price paid less the value received, we say that is entirely uncontroversial and conventional. I don't propose to go to the cases on this unless that would be of assistance, but I will just note the references in particular to this Court's decision in the *Altimarloch* case where all of the Judges agreed that this is how you assess the normal measure in tort. So that's paragraph 62 in Justice Blanchard's judgment, footnote 108, the Justice Tipping, paragraphs 9 and footnote 56, Chief Justice Elias' judgment, and paragraph 229 in Justice McGrath's judgment, and how that worked in the *Altimarloch* case is the property was purchased for 2.675 million, it was actually worth, the market value of it was 2.55 million, so the normal measure was the difference between those two numbers.

25

30

The Court of Appeal in this case had that correct as well, just giving you the paragraph numbers, 115 and 126, where the Court of Appeal said the normal measure is the price paid less the value received, and that makes perfect sense in light of the objective tort damages, which is to undo the wrong. It's not to  
 5 give us the benefit of the bargain.

I'll finish my first point by just going to PGG's submissions on the cross-appeal, paragraph 24. So this is the file, the respondent's submissions, paragraph 24. Here, PGG says: "The normal measure of loss as a consequence of a  
 10 misrepresentation is the difference between the value of the property, with and without the misrepresentation," and they cite in support *Cox and Coxon Limited v Leipst* [1990] 2 NZLR 15, *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 and *Shabor v Graham* [2021] NZCA 448. None of those authorities say that. I will just give you the pinpoints again, I don't propose  
 15 to go to them, but the pinpoint references are Cox at 24 –

**WINKELMANN CJ:**

Fox with an F?

**MR NELSON:**

Cox with a C.

20 **WINKELMANN CJ:**

Cox.

**KÓS J:**

Cox, 24?

**MR NELSON:**

25 Cox at –

**GLAZEBROOK J:**

Can you perhaps go down to the footnote because then we can see what the case names are.

**MR NELSON:**

Yes.

**WINKELMANN CJ:**

That's good.

5 **MR NELSON:**

So Cox at page 26 of the report, *Roberts* at paragraph 24, and *Shabor* at paragraphs 59 and 67. All of those paragraphs say the normal measure in tort, price paid less value received.

**GLAZEBROOK J:**

10 They say what, sorry?

**MR NELSON:**

The normal measure in tort is the price paid less the value received. Turning to paragraph 26 in PGG's submissions here, after having set out their equation, which is the 103 valuation minus the 97,000 valuation, they say: "This is  
15 consistent with the Court of Appeal's assessment of the correct measure of loss in *Shabor Limited v Graham*," and then they purport to quote from that case and say: "Mr McLaughlin assessed the difference in value of the property on the basis it carried 7,500 stock units and 5,500 stock units...". So that quote in isolation appears to be the kind of thing they're arguing for, it's assessing it at  
20 two different data points for carrying capacity. But that's also just fundamentally wrong.

As a first point, that's not a quotation from the Court of Appeal's judgment at all. What that is is a quotation from the High Court judgment purporting the expert  
25 evidence on that. When it's viewed in context, and that's paragraph 231 of the High Court judgment that is quoted, when it's viewed in context with paragraph 230 of the High Court judgment, it's clear, there her Honour Justice Fitzgerald says: "The normal measure of damages is the value transferred generally represented by the contract price...".

30 1550

**WINKELMANN CJ:**

Well I mean I think you're putting (inaudible 15:50:08) authorities on the normal measure of damages, but you're saying they've got a misquote there, that's, they've wrongly stated this is from the High Court judgment when it's

5 the – sorry, a Court of Appeal judgment when it's in the High Court.

**MR NELSON:**

Yes, but I don't point it out merely for the sake of pointing out an error.

**WINKELMANN CJ:**

No, no, but it's just for us to note when we read the submissions.

10 **MR NELSON:**

Yes, it's an important error because in isolation it looks to be this artificial exercise of comparing the value at two data points, but viewed in context what those data points represent is the price paid and the market value received. It is not some other artificial exercise. To conclude my first point, what we say

15 that means is that the 50,000 figure cannot be the right one. If Mr Hines is correct, and this farm was actually worth 2.9, then there's no loss. There's no basis for 50,000 figure. If they'd paid 2.8 for a farm worth 2.9, they're better off by \$100,000. There is no loss in that equation.

20 Turning to my second point, which is that Mr Hancock's evidence should be preferred when it comes to assessing the market value of the property, I will just return back to table 4, which is the one I was at before, the very last one, and I see my learned friends have attached a similar table to their road map, but the critical additional data point in our table is the second green column.

25 It's the land value per kilogram of milk solid of the milking platform.

**WINKELMANN CJ:**

Can I just ask, are there concurrent factual findings preferring Mr Hines to Mr Hancock on this point or is it not dealt with by the High Court judge?

**MR NELSON:**

So the High Court judge did not deal with this point. The Court of Appeal, we say, accepted Mr Hancock's evidence as to the difference in value of \$480,000 and a half, but then completed the kind of double-SAAMCO analysis that

5 Mr Kalderimis covered, to then reduce that further. But the Court of Appeal's input was still that the bare difference in value is Mr Hancock's figure, and the references for that in the Court of Appeal judgment, I'll just note them, paragraphs 144 and 145. Effectively what the Court did there is they took Mr Hancock's valuation, but modified it to reflect the number of 90,000

10 kilograms of milk solids, and set at 84, which is what Mr Hancock assessed to be the average efficient production of the property.

A few paragraphs up the Court of Appeal said at paragraph 141 that the divergence between the valuers simply reflect the different assumptions they

15 were instructed to adopt, and that can be seen in the table again. There's no massive variance here. Really they're all in the same ballpark except for the Property Advisory valuation at roughly \$21 in land value per kilogram of milk solid. The difference between them is the different basis on which they valued it, and on that point Mr Hancock is the only one who actually completed a

20 market valuation. He made an assessment that the property's average efficient production is 84,000 kilograms of milk solid, and then he valued it on that basis. Mr Hines did not do that. Just in the interests of going quickly –

**WINKELMANN CJ:**

I should say we expect you to finish by four if you possibly humanly can.

**MR NELSON:**

I definitely will your Honour. I won't go to all of the references but they are in our cross-appeal submissions. The basic point is that Mr Hines did not complete that kind of market valuation. Mr Hines completed an artificial valuation based on instructions as to what the production levels should be.

30 Again in our submissions we have the references where Mr Hines said in his own report that average efficient production is the preferred practice. He volunteered it in his report.

1555

He said, this is what I should be doing, but this is what I've been asked to do, and then in cross-examination again he accepted that all of his valuations were on assumed production levels that were not his expert assessment, they were  
 5 just what he was told to assume. So we say that once that aspect of his evidence is corrected, as it should be in line with Mr Hancock's at the 84,000 figure, they're really not that far apart.

The final point I will make is just on the very top item in our table 4, which is the  
 10 Property Advisory valuation, and this admittedly is the one that is higher as an input of 87,000 kilogram milk solids, and that translates to a much higher land value per kilogram of milk solids figure of \$24.62, and PGG now relies on that document in support of its cross-appeal as well. But the author of that report, Mr Mills, was not a witness. He was not a valuation witness before the Court.  
 15 There was no testing of that valuation. There was no opportunity to test it. rather the reason that document is in evidence is because it was used by the plaintiffs in cross-examining a number of the defendant's witnesses, because it contained facts about Mr Cook's farming system. So it's really a by-product that there's a valuation data point in there as well.

20 **WINKELMANN CJ:**

Well, you've put it in there.

**MR NELSON:**

Yes.

**WINKELMANN CJ:**

25 It goes to weight, doesn't it.

**MR NELSON:**

That's correct your Honour.

**WINKELMANN CJ:**

He didn't get cross-examined on it?

**MR NELSON:**

No we're not taking a strict hearsay objection and it goes to weight. But in any event we say it's a clear outlier. It's dated more than a year before the transaction –

5 **WINKELMANN CJ:**

Is it Mr Mills?

**MR NELSON:**

Yes.

**WINKELMANN CJ:**

10 Mills, okay.

**MR NELSON:**

So it's not actually valuing the thing received at the relevant time, and when a closer look is taken, most of his data points are more than two years, or half of his data points are more than two years before the transaction, shortly after the  
15 2008 GFC, so there are real question marks surrounding that valuation to the point that we say it should just be put to one side, and that Mr Hancock's evidence is the only evidence from an expert witness, the only reliable witness generally as to what the market value of this property actually was.

20 Your Honours I will end there, unless I can be of any other assistance.

**WINKELMANN CJ:**

Thank you Mr Nelson, that's excellent. So we're going to adjourn at this point for a short time, and then we will be meeting with the students, there are other counsel at the back of the court, they are very welcome to attend, and also to  
25 attend the session afterwards where we have a discussion with the students.

**COURT ADJOURNS: 3.58 PM**



**COURT RESUMES ON TUESDAY 12 MARCH 2024 AT 10.01 AM****MR TAYLOR KC:**

Mōrena.

**WINKELMANN CJ:**

5 Mōrena, Mr Taylor.

**MR TAYLOR KC:**

Your Honours will have received the road map which I will be going through and –

10 **MICROPHONE ADJUSTMENTS MADE****MR TAYLOR KC:**

Before I come to that road map I just want to put Mr Daly's role in perspective because, as I will be submitting, it's the specific facts which govern the scope of the duty and it's important to get those right and I will start by going to the  
15 CRT brochure which is 301.0227.

This was a brochure that was prepared by another real estate agent approximately a year earlier before Mr Daly became involved and it's useful to go to that document and just see what it contained. If we start at the first page  
20 we have a photograph of the farm in question and then a brief description of the farm in the paragraph below it. And as your Honours will see, that says: "This quality unit in an excellent location 10 minutes inland from Hokitika has all you could want. Averaging 103,000 kilograms for the last three seasons from approximately 260 cows on a grass based system with half the herd wintered  
25 off each year."

So that's the introductory brief description of the farm and for the record the average production of 103,000 kilograms for the last three seasons was correct. That was the average at the time that this document was prepared, and you'll

note there too the reference to “approximately 260 cows on a grass based system.” If we scroll down to 301.0228 the –

**GLAZE BROOK J:**

Is it possible to blow these up slightly?

5 **MR TAYLOR KC:**

Yes.

**GLAZE BROOK J:**

It may not be. That’s great. It’s just that my screen is quite a long way away.

**MR TAYLOR KC:**

10 So the first statement there is under the heading “Property Details” property  
condition “well maintained and established property. 105 hectares” et cetera.  
“Water supply: Well at dairy shed for all water supply. Fertiliser: As per  
recommendation.” And Your Honours just might note, I won’t take you to it, but  
the notes of evidence of Mr Cook’s cross-examination he discusses how he  
15 went about applying fertiliser and, in particular, that he relied upon a farm  
consultant who he had great trust in and in his words “he followed the controller”  
and that’s at page 529 of the transcript.

**WINKELMANN CJ:**

529?

20 **MR TAYLOR KC:**

Yes, of the transcript and it’s 204.1149.

**KÓS J:**

The controller being the consultant?

**MR TAYLOR KC:**

25 Yes.

**GLAZEBROOK J:**

Was that different from the fertiliser schedule attached to this?

**MR TAYLOR KC:**

He explains that he refers to the plan but he says in implementing the plan he  
5 didn't, as a rule, follow the recommendations as to the product to be used.  
He relied on Mr Davis who was his farm consultant.

**WINKELMANN CJ:**

Sorry, did you said he followed the plan?

**MR TAYLOR KC:**

10 He followed the controller were the words he used.

**WINKELMANN CJ:**

Right, follow, that's right.

**MR TAYLOR KC:**

Would it be helpful if we went to the transcript?

15 **WINKELMANN CJ:**

I think it would be helpful.

**MR TAYLOR KC:**

Yes.

**WINKELMANN CJ:**

20 Because what's interesting is, of course, there's the same representations  
about number of cows, wintering off, fertiliser plan.

**MR TAYLOR KC:**

Yes, and I'm going to come to that, your Honour, in putting this in perspective.  
204.1149, can you just scroll up. There's previous pages but this was the one  
25 that I took you to and it's obviously worth reading the whole of the  
cross-examination.

**KÓS J:**

Just remind me, who was Cook giving evidence for?

**WINKELMANN CJ:**

Who was Mr Cook called by?

5 **MR TAYLOR KC:**

He was called by PGG. I think my learned friend explained yesterday that he was initially a third party and then that was withdrawn and he gave evidence.

**KÓS J:**

No, not Mr Cook I don't think.

10 **WINKELMANN CJ:**

Mr Bishop was initially a third party.

**MR TAYLOR KC:**

We're talking about Mr Cook.

**WINKELMANN CJ:**

15 As well?

**KÓS J:**

Yes.

**WINKELMANN CJ:**

He was also a third party?

20 **MR TAYLOR KC:**

He was, yes, he was also a third party in the same –

**KÓS J:**

Well that's not quite what I understood from yesterday. I understood he hadn't been sued at all.

**MR TAYLOR KC:**

I think –

**WINKELMANN CJ:**

Third party joined by the defendant.

5 **MR TAYLOR KC:**

Yes, yes.

**KÓS J:**

Right.

**MR TAYLOR KC:**

10 So if we go to 529. I'm sorry, your Honours, I'm going to have to... Where was the bit about following the controller?

**WINKELMANN CJ:**

It's there.

**MR TAYLOR KC:**

15 It's there?

**WINKELMANN CJ:**

Yes, it is there. It's at about line 17.

**MR TAYLOR KC:**

Yes, yes. Now that's his evidence that he gave in court when he was  
20 cross-examined on this issue. I don't think there was anything in his brief of evidence around the fertiliser plan because the various allegations that are now made in respect of over-fertilisation or too much nitrogen, those things were only introduced in the reply evidence of Mr Routhan. So they weren't addressed in the original briefs of evidence, and in fact were only put to the various  
25 witnesses, including Mr Cook, in cross-examination.

1010

**GLAZEBROOK J:**

So do we know from this what his plan was and whether it did involve –

**MR TAYLOR KC:**

No.

5 **GLAZEBROOK J:**

– a departure from other than products?

**MR TAYLOR KC:**

That was the evidence that was given by one of the plaintiffs' witnesses. He was asserting that there was too nitrogen put on, but in terms –

10 **GLAZEBROOK J:**

But I mean was the controller's plan, was it ever worked out what the controller's plan was in respect of nitrogen?

**MR TAYLOR KC:**

No.

15 **GLAZEBROOK J:**

If you – I mean I can understand he said, well, I don't know, I was following what I was told.

**MR TAYLOR KC:**

Mr Davis gave evidence.

20 **WINKELMANN CJ:**

Well it says here that it was considerably more liberal than the Ravensdown plan.

**MR TAYLOR KC:**

Yes, yes, that's right.

**GLAZEBROOK J:**

He agrees with that does he? Sorry, I can't see the –

**WINKELMANN CJ:**

It's at line 18.

5 **MR TAYLOR KC:**

Well Mr Davis was, stood by his advice so he didn't accept that it was over-fertilisation, but certainly he accepted that it was –

**GLAZEBROOK J:**

Okay, I see.

10 **MR TAYLOR KC:**

Yes. So if we continue with that document and we go to...

**KÓS J:**

We have dairy shares of 95,000 at the bottom of that page, that's interesting.

**MR TAYLOR KC:**

15 Yes, that's the page that I was after. Dairy shares of 95,000. Now my learned friend was correct yesterday that the evidence or the situation as I understand it was that Mr Cook had shares that were allocated in respect of one property but then had a further 267,000, I think it was, block of shares, so they weren't in that sense specifically allocated to this property but to all of the production  
20 from his various farms that he operated in the area, and that probably explains why it was easy for him to agree to provide 103,000 hectares which was the average production for the previous three years and which Mr Daly mistakenly believed had remained constant at the time he prepared his proposal, which we will come to.

25 **KÓS J:**

But isn't there a disjunct between page 1 and page 2? Page 1 talking about 103,000 as an average and page 2 talking about 95,000 shares?

**MR TAYLOR KC:**

Yes.

**KÓS J:**

And wouldn't an astute purchaser appreciate that there's a point of enquiry  
5 there?

**MR TAYLOR KC:**

Perhaps. There's certainly no evidence of that, your Honour.

**KÓS J:**

Right.

10 **MR TAYLOR KC:**

But perhaps.

**GLAZEBROOK J:**

Can I just get it clear, this was a year before and you say it was a 103 but I don't  
think it was, is that right, by the time Mr Daly did the updated prospectus,  
15 because we're a year on?

**MR TAYLOR KC:**

I'm going to come to that, your Honour, yes.

**GLAZEBROOK J:**

Okay, fine, I'll let you –

20 **MR TAYLOR KC:**

Yes, but I'm saying is that the statement in this brochure was –

**GLAZEBROOK J:**

Yes, oh, no, I understood that is, I understood that, yes.

**MR TAYLOR KC:**

25 – 100% correct and nobody's suggesting otherwise.



**GLAZEBROOK J:**

It was average. Had there been a drop in that third year?

**MR TAYLOR KC:**

I'll come to that in a moment as well, but basically the information was that in  
5 the previous three-year period there had been a high of 107,000. I think that –

**GLAZEBROOK J:**

But this is – sorry, I was just making sure I'm absolutely following this.

**MR TAYLOR KC:**

Yes.

10 **GLAZEBROOK J:**

The previous three-year period from Mr Daly's three year or from CRT?

**MR TAYLOR KC:**

No, from, from the CRT brochure.

**GLAZEBROOK J:**

15 CRT, thank you. High as 107 and...

**MR TAYLOR KC:**

No, one – there was a high of 107 and then I think the next one was 106 and then the year after that it was – it's actually in the Court of Appeal judgment somewhere but I can't take you to it immediately.

20 **GLAZEBROOK J:**

Well so the third year had brought the average down effectively?

**MR TAYLOR KC:**

The third year had brought the average down, correct.

**WINKELMANN CJ:**

25 Well, it must have come down quite a long way to bring us down to 103.

**MR TAYLOR KC:**

Yes.

**KÓS J:**

It's at paragraph 5 of the Court of Appeal judgment.

5 **MR TAYLOR KC:**

Thank you, your Honour. Now what follows then –

**WINKELMANN CJ:**

Well can I just ask you then if we're moving off this brochure –

**MR TAYLOR KC:**

10 Yes.

**WINKELMANN CJ:**

– Mr Kalderimis said those facts weren't right, that there wasn't – he said the fertiliser plan, that was a misrepresentation as the fertiliser and that the wintering off was wrong.

15 **MR TAYLOR KC:**

Well, I didn't understand him to be saying that in respect of this brochure.

**WINKELMANN CJ:**

No, when he gets to Mr Daly which is why I'm asking you. You're saying it was right at this point?

20 **MR TAYLOR KC:**

Well as far as we know. There was no evidence about precisely how many animals were on the farm but no I can't say. There's no evidence. There was some statistical evidence about averages of cattle that were herd tested on the farm over a period of several years but the focus in terms of the case was not  
25 on how many cows were there at this time. That information would presumably have come from Mr Cook who is the farmer and knows the herd pretty well and it is his approximation of the number of stock that were farmed on the property.

But obviously, particularly in a situation where you have other properties and a run-off property, the particular number of cows on the property at any given time are likely to vary but that doesn't necessarily mean that they're not part of the herd.

5

Now if we scroll down we have there some production figures for the area which are just taken from a Westland dairy company statistics document and that's annexed to this and you'll see if we go to page 2008 it states: "Production...was down in most areas which was principally due to herds drying off a little earlier than last season." That's at page 301.0230. And what that makes obvious is that production varies not just across herds but across areas and is influenced by all sorts of factors like weather –

10

### **KÓS J:**

Those are two different years, 229 and 230, one's 2009 and one's 2008.

15

1020

### **MR TAYLOR KC:**

Yes, correct. But the point I'm making is production varies for a lot of reasons. The next document down which is at 301.0231 is the Ravensdown Recommended Fertiliser Plan, and that runs on for several pages, but if we go to 301.0232 you will see there under the heading, or the statement: "Lime required on parts of the farm..." and then below that: "Prices... Fertiliser plan. Application: Ravensdown recommends the use of Spreadmark certified contractors," and recommends that the fertiliser be applied in accordance with the Fertilisation Research Code, and then importantly, to place your order give us a call.

20

25

Now the next document down is 301.0233 and that's a soil analysis report. I don't think there's any dispute that the soil quality on the property was regarded as good, and of course the importance of the soil quality is that if the soil quality is good for growing grass and you manage it properly, you should get good grass growth and that's why the soil quality is of importance. That document continues down. Importantly, it's worth noting the date of that

30

document which is at 301.0234 and it says: "Samples received: 25 June. Report issued: 30 June 2009."

**KÓS J:**

5 So the bit that's actually missing from the analysis is grass quality, because that seems to be at issue. Old grass, poor grass, weeds seem to be –

**MR TAYLOR KC:**

Yes. Yes.

**WINKELMANN CJ:**

Pasture quality.

10 **KÓS J:**

Yes.

**MR TAYLOR KC:**

15 Exactly. So the pasture quality is not reflected in the soil analysis. Mr Routhan in his evidence at some point seemed to suggest that the two were connected, but they're only connected in the sense that if you've got good soil and you manage it properly and manage the farm properly, including clearing weeds and application of fertiliser, et cetera, you will hopefully get good grass growth. But the grass, the quality and state of the grass, is something that is apparent by a visual inspection of the grass.

20

Just to note that Mr Routhan at the transcript at, notes of evidence at page 68, which is 203.0688, accepted –

**GLAZEBROOK J:**

Sorry, I think I got the – oh, okay, no, that's all right.

25 **MR TAYLOR KC:**

Page, yes, page 68 of the transcript and he's asked the question at line 12: "Would you have had the ability to decipher that material?" "I know I didn't but

would I have the ability to?" So he says: "I know I didn't" analyse it "but would I have the ability to do it?" "At the time." "At the time no, no." And he makes a similar comment about the fertiliser plan, that he didn't know anything about it and it wasn't something that he would have been able to decipher at the time

5 he had this information. Sorry, the part about the fertiliser is at lines 15 to 25. And then he says: "...just trying to think...I mean I can't second guess, sorry, McLaughlin but I would have thought she'd put that together." McLaughlin was the real estate agent for CRT.

10 Now, as my learned friend indicated and as the evidence clearly shows, this CRT brochure was given to Mr Routhan by Ms McLaughlin and that was following a prospective purchase by Mr Routhan of a property known as the Moynihan property and Mr Daly was involved acting as an agent on the sale of that property but Ms McLaughlin, and an offer was made, I can't recall how

15 much for, I think it was about 4.2 million by Mr Routhan for that property which was a property of about the same size as the subject farm that we are talking about but that deal fell through because essentially, at least according to Mr Routhan, Ms McLaughlin became involved and convinced the Moynihans that the price offered was too low and he could do better or the Moynihans could

20 do better.

But in any event, Ms McLaughlin provided Mr Routhan with this CRT proposal or advertising form, whatever we want to call it. Mr Routhan took that document to Mr Daly and asked Mr Daly to find out whether Mr Cook, who had taken his

25 farm off the market, he had had it on the market a year earlier, whether he would be willing to sell and if so at what price. He also asked to Mr Daly – well no, I'm getting out of order.

1030

30 Mr Daly following that approached Mr Cook and made enquiry of him as to whether he was willing to sell his farm. If so, at what price. In the course of that conversation, Mr Daly got the impression that the average production for the previous three years was about the same and he conveyed that to Mr Routhan when he reported back to Mr Routhan saying, yes, Mr Cook would

be willing to sell, the price would be 2.8 million dollars, and Mr Daly told him that the average production had remained about the same. The reason Mr Daly had that impression was that Mr Cook in the course of that conversation had said to him that production had been, he had had a very good production year  
5 with an excellent manager...

**GLAZEBROOK J:**

That's the current year presumably?

**MR TAYLOR KC:**

Yes. No, no, let me finish actually.

10 **GLAZEBROOK J:**

But I mean the previous, sorry, the previous –

**WINKELMANN CJ:**

The completed year.

**MR TAYLOR KC:**

15 He told him and it's in the, and there's a specific finding by the High Court, in fact it might be useful just to go to paragraphs 21 and 32 of the High Court judgment. There, the Judge describes the evidence but he [*sic*] says there: "However, Mr Cook denied that he confirmed the milk production levels..."  
However, "... he recalled that 'production had been consistent for the last  
20 couple of years, after a peak when I had an outstanding farm manager'." And the farm manager on the property for the previous two years to this was a Mr Lord, but prior to that Mr Cook had had another farm manager who he regarded as outstanding and who –

**GLAZEBROOK J:**

25 Is that –

**WINKELMANN CJ:**

That's Mr Davis, is it?

**MR TAYLOR KC:**

Sorry?

**WINKELMANN CJ:**

Mr Davis?

5 **MR TAYLOR KC:**

No, not – no, we’re talking about farm managers, the –

**WINKELMANN CJ:**

Yes, sorry, what’s the name of the farm manager before Mr Lord? The one who produced the 107,000 kilograms?

10 **MR TAYLOR KC:**

I’m told his name was Cudmore, your Honour.

**WINKELMANN CJ:**

Cudmore.

**GLAZEBROOK J:**

15 So was the peak the 106, 107, 106 and the outstanding farm manager?

**MR TAYLOR KC:**

Yes. No.

**GLAZEBROOK J:**

Yes, it’s –

20 **MR TAYLOR KC:**

Mr Lord had been on the property by that time for two years, I’m fairly sure.

**KÓS J:**

Well the peak years were –

**GLAZEBROOK J:**

Perhaps we need to look at what Mr Cook says he said.

**MR TAYLOR KC:**

Yes. Well, yes, but if we go please to paragraph 32 of the judgment and her  
 5 Honour finds: "What is important is what Mr Cook told me Daly about production records [*sic*]." She says...

**GLAZEBROOK J:**

Where are we, sorry? Paragraph?

**MR TAYLOR KC:**

10 At paragraph 31.

**GLAZEBROOK J:**

Thank you.

**MR TAYLOR KC:**

And then at paragraph 32 her Honour makes the finding: "I consider it likely that  
 15 Mr Cook did say something to Mr Daly about production levels having 'been pretty consistent for the last couple of years after a peak when I had an outstanding...manager."

**KÓS J:**

Could we just have a look quickly at the table in the Court of Appeal judgment,  
 20 paragraph 5?

**MR TAYLOR KC:**

At 5, yes.

**KÓS J:**

I just want to work out where this conversation in September 2010 fits on that  
 25 table.



**MR TAYLOR KC:**

Yes, the seasons end on the 30<sup>th</sup> of June so this discussion in September 2010 would have been referring to the 2009/2010 period but, of course, neither Mr Cook or Mr Daly would at the time of that conversation have had the  
 5 production levels for that season and, indeed, Mr Cook's evidence says, "Well I wouldn't have confirmed that the production level had stayed the same." So he's basically – he's saying, "And what I would have done was ask Mr Daly to go and get the information from the dairy company" but I don't think it's disputed that at that time neither Mr Daly nor Mr Cook had the actual records  
 10 of production and what –

**GLAZEBROOK J:**

Can we just make it clear what season you're talking about?

**MR TAYLOR KC:**

The 2009/2010 season.

15 **KÓS J:**

So looking at the table in the Court of Appeal the 90,337 for 2009/10 that finishes in June 2010?

**WINKELMANN CJ:**

What paragraph is that table, sorry, Justice Kós?

20 **KÓS J:**

Paragraph 5.

**GLAZEBROOK J:**

Paragraph 5 in the Court of Appeal on the table.

**MR TAYLOR KC:**

25 Paragraph 5 of the judgment. And this, of course...

**GLAZEBROOK J:**

So when was the outstanding – what I don't understand is there was a peak which must be the 106, 107 you would have thought?

**MR TAYLOR KC:**

5 Yes, correct, yes.

**GLAZEBROOK J:**

Then the outstanding farm manager was responsible for those peaks according to Mr Cook of course. There could be fluctuations or anything as you point out but...

10 **MR TAYLOR KC:**

Yes, well it could be, it could be a number of factors.

**GLAZEBROOK J:**

Well exactly.

**MR TAYLOR KC:**

15 I'll need to check just when Mr Lord replaced the previous farm manager, whose name was not Cudmore, or was? Yes. I'll check that.

**WINKELMANN CJ:**

Was it Cudmore?

**MR TAYLOR KC:**

20 Sorry?

**WINKELMANN CJ:**

Is it Cudmore, was it?

**MR TAYLOR KC:**

Cudmore, yes.

**WINKELMANN CJ:**

Like it's an acronym, a name suggesting the job.

**MR TAYLOR KC:**

Yes, and that may explain the high production level, your Honour. The point is,  
5 of course –

**GLAZEBROOK J:**

Okay, so the time of the conversation was September and they wouldn't have  
had the 2009/10 figures but would have –

**MR TAYLOR KC:**

10 Whether they could have got access to them or not –

**GLAZEBROOK J:**

Yes.

**MR TAYLOR KC:**

– I'm not sure but there's no dispute that at the time of this conversation neither  
15 of them had those figures.

**WINKELMANN CJ:**

Well, can I just check this then because the Routhans took over the farm  
mid-season. The seasons are June to June are they?

**MR TAYLOR KC:**

20 Yes.

**WINKELMANN CJ:**

And so they took over the farm when?

**MR TAYLOR KC:**

20<sup>th</sup> of December 2010 and they made the offer to purchase the property – well  
25 they signed the agreement for sale and purchase on the 18<sup>th</sup> or 19<sup>th</sup> of October  
and initially Mr Routhan wanted to settle in November but because that was in

the middle of calving when calves are being born and their mothers are going into milk production, Mr Cook wanted to push that date back to the 20<sup>th</sup> of December.

**WINKELMANN CJ:**

- 5 So when this conversation was taking place then the figures for 2009 and 2010 were available but had not been obtained?

**MR TAYLOR KC:**

I'm not even sure they were available but they may well have been.

**WINKELMANN CJ:**

- 10 Okay.

**MR TAYLOR KC:**

They may well have been because Mr Cook says in his evidence he couldn't remember what he said but he said: "I would have asked him to go and check with the dairy company."

- 15 **KÓS J:**

I mean it's hard to imagine you wouldn't have a sense of how your farm had gone three months after the season ended.

1040

**MR TAYLOR KC:**

- 20 That would be right, your Honour, and hence Mr Daly being somewhat surprised that when those figures ultimately came out the average was 98,729, and the production from that previous year, a drop of 98,000 down to 90,000.

**ELLEN FRANCE J:**

- 25 Mr Taylor, can I just check so that, to orient myself. So where do you see this material is taking you?

**MR TAYLOR KC:**

I'm just putting it in perspective. I'm putting Mr Daly's role in all this in perspective, and it's important to get the sequence of events and what happened.

5 **ELLEN FRANCE J:**

But why, I suppose I'm a little bit unclear about how that affects the approach, given the findings about the misrepresentation.

**MR TAYLOR KC:**

Well, there's no question that – well. Your Honour, it'll become clear when I  
10 take you to the next document, which is the proposal document, but just following the sequence. If we go please to document 305.2913. This is a handwritten note by Mr Daly of a conversation that he had with Mr Cook in which he took the CRT brochure with him and discussed the contents of that brochure in order to get confirmation of what the situation with the farm was  
15 because Mr Daly had been requested by Mr Routhan to prepare a proposal document which he could provide to the bank, because Mr Routhan, at this time, was contemplating purchasing not just this farm for 2.8 million, but another farm known as Casa Finca.

**GLAZE BROOK J:**

20 Can I just check, do we know that date of that? I think maybe we were told yesterday but...

**MR TAYLOR KC:**

I don't...

**GLAZE BROOK J:**

25 Approximately.

**MR TAYLOR KC:**

I think there was some doubt about the precise date.

**GLAZEBROOK J:**

Obviously before the prospectus is prepared.

**MR TAYLOR KC:**

Yes, yes, and not long before it.

5 **GLAZEBROOK J:**

Okay.

**MR TAYLOR KC:**

But it would have been in September 2009. 2010 I'm sorry. So Mr Daly takes the brochure, discusses it with him, and he makes this note, and he says:

10 "\$2.8 million random land and buildings, 260 cows can be anything," and I presume that the "anything" is referring to various types and ages of cows, "has his elite cows on place would like to keep could sell 100 around \$1,400 to \$1,500." So what he's discussing there is possible sale of his herd as part of a sale and purchase transaction. "130 cows wintered on" which is approximately

15 half, and the other interesting part is "115 baleage made on" which is suggesting that he was making about 115 bales on the property and –

**MILLER J:**

So you would accept, I think, that all of the information in this note is relevant to the scope of the risk –

20 **MR TAYLOR KC:**

Yes.

**MILLER J:**

– that your client took on in advising Mr Routhan?

**MR TAYLOR KC:**

25 It's certainly relevant because it's part of the circumstances in which the duty arises, but the point is that that information, "the 115 baleage made on" and the "130 cows wintered on", that could only come from Mr Cook. It can't be

suggested that Mr Daly was required or negligent, or was required to find out that information from some other source, so what he was doing was saying here's this brochure, here's this information, what more do we need to add, and is the information in here generally correct?

5

So following that we come to the proposal document itself which is 305.2914, which is the proposal document which Mr Routhan had requested Mr Daly to prepare so that he could provide it to the bank, and although I will focus on the subject property and the information in relation to that, what you will find in that document is that it described two properties, Mr Cook's property, the subject property, and Casa Finca which was another property, certainly in the immediate vicinity which Mr Routhan was proposing to purchase at the same time because Mr Routhan, notwithstanding that he had never farmed a property in his life, was contemplating buying two properties with an expectation of a herd size of 500 to 600 cows and was planning to borrow the whole of the purchase price for both properties, 2.8 million plus I think 4.2, but I – four million — but I stand to be corrected, from a combination of the bank, Rabobank, and a friend of his, a Mr Timmins, Timpson, sorry.

**WINKELMANN CJ:**  
20 Timpson.

**MR TAYLOR KC:**  
Yes.

**KÓS J:**  
Two questions, Mr Taylor.

25 **MR TAYLOR KC:**  
Yes.

**KÓS J:**  
Firstly, presumably, that meant that Mr Routhan was somewhat vulnerable and that would've been appreciated by Mr Daly?

**MR TAYLOR KC:**

Vulnerable in what sense?

**KÓS J:**

Well he's inexperienced in the scale of the operation he was taking on board.

5 **MR TAYLOR KC:**

Mr Daly was giving him no advice about the merits of the transaction or the wisdom of borrowing vast amounts of money.

**KÓS J:**

10 No, but contextually he would've appreciated the sort of person he was dealing with.

1050

**MR TAYLOR KC:**

15 Well he was dealing with, according to Mr Routhan, a highly-experienced businessman and his wife, both of whom had grown up in the area, both of whom had a dream of coming back to the West Coast and Ms Routhan had grown up on a dairy farm and had obviously done some work on the dairy farm... sorry, she had grown up on the farm and worked on the farm when she was there but they had basically been in Wellington for many years.

**KÓS J:**

20 And the more important question I think is this, how do you characterise Mr Daly's responsibility at this point? Who was he acting for? He didn't have a contract with Mr Cook and he was asked to produce this by Mr Routhan so who was his client?

**MR TAYLOR KC:**

25 Well, I'm not sure it's an inquiry that takes us very far but the facts are that Mr Routhan requested him to prepare that document so he could present it to the bank for the purpose of the bank considering Mr Routhan's application to borrow circa I think six million or seven million.



**GLAZEBROOK J:**

There are I think matters in the conduct rules in respect of buyer's agents as there are for seller's agent but I think it's fairly clear he was actually trying to get the agency agreement from Mr Cook, isn't it, because he obviously wanted the  
5 commission?

**MR TAYLOR KC:**

Yes, and I've – one would fully expect that if he's gone to Mr Cook and Mr Cook has said: "Yes, I'm willing to sell" then Mr Daly, like most real estate agents, would go: "Right, I'm going to do my best to get this done." But I trust, your  
10 Honour, that you're not going down the fiduciary duty path or any of that because in my submission it's pretty irrelevant to the circumstances which give rise to the duties.

**KÓS J:**

Mr Routhan clearly appreciated that the remuneration was not going to come  
15 from him but from Mr Cook?

**MR TAYLOR KC:**

Yes, yes. And he was basically asking Mr Daly for his assistance to get this through with every intention of offering to buy not just this property but the Casa Finca property as well.

**20 MILLER J:**

What's distinctive about this document is it's prepared for the Family Trust. It's not prepared as agent for a vendor.

**MR TAYLOR KC:**

Yes.

**25 MILLER J:**

It seems incontrovertible, does it not, that as between Mr Daly and the Routhans, Mr Daly was taking responsibility for the accuracy of the information in it?

**MR TAYLOR KC:**

He's taking responsibility essentially not to provide – well he's not taking responsibility for the accuracy of it. He is taking responsibility to exercise reasonable care and skill when providing the information and to provide

5 reasonable – exercise reasonable care and skill to provide accurate information and there's no dispute here that he breached that duty but only in respect of the misrepresentation of the three-year average which was 98,000 kg approximately rather than 103,000 kg, a difference of about 4%.

**WINKELMANN CJ:**

10 He wasn't taking responsibility to exercise reasonable care and skill in providing accurate information, was he, because wasn't his task to go and get the information from Mr Daly?

**MR TAYLOR KC:**

Yes.

15 **WINKELMANN CJ:**

He wasn't asked by the Routhans to go and get the best information available in the marketplace about what the product is. It's go and ask Mr Daly, sorry, Mr Cook, sorry. Mr Daly is asked to go and talk to Mr Cook.

**MR TAYLOR KC:**

20 Yes.

**WINKELMANN CJ:**

So, his failure is in his engagement with Mr Cook and he's taking responsibility to get the information from Mr Cook?

**MR TAYLOR KC:**

25 Correct, but the point, just in response to Justice Miller's question, the point I was trying to make is that if, for instance, the 115 bales was wrong, that is not a result of any negligence on the part of Mr Daly because he got that information from the source, Mr Cook, and duly recorded it in the proposal document and,

interestingly, the 150 bales of baleage, there's not a similar representation in the CRT brochure, so this was something that Mr Daly added to this document.

**GLAZEBROOK J:**

Is a better way of putting it, is that it's accepted by everybody that the only  
5 expectation of him was to get information from Mr Cook and not negligently to  
– well to change it or to misrepresent it?

**MR TAYLOR KC:**

Yes.

**WINKELMANN CJ:**

10 What about the fertiliser plan?

**MR TAYLOR KC:**

Well if we – can we go to the PGG broker document itself which is at 305.2914,  
can you pull that up for me, 305.2914, and I think it's pretty accepted by the  
parties, and my learned friend can correct me if I'm wrong, that essentially most  
15 of the information that goes into this document was taken from the CRT  
brochure although, as I'll come to, there were some differences, one of which  
was the 115 baleage. Sorry, I'm just scrolling up. So if we start at 305.2915,  
this isn't an advertisement document so we don't have the one sentence  
description of the property that was in the CRT brochure and if we scroll down  
20 to 2915 we've got the description of the property, price et cetera, description of  
the fencing, milking paddocks, "Fertiliser: Soil tests available, follows  
recommended programme." So very similar wording to the CRT brochure.

**WINKELMANN CJ:**

Did it say in the CRT brochure that it followed the recommended programme?

25 **MR TAYLOR KC:**

I think the wording in that was "follows recommended plan." Then we go down:  
"Production: Average last three years 103,000 kgs from 260 cows" so the 260  
cows, as we've seen from that note, comes from Mr Cook in the discussion that

he had with Mr Cook. The 103,000 kg is wrong. It's inaccurate but it was based on Mr Daly's belief that he had been told by Mr Cook that the production for the last couple of years had been consistent. And no question here, we accept that that was a negligent misrepresentation. The correct –

**5 MILLER J:**

Would you accept that it's apparent from this document that Mr Daly is aware that the production figures are a function of the farming system?

1100

**MR TAYLOR KC:**

- 10 Mr Daly is aware of that. Yes, definitely, and that it is a key metric but, as my learned friend repeated repeatedly yesterday, on its own it doesn't tell you very much because to understand whether you can replicate it you have to know how it's being achieved.

**WINKELMANN CJ:**

- 15 It's not just an outcome of the farming system, is it? It's an outcome of the farming system on the particular spot in the particular region with the particular weather systems?

**MR TAYLOR KC:**

- And the fact that Mr Cook was regarded in the district as being an outstanding  
 20 farmer who farmed several properties in the immediate area, including a run-off property which was he called the Lake Arthur property, which I think in his evidence he said he purchased when he was 20 and it was 200 hectares in size but 50 hectares of that was in bush. So there was approximately 150 hectares which he used as a run-off property and a run-off property is essentially a  
 25 property that you use for making silage, making feed, if there's feed available, or for grazing and feeding your non-productive cows which would include yearlings and heifers and non-milk producing cows. There's no dispute that that was the case and Mr Routhan in his evidence or in cross-examination said that he had an outstanding reputation, that Mr Cook had an outstanding  
 30 reputation and, of course, that is reflected in Mr Cook's brief of evidence where,

among other things, he records the number of awards and important positions he has held in the dairy industry and the fact that he was the president for some time of the Friesian, well we're going to get the name wrong, Holstein Friesians Association.

**5 GLAZEBROOK J:**

I suppose that could be a reason that Mr Routhan then reasonably thought that it was something he was doing because there are findings that say that effectively that it was reasonable for him to think he must be doing something wrong and, if Mr Cook had such a good reputation, one can understand that  
10 maybe you think it's something to do with what you were doing.

**MR TAYLOR KC:**

Well yes is the short answer for that but, as Mr Cook says in, again in his cross-examination, he spent a lot of money and time in employing good farm managers and he had a preference for Friesian cattle which we all know, well  
15 we don't but I can tell you from the bar, are larger cattle which per calf produce much greater quantities of milk per cow. And the other point I make is that there's certainly no finding on the evidence that Mr Cook was somehow magicking these high production figures out of the ground or that the farm was not capable of producing the large quantities of product that it had historically  
20 done.

**WINKELMANN CJ:**

Well, it's been put to us by Mr Kalderimis, but these are my words that I put to him, he was saying that those years of 107, 106, 1-0-whatever, were the effect of a spiking of production, an unsustainable spiking of production and are you  
25 saying there's no evidence that that was the case?

**MR TAYLOR KC:**

No, there isn't, certainly not, no evidence of that. The figures speak for themselves. Mr Cook, for instance, says in his evidence, or in cross-examination, how important it is to have outstanding or really good farm  
30 managers and he – sorry I just need to find my notes.

**WINKELMANN CJ:**

Couldn't you say though that the evidence of the decline in production is in itself evidence of it?

**MR TAYLOR KC:**

5 No.

**WINKELMANN CJ:**

It's propensity evidence for their farm?

**MR TAYLOR KC:**

10 Propensity evidence, that's probably fair comment, your Honour. There are any number of explanations for that.

**GLAZEBROOK J:**

Were any, apart from having an outstanding farm manager, were any explanations given for the 106, 107 and for the drops?

**MR TAYLOR KC:**

15 Well, one explanation which wasn't explored, which is in the evidence but wasn't explored, was that in 2009, yes 2009, the run-off property which Mr Cook was using, the Lake Arthur property, was in the process of being converted to a dairy farm, in other words it had a cowshed that was being built on it.

**KÓS J:**

20 Given your expertise in dairying and my lack of it, could you just explain to me quickly what a run-off farm does?

**MR TAYLOR KC:**

A run-off farm –

**KÓS J:**

25 You obviously don't milk on it, you take cattle off, what during winter?

**MR TAYLOR KC:**

You take, essentially you take non-productive cattle off it. The ones –

**KÓS J:**

Right.

5 **GLAZEBROOK J:**

But also you said earlier for making silage and feed, presumably hay?

**MR TAYLOR KC:**

Yes, if there's available feed that's not needed for grazing, yes.

**KÓS J:**

10 So effectively you run the productive farm, the run-off farm in partnership?

**MR TAYLOR KC:**

Correct.

**KÓS J:**

And if he put – if you put cattle from the productive farm onto the run-off, you  
15 can grow grass and create baleage on the productive farm –

**MR TAYLOR KC:**

Yes.

**KÓS J:**

– but equally you can't do it on the run-off farm where the cows are eating the  
20 grass?

**MR TAYLOR KC:**

Yes, but more importantly, you're going to want to keep your productive cows on the home block, as it were, because that's where the cowshed is and that's where –

**GLAZEBROOK J:**

And also where the grass is likely to be better or is that not right?

**MR TAYLOR KC:**

I don't think that's right, no. I think the aim is to produce as much feed as you  
5 can and you do that on the run-off property as well as the other properties and,  
indeed, Mr Routhan in his evidence, and I'll come to it, says that on the basis  
of advice he received from Mr Bishop, and I'll be coming back to challenge  
some of this evidence, on the advice he received from Mr Bishop he worked  
out that he could produce another 9,000 kg of milk solids by using his run-off  
10 property.

1110

Not only does he say that, he says: "We thought we could do better than  
Mr Cook even notwithstanding Mr Cook's outstanding reputation as a farmer in  
15 the area and has ownership of several farms. We could do better than that  
because unlike him who was going to winter off or said he was wintering off  
approximately 130 or half the herd, we were going to winter off the whole herd."  
And this is the reasoning or explanation that Mr Routhan is putting forward for  
saying that he's been misled by this brochure into believing that he could  
20 replicate Mr Cook's farming system, even though Mr Cook was using a run-off  
area which was twice the size of Mr Routhan's run-off area.

**GLAZEBROOK J:**

How does he know what size anything was?

**MR TAYLOR KC:**

25 His evidence suggests that he did know it but whether he knew it at the time I  
don't know because there's no representation anywhere about the run-off or the  
size of it or how it was used or when it was used or what cattle were put in it.  
There's nothing of that in the brochure except the inference, which you can  
clearly draw, that if you're wintering off half your herd you're putting them  
30 somewhere else other than the subject property.



**WINKELMANN CJ:**

Well, I mean what do we make of all of this though? I mean the fact that Mr Routhan expected an increased – a plan to increase production, doesn't seem to have factored in anybody's reasoning in either of the lower Courts.

5 **MR TAYLOR KC:**

Well, it's part of the evidence that is put forward to support this story that what this brochure represents is that this was a standalone, low input, highly productive farm which the Routhans say they could have replicated. That's the representation which is now being put forward Not in the pleadings, not  
10 anywhere. It first starts appearing in the reply brief of Mr Routhan which was filed a month before the trial.

**GLAZEBROOK J:**

Well, I don't totally understand that because if the average for the three years had been 103, then one would have expected that you could just continue at  
15 103, wintering off half of the cows?

**MR TAYLOR KC:**

Well, the point, your Honour, is that the historic prediction achieved via an outstanding farmer on a property that he has in an area where he has spent his whole working life –

20 **GLAZEBROOK J:**

But it was actually false so we're –

**MR TAYLOR KC:**

It was inaccurate.

**GLAZEBROOK J:**

25 If it had been true, if he had been doing 103, then one would have expected that you could continue to do 103 unless you were doing something very different.

**MR TAYLOR KC:**

No, your Honour.

**KÓS J:**

I think your point is that he could expect to do it if he was Mr Cook?

5 **WINKELMANN CJ:**

Well, perhaps Mr Taylor could be allowed to answer the question.

**MR TAYLOR KC:**

Sorry? I'm sorry?

**WINKELMANN CJ:**

10 Go ahead and answer the question that Justice Glazebrook asked you.

**MR TAYLOR KC:**

Okay. Thank you, your Honour. The answer, the short answer to that is no. You've got a – you're buying a farm that's got an average production of 103,000 kg. All that tells you is that the farm is capable of producing that level of  
15 production. It tells you it's capable of doing that and it has done that. It doesn't tell you whether you can achieve those same levels of production and, as the Court of Appeal rightly stated, historic production is not a predictor of future production because there are a whole lot of factors that go into how that production is achieved and some of those are management, fertiliser  
20 application, checking the soil quality every year, as Mr Cook says he did, the use of run-off properties for additional grazing or wintering off et cetera, and as Mr Cook says when he was cross-examined: "I put a lot of effort into getting a good manager because a good manager can make the difference between an average farm and an outstanding farm."

25

But the point I was coming to, no the point I was making, is that in 2009, September 2009, Mr Cook was in the process of converting the run-off property, the 150 hectares of run-off, into a dairy farm and there was a shed being built. And could I take your Honours please to document 301.0325 and this is a

valuation report that was carried out in September 2009 and the valuation was taken out for matrimonial purposes and that's at page 301.0331 and they use an effective date for the valuation of the 15<sup>th</sup> of August but the valuation followed an inspection of the farm on the 24<sup>th</sup> of August 2009.

5 **WINKELMANN CJ:**

Are these all of his farms?

**MR TAYLOR KC:**

Yes. And what we have at the top at 301.0332 is we have the various descriptions. We've got the "#1 and #2" dairy farms and for the purposes of this exercise I can tell you that number 1 is the subject property and then you'll see down there, there's his other farms including Lake Arthur: "This farm unit was being converted as at our inspection date. Our current market value assessment is based on the state of the property as at our inspection date. In order to assess the current market value we have deducted from the post development market value the remaining costs to complete the dairy conversion development including an allowance for the revenue forgone...".

**WINKELMANN CJ:**

I mean I don't know how much time we should spend on this Mr Taylor because it seems highly speculative.

20 **MR TAYLOR KC:**

Well yes and no because when Mr Cook was cross-examined it was put to him in cross-examination... I might just come back to it.

1120

**GLAZEBROOK J:**

25 Can I just check I've got the reason why we're going to this right? One of the reasons for the – well the reason he put forward in cross-examination for the high 106, 107 was an outstanding farm manager?

**MR TAYLOR KC:**

Yes.

**GLAZEBROOK J:**

And you're now saying that one of the possible explanations for the drop, if I'm  
5 understanding you correctly, was the conversion of the run-off property and  
therefore presumably the inability to use it in the same way that he had been  
using it before, is that...

**MR TAYLOR KC:**

That's, that's correct, yes.

10 **GLAZEBROOK J:**

And hopefully we're being taken to somewhere where he actually says that  
rather than trying to infer it ourselves?

**MR TAYLOR KC:**

Yes, yes.

15 **WINKELMANN CJ:**

Can I just ask though, isn't it implicit in the representations and the prospectus  
that this – that only half of the cows are being wintered off, that in terms of its  
extra feed, it's coming from the bales on site, but there is no suggestion of extra  
feed coming from other properties?

20 **MR TAYLOR KC:**

Well that's – that seems to be what is being suggested by my learned friends  
but in my submission that's not implicit at all. Wintering off, how many of the  
herd you winter off is a key metric. Saying: "We winter off approximately half of  
the herd or 130" doesn't tell you what animals are being wintered off. It doesn't  
25 tell you anything about what alternative sources of feed are being used to  
produce the production levels that are being achieved.

**WINKELMANN CJ:**

Can we just look at that prospectus because that is what's being said, that there is a representation, although not one that's relied upon as it wasn't alleged to be a misrepresentation and it is information coming from Mr Cook, which is the  
 5 context which is that this is a low input place that has – that you just rely on half the cows being wintered off and otherwise its own bales of hay and a pretty regulation –

**MR TAYLOR KC:**

No, the statement is 115 bales made on, made on the property. It's not saying –

10 **WINKELMANN CJ:**

Well what do supplements mean?

**MR TAYLOR KC:**

– we don't use any other source of feed, we don't use supplements, we don't – it's not saying anything about that and in my submission it's not fair to  
 15 imply into a brief document like this some sort of assurance that Mr Cook, who's been farming in the area and has several properties around it, isn't using any of his other properties, including his run-off properties, for grazing and producing feed and doing all the things that any sensible farmer with half a brain would do if they've got available land to do it.

20 **WINKELMANN CJ:**

Well I'm sure that Mr Kalderimis is going to say to us in reply that that is exactly what is stated there because why do you include the heading "Supplements" if you're not actually asking for information about what other resources are needed to support this farm to produce that?

25 **MR TAYLOR KC:**

Well because –

**WINKELMANN CJ:**

If you just look at the words Mr Taylor, if you've got it up in front of you?

**MR TAYLOR KC:**

Yes.

**WINKELMANN CJ:**

Or you probably know it by heart?

5 **MR TAYLOR KC:**

No, not really but yes it's a general heading of "Supplements." What supplements do you use? Approximately half a herd wintered off and 115 baleage made on. That's all it's saying. It can't be suggested that that is a representation that we don't use any other form of supplement. Whether it be –

10 **MILLER J:**

Can I interrupt you?

**MR TAYLOR KC:**

Yes.

**MILLER J:**

15 It seems to me that you're defending a case that is not being made against you. You're advancing a case that this is about a negligent representation concerning the farming system. It is not the case that was pleaded and it's not, as I understand it, the case that is made against you now.

**MR TAYLOR KC:**

20 Well, this is the –

**MILLER J:**

Can I just finish my proposition?

**MR TAYLOR KC:**

Yes, sorry, your Honour, yes.

**MILLER J:**

It is that a representation was made that was incorrect about the historic production. Some losses flowed from that in fact. We are now considering what was the scope of the risk that Mr Daly understood he was taking on because that is being used to limit those losses. That's quite a different thing from saying it was a positive misrepresentation about the farming system. The point you seem to be coming to that is relevant to this question is was it reasonable to try to replicate Mr Cook's production. That makes sense but that's a different point I think.

10 **MR TAYLOR KC:**

Well it's probably the first point you make. If you read my learned friend's submissions in this Court, what he is alleging repeatedly is that PGG misrepresented that this was a standalone, low input, orthodox farming system which they could replicate. Now that allegation is not pleaded anywhere in the statement of claim. The case that was put in the statement of claim was you misrepresented the average production figures. You got it wrong. You misrepresented that it was 103,000 and it wasn't and not only that you failed to disclose to us that you hadn't confirmed the correctness of the figures with Mr Cook. That was the pleaded claim then, right through the hearing and now but –

**WINKELMANN CJ:**

I should say I do understand Mr Kalderimis was to be saying, as you say. So in fact he says the misrepresentations as to how it was found, although they're not pleaded but they're false statements or they're inaccurate information, although not pleaded, are part of the necessary context for how –

**MR TAYLOR KC:**

That's what he's –

**WINKELMANN CJ:**

– for how the loss comes to be part of the scope of the duty.

**MR TAYLOR KC:**

Yes. Well, that's what he's saying your Honour but the point I am making is it's a wholly different case to what he was initially running as pleaded and, as I've already indicated, the first signal that we get of this line is in the reply brief of evidence of Mr Routhan filed one month before the trial. But in this Court it is repeatedly the negligent misrepresentation which PGG has said to have made in this brochure.

**GLAZEBROOK J:**

There is a finding in the High Court that we were taken to in respect of this being relevant context and a finding about the pleading.

**MR TAYLOR KC:**

Sure.

**GLAZEBROOK J:**

I'm just checking whether you are saying that it's wrong, the finding?

15 **MR TAYLOR KC:**

As a broad –

**GLAZEBROOK J:**

I mean it's probably more than a finding.

**MR TAYLOR KC:**

20 It's a broad statement of principle. It comes down to cases like *Red Eagle* and any number of cases in that nature that the meaning of a statement has to be taken from its context. What I am saying is you don't need, in order to figure out what the production data is telling you, to work out its meaning from its context and –

25 **GLAZEBROOK J:**

I'm sorry, you perhaps need to explain. I mean the Judge, the High Court Judge thought you did need to know the context.



**MR TAYLOR KC:**

Well, we all know the context because the context is this proposal document. That is the sole document that is relied upon as giving rise to this wide misrepresentation that Mr Cook was selling a standalone, low input, orthodox  
5 farming property. Low input, standalone, orthodox farm. That is the representation and because of that representation they now say in this Court, because of that representation, we believe that we could replicate it.

**WINKELMANN CJ:**

And improve it.

10 **MR TAYLOR KC:**

And improve it.

**WINKELMANN CJ:**

But they don't – that's not for their claim but it's definitely not part of their claim. Mr Kalderimis was shaking his head at me.

15 **MR TAYLOR KC:**

Sorry?

**WINKELMANN CJ:**

It's not part of their claim the improvement. Right, well we should take the morning adjournment but I'm asking you to check your time Mr Taylor because  
20 how are we going to go for the rest of this hearing, have you thought about that?

**MR TAYLOR KC:**

Well, we're going – well hopefully, well obviously you have to finish by 4 o'clock but I really do think it's important to get a grip of the facts and the way in which this case has morphed in the process of the years that it's taken to get to this  
25 level.

**WINKELMANN CJ:**

Yes. I won't say a terrible – I won't make a terrible pun which just popped in my head but you will have to cut your garment according to your cloth in that regard so...

5 **MR TAYLOR KC:**

Yes, well what I'm aiming to do is finish the facts hopefully by 1 o'clock. I'll probably go through it a bit quicker than I'd anticipated but – and then I'm going to move onto a discussion of the SAAMCO principle itself and what I was hoping to do was refer to and discuss some of the academic comment on the SAAMCO principle and then I will come to how in my submission the SAAMCO principle should be applied.

**WINKELMANN CJ:**

And when do you expect to finish?

**GLAZEBROOK J:**

15 And the cross-appeal?

**MR TAYLOR KC:**

Well then I have to deal with the cross-appeal.

**WINKELMANN CJ:**

Yes.

20 **GLAZEBROOK J:**

And there's some reasonably complicated valuation issues there that I'm sure we'd need assistance on.

**WINKELMANN CJ:**

Perhaps you'd like to sketch yourself out a timetable and then we need a reply from Mr Kalderimis.

**MR TAYLOR KC:**

You need a reply from Mr Kalderimis?

**WINKELMANN CJ:**

Well I mean he has a right to reply.

**MR TAYLOR KC:**

He has got a right to, right okay. Well –

5 **WINKELMANN CJ:**

Well, you don't think he does Mr Taylor?

**MR TAYLOR KC:**

Well, I wouldn't have thought so but I'm not used to this Court, your Honour.

**KÓS J:**

10 On the appeal he does.

**MR TAYLOR KC:**

Right, on the appeal. Well, I'll aim to –

**WINKELMANN CJ:**

But usually it's only a brief reply of about 10 minutes so.

15 **MR TAYLOR KC:**

Yes, well I'll aim to finish everything by quarter to four and I'll hopefully I'll aim to finish earlier if I can.

**WINKELMANN CJ:**

20 We could come back at two if that would assist but we're not breaking for lunch now on the upside.

**MR TAYLOR KC:**

That would assist, your Honour. I think that would assist.

**WINKELMANN CJ:**

Right, we'll take the morning adjournment.

**COURT ADJOURNS: 11.32 AM**

**COURT RESUMES: 11.51 AM**

**MR TAYLOR KC:**

I'll just briefly finish off where I was in terms of this run-off issue. Could I take  
5 your Honours please to 204.1120 of the transcript. This is the  
cross-examination of Mr Cook at page 500 of the transcript, and if we go down  
to line 14 we have the question: "Lake Arthur which you have described as your  
run-off. Now did Lake Arthur, does that comprise your run-off and other land or  
is Lake Arthur the 150 hectares in total?" And he says: "The total area is 200  
10 and something but a lot of it was bush... And it was run-off up until – I'm not  
sure what year we got it. It was the third cow shed we built." So what he's  
referring to there is the cow shed, which in the report we saw that in  
September 2009 was in the process of being constructed.

15 Then if we go to, well your Honours should obviously read the rest of the  
transcript in this part, but just if we go to the bottom of page 501 and just as a  
matter of interest really, we get there, at the bottom of that page: "You own  
respectively 267,000 and 65,000 Westland Milk...shares," and it's that 267,000  
that he would've taken the 103,000 from.

20

Yes, Mr Kalderimis on the following page says: "And that's *[sic]*...267,000 is  
what I'd call an undifferentiated parcel." But carrying on at page –

**GLAZEBROOK J:**

Presumably in the future, your shares would go up or down depending upon  
25 what the, if you now are only one property, your shares would go up and down  
depending upon the –

**MR TAYLOR KC:**

I think if you cease producing that would be right. I don't know to be honest,  
your Honour.

**GLAZEBROOK J:**

I thought they were tied to the production, but –

**MR TAYLOR KC:**

I think that's right, and I would've thought that if you stopped producing, but –

5 **GLAZEBROOK J:**

103 and we're only producing 80, you'd go down from 103 to 80? I don't know whether it's as simple as that.

**MR TAYLOR KC:**

I don't know either, your Honour, I'm sorry.

10 **WINKELMANN CJ:**

That wasn't explored?

**MR TAYLOR KC:**

No.

**WINKELMANN CJ:**

15 I think – yes, okay.

**GLAZEBROOK J:**

Okay, well we won't take any judicial notice of it.

**MR TAYLOR KC:**

Yes. Could I take your Honours then to page 502 of the transcript, which is  
20 204.1122. I'm sorry, your Honours, I made a wrong reference. A question is  
put to Mr Cook in which my learned friend is referring to another valuation report  
that was done at the same time, this one by Mr Hines, and Mr Hines – it's  
probably, yes, if we go to page 204.1122 and you'll see there that my learned  
friend is cross-examining Mr Cook on the basis of statements made in another  
25 valuation that was done in 2009 by Mr Hines and that's document 302.0633,  
you'll see that's mentioned at about line 10.

What Mr Hines did in that valuation, and I won't take your Honours to it but it's there, the previous valuation that we looked at, which was the Property Advisory one, that was based on average efficient production for the farm of 87,000 kg. So what that valuer did was rather than basing his valuation on the actual  
5 production figures, which he knew, he based it on an average production figure. One of the reasons he did that was that at that time there wasn't a lot of market evidence of farms of that kind because back in those days it was just post the GFC and things were pretty uncertain about investments generally, and particularly large investments in things like dairy farms.

10

So that's how he did his valuation, but Mr Hines, when he did his valuation, he records that for the purposes of the valuation of this property, and we're talking here about the run-off property, we're not talking about the subject farm, instead of using an average efficient figure, he notes in that valuation that the average  
15 production was 103,000 but he also notes that the farm is in the process of being converted to dairy and in that valuation he values the cow shed as if it was complete, but to allow for the fact –

**WINKELMANN CJ:**

So what are you talking about, is this for the run-off?

20 **MR TAYLOR KC:**

Sorry?

**WINKELMANN CJ:**

Which farm are you talking about Mr Hines valuing at this point? I lost the thread, I'm sorry.

25 **MR TAYLOR KC:**

I'm sorry.

**WINKELMANN CJ:**

No, it's my fault.

**MR TAYLOR KC:**

He's valuing all of them –

**WINKELMANN CJ:**

Okay, that's –

5 **MR TAYLOR KC:**

– but when he's valuing block 1, or the subject farm, he's talking about the run-off property, Lake Arthur, and he says he notes that that is under conversion and when he values that, he values it as if the cow shed was complete, although obviously it wasn't at that time. But that's why he used the figure of 95,000 kilos  
10 of milk solids for 240 cows as a self-contained unit. That's what Mr Hines based his valuation on of the subject farm, and that's put to Mr Cook in the cross-examination and that statement is referred to and Mr Kalderimis asked him "does that seem fair" and he says "yeah well if you took the Lake Arthur Pass away it would be, yes". So what he's saying is, you're producing 103,000  
15 kg, but you're going to convert this run-off. Is 95,000 a reduction in production from the subject farm fair and Mr Cook's immediate answer is "yeah, if you take the run-off away".

1200

**KÓS J:**

20 So where do you take the 130 cows that you're wintering off at Lake Arthur?

**MR TAYLOR KC:**

Well...

**KÓS J:**

Somewhere else?

25 **MR TAYLOR KC:**

Somewhere else. Exactly.

**KÓS J:**

So why does anything change?

**MR TAYLOR KC:**

You can pay for grazing land.

5 **KÓS J:**

Yes.

**MR TAYLOR KC:**

Or you can do anything. In September 2010 who knows.

**KÓS J:**

10 Well these guys had their own run-off.

**MR TAYLOR KC:**

Sorry the Cooks?

**KÓS J:**

The Routhans.

15 **MR TAYLOR KC:**

But we're talking here about the Cook property.

**KÓS J:**

Sure.

**MR TAYLOR KC:**

20 Yes.

**KÓS J:**

But if you're working out how this applies to the Routhans, if you, if the Lake Arthur option wasn't there, you need another Lake Arthur, otherwise you've got to winter your cows off on the same property, and then –



**MR TAYLOR KC:**

Or another adjacent property.

**KÓS J:**

Yes, exactly.

5 **MR TAYLOR KC:**

Of which he owned several. He's making no representation in the brochure about where he's wintering off, or what he's doing, and in some circumstances they'll graze property on other farmers and pay them for it.

**KÓS J:**

10 Yes, but what you realise looking at that is, if you didn't have a run-off property, you could not achieve the 103, because you would be eating up your baleage.

**MR TAYLOR KC:**

Correct, yes, that's right, and that – all I'm suggesting is that that is one a possible explanation for the downturn in production from the farm in that 2009  
15 year. There's no finding of fact to that effect, but the point I'm making is there's no question that those average production figures were being achieved from this property, and there are any number of explanations for why there was a drop in production in that 2009/2010 season including, for instance, whether, including perhaps less use of the run-off, any number of reasons.

20 **WINKELMANN CJ:**

Don't you have a problem though that there is a finding that they were farming at reasonably and in fact achieving average – what do you say about that. I mean maybe it's not...

**MR TAYLOR KC:**

25 Well, I don't dispute that entirely. If we look at the figures for that, which, are they recorded in the judgment. Yes. if we go to the Court of Appeal judgment at paragraph 95. So this table is a record of the production from the property, and we see there 2009/2010, 90,000, a drop of 7,000 approximately kilos.

Then 2010/2011, bear in mind that 2010 and 2011, half the season it was owned by Mr Cook and was being farmed by Mr Lord, and the second half of the season, to 30 June 2011, it was being farmed by Mr Routhan, but Mr Lord, who was the manager at that time for Mr Cook, and who was agreed to be transferred to Mr Routhan, lasted about one month. Sorry, I'm corrected, 5 eight weeks from the transfer of the purchase on the 20<sup>th</sup> of December for eight weeks and he was gone, and if you read Mr Lord's brief it was because essentially he and Mr Routhan did not –

**MR KALDERIMIS:**

10 Sorry, I have to object to that. Mr Lord didn't come to give evidence so he has no brief in this case.

**WINKELMANN CJ:**

All right, okay.

**MR TAYLOR KC:**

15 I'm sorry, I thought he had.

**MR KALDERIMIS:**

No.

**MR TAYLOR KC:**

The evidence is there somewhere and I don't think my learned friend will dispute 20 it that Mr Routhan –

**WINKELMANN CJ:**

We'll just check with Mr Kalderimis if he does dispute, just check with...

**MR TAYLOR KC:**

Well...

25 **WINKELMANN CJ:**

Mr Kalderimis, do you just want to check with Mr Taylor what he's about to say?

**MR TAYLOR KC:**

We're agreed that Mr Lord left within eight to 12 weeks. There's some doubt about whether it was eight weeks or March that he left but he left because they didn't get on and we don't need to explore any of the reasons why they didn't

5 get on. But bearing in mind the significance and importance of experienced farm management, that removal of Mr or that ceasing of an experienced farm manager left the Routhans, who had no experience of running the farm, to run it themselves and they engaged the assistance of a Mr Bradley, who the Judge in her judgment wrongly describes as the farm manager. Mr Bradley was not

10 the farm manager. He was a consultant that used to attend the property approximately one day a week and who Mr Routhan relied upon considerably during the course of farming the property including in respect of decisions such as the quality of the cows they had which led to the cow arbitration, the fencing that needed replacing, the state of the pasture.

15 **WINKELMANN CJ:**

Well, didn't they get expert advice on the state of the pasture?

**MR TAYLOR KC:**

Yes, they did but initially it was Mr Bradley who said: "This is not looking good. We need to get some soil tests done. We need to get some expert advice."

20 Not suggesting that there was anything wrong with that at all but the point I'm making is there are any number of factors which go into explaining why they didn't –

**GLAZEBROOK J:**

Well it's hardly that in the eight weeks – in the couple of weeks after he left, the

25 pasture suddenly went downhill and it would have stayed fine if Mr Lord had been there.

**MR TAYLOR KC:**

It's not –

**GLAZEBROOK J:**

It's not an inference we're going to be drawing, is it?

**MR TAYLOR KC:**

Well, Mr Routhan in his evidence says that the pasture was in a poor state when  
5 he took it over.

**MILLER J:**

Can I take you back to your point about the run-off because it didn't seem to  
me to accord with the Judge's findings and I've now found that. She says at  
paragraph 41 that: "In contrast to the existing practice of wintering half the herd  
10 off the farm the Routhans were going to winter off all of it."

**MR TAYLOR KC:**

Correct, that's correct.

**MILLER J:**

Yes. So –

15 **MR TAYLOR KC:**

But that was part of their aspiration that they could do better because they read  
this and they said: "Well look Cook only winters off half the herd, we're going to  
winter off our whole herd." But if we were facing a claim –  
1210

20 **MILLER J:**

So how does it help us that Mr Cook had a larger run-off block? You seem to  
be suggesting that the larger run-off block allowed him to winter off more  
animals or perhaps produce more supplementary feed.

**MR TAYLOR KC:**

25 Well it clearly would've. It clearly – because it was 150 hectares, whereas the  
Routhans' block was 73 hectares, so –

**WINKELMANN CJ:**

You're saying the name incorrectly, Mr Taylor, and now I can't say it correctly because you put the –

**MR TAYLOR KC:**

5 Oh, Routhan, yes. I apologise, Mr Routhan.

**WINKELMANN CJ:**

It's a good idea to try and say the name correctly, thanks.

**MR TAYLOR KC:**

Yes.

10 **KÓS J:**

Where does any of this take us though, Mr Taylor, because what is incontrovertible is the finding which we have a right of leave to challenge, which is that but for the 103 misrepresentation, they would not have owned this farm at all.

15 **MR TAYLOR KC:**

Yes.

**KÓS J:**

So what happened afterwards is kind of interesting but not really.

**MR TAYLOR KC:**

20 Well it is, that's absolutely correct. I totally agree. All I'm trying to say is it would be wrong to reach a conclusion that the farm purchased wasn't capable of producing 103,000 kilograms, or whatever, and –

**WINKELMANN CJ:**

I mean you're running out of time, so just, I mean not imminently running out of  
25 time, but there's quite a lot yet for you to cover.

**MR TAYLOR KC:**

Yes.

**WINKELMANN CJ:**

But just to cut to the chase, when you look at that chart in paragraph 5, would  
 5 it be a more – I mean are you really coming in your own way to the proposition  
 that when you look at those figures you just cannot really say that there isn't a  
 lot in operation going on which can explain the variation, 85 to 64 to 79 –

**MR TAYLOR KC:**

Well there are –

10 **WINKELMANN CJ:**

– and that the scope of risk he was taking on was the accuracy of those  
 production figures with an uncertain farming system and he wasn't warranting  
 that these particular people would be able to farm the farm successfully.

**MR TAYLOR KC:**

15 Correct. That's what I'm saying is all this is a misrepresentation of the average  
 production for the previous three years, that's all it is. It's a misrepresentation  
 because it was inaccurate, but as Mr Kalderimis indicated yesterday, historic  
 production is only one of a number of factors that a purchaser will take into  
 account and –

20 **GLAZEBROOK J:**

Well the – sorry.

**MR TAYLOR KC:**

– historic production is no guarantee of future production, particularly when you  
 don't know the full details of the farming system of the property you're  
 25 purchasing from and you are an inexperienced farmer who decided and chose  
 to use a different type of cow to what was produced, what Mr Cook had been  
 using, and I'll come to that, and who chose to spend money on vast – well,

considerable sums of money on capital improvements and on re-pasturing, et cetera.

Those are all operational decisions and investment decisions that a farmer has to make in the course of farming a property and which PGG had nothing whatever to do with. They were not giving advice about those decisions, changing the cows, increasing the number of cows on the property to 300. They weren't giving advice on that at all. Whatever advice was given in that regard was given by people like Mr Bishop who was the farming consultant, who was advising Mr Routhan up to the time of the agreement for sale and purchase, and subsequently to that, Mr Bradley, the farm consultant who was there one day a week, and various experts such as Ravensdown and PGG, and could I just say that apparently the PGG company that was giving advice about the seeds is a different company presumably in the same group. But – and I'm not making a single complaint that the Routhans when they went to experts for advice, engaged Mr Bradley. They were doing what you would expect them to do, and it was perfectly reasonable for them to do that. But to suggest that they did all of that in reliance on the misrepresentation of the three-year average figures, is a bridge way too far.

20 **KÓS J:**

Well, here we hit the but for issue. But for the 103 misrepresentation they wouldn't have been in this farm.

**MR TAYLOR KC:**

Correct.

25 **KÓS J:**

So they then had to fix the problem they found themselves in where the farm was not immediately as productive as the represented figures suggested.

**MR TAYLOR KC:**

For all sorts of reasons, but really – then we come to the *SAAMCO* principle.

**GLAZEBROOK J:**

I mean you say “all sorts of reasons” but normally what would happen is that there would be evidence there’d been a market shift or something that was extraneous to the misrepresentation. So perhaps you can say why there were  
5 all sorts of reasons. I’ve got inexperienced farmer, change manager. Was there anything else? And possibly something to do with the run-off, but that’s explaining why the figures had gone down in the first place.

**MR TAYLOR KC:**

The simple answer –

10 **GLAZEBROOK J:**

There was just – I can understand – I know the submission you’re making about the actual expenditure. It just seems to me that that’s slightly different from the submission there were all sorts of reasons and historical doesn’t matter. There’s a gap in between is what I’m suggesting to you.

15 **MR TAYLOR KC:**

Yes. If you say, if they hadn’t purchased the farm, they wouldn’t have suffered all these losses.

**GLAZEBROOK J:**

Well I’m really saying if they, if the representation was true, what would the  
20 ongoing position have been.

**MR TAYLOR KC:**

If the representation is true, if the representation was the historical production achieved by this farmer running this farm was 103,000 kgs, it would have made no difference to the issues and the problems and the lack of experience and  
25 the lack of management expertise, all of those things that occurred after the purchase, and this is –



**GLAZEBROOK J:**

Sorry, I'm just wondering where the evidence is that the lack of experience caused a fall-off in production?

**MR TAYLOR KC:**

5 Well, it's, the evidence is Mr Cook when he's cross-examined and he says "I spent a lot of time getting good farm managements" then Mr Cook when he's speaking with Mr Daly says "well one year I had an outstanding manager" et cetera et cetera. Mr Cook in his cross-examination he says the difference between an average farm and an outstanding farm is a good manager, or an  
10 outstanding manager.

**WINKELMANN CJ:**

Can I just ask you Mr Taylor, because I think you put your – you said you're not saying that this taking of expert evidence was, advice was wrong, but just that they were not responsible for them taking that advice. Well I don't think that's  
15 what you're saying. I think you're saying is – you're not saying that they acted unreasonably et cetera, but what you're saying is that the outcome of the farming decisions taken, responsible though they were, were not within the scope of the risk that had been taken on, and that you can see, and that when you look at the chart at page 5 you can see a great deal of variability, which  
20 cannot all be attributable...

1220

**MR TAYLOR KC:**

None of it can be attributable to the inaccurate representation as to historic production. For instance, when I think the evidence was that the periods when  
25 it went down to 69 or 64, you will see they did the regressing I think in 2013. They got a good level of increased production in that year, but I stand to be corrected, my learned friend will I'm sure, but the 2014/15 year they were over-stocked, they didn't have enough feed, they reduced their milking to once a day. There were a number of reasons why that year – I'm quite happy to be  
30 corrected, but there is evidence that that is an explanation of why it goes down significantly in that year and then starts creeping up again.

**MILLER J:**

Can I ask you to – I just would like to pin you down on something, whether it was reasonable of them to try to replicate the 103,000?

**MR TAYLOR KC:**

- 5 Absolutely not. Well, it's not – they can have whatever aspirations they like but we were not advising them on whether they could, or PGG was not advising them, on whether they could replicate it. That's an assumption that they say they –

**MILLER J:**

- 10 That's a different – I'm asking you whether it is objectively reasonable of them to attempt to replicate that figure because to some extent your argument seems to suggest it was available to them and so not unreasonable to do it. In other respects you seem to be saying they ought never have made that attempt and I just want to be clear what is your position.

15 **MR TAYLOR KC:**

- Well, it's a good question, your Honour. It's not unreasonable to aspire to produce as much as you can but there will probably come a time when you might work out that for one reason or another you're not able to, but I'm not critical of them taking steps when they, for instance, discover that the grass isn't  
20 up to scratch and needs to be repastured. I'm not critical of them for doing that. I'm far more critical of them for spending \$100,000 on a 600-cow shed, landing or feeding area for 600 cows when they had never had more than 300 cows.

**WINKELMANN CJ:**

- Is it implicit in the arguments that Mr Kalderimis put forward yesterday, and I'm  
25 saying this so he can hear this, that 103,000 cannot be obtained from this farm using the best farming system to support it?

**MR TAYLOR KC:**

That is his submission but that has certainly not been proved because we know that the farm four years earlier was producing 107,000 kilograms of product and

if we go to those two valuation reports that I've referred to, the two 2009 ones, both of them comment on the well-above-average production from this farm due to good soil quality and skilled farm management. Both –

**GLAZEBROOK J:**

5 And what, sorry? Sorry, I didn't just catch that last bit.

**MR TAYLOR KC:**

Skilled farm management. Both of those reports make the same comment about the standard of the management of the property as an explanation for why it was achieving above average for the area.

10

I'm not here to criticise the Routhans for making decisions which they believed were necessary on good advice to improve the productivity capacity of the property. What I am critical of is the suggestion that PGG somehow represented to them that they could do it.

15 **KÓS J:**

Well, I'm not sure how that argument really can run because they were not Mr – who was the ex-farm manager, Mr Cudmore? They were not –

**MR TAYLOR KC:**

Mr Cudmore, yes.

20 **KÓS J:**

They were not Cudmore's?

**MR TAYLOR KC:**

They weren't. They were anything but Cudmore's and Mr Cook in his notes of evidence says – he makes the point it would take – no, it's not Mr – no, I think  
25 it might – I'll have to come back to it but someone in the evidence says that it'll take at least five years to get an inexperienced manager up to a standard of what an average efficient farmer may be, you know, that's – it's not a small matter that these two had no experience whatsoever.

**KÓS J:**

So let's tick through this in conventional terms. On a but for basis, but for misrepresentation they wouldn't have had this farm, okay?

**MR TAYLOR KC:**

5 Correct.

**KÓS J:**

So, they've got the farm –

**MR TAYLOR KC:**

Yes.

10 **KÓS J:**

– the first loss they have is probably a capital one, the thing is not worth as much as it might be if the representation was true.

**MR TAYLOR KC:**

Correct, and no problem –

15 **KÓS J:**

You say the loss is 50,000, they say it's much more, well we'll have to work out what the answer is.

**MR TAYLOR KC:**

And I have no problem with that.

20 **KÓS J:**

The second thing it seems to me is what you are really effectively arguing is that they failed to properly mitigate their loss, stuck in the situation with this less productive farm, the first thing they didn't do was file it in the same way that Mr Cudmore did where he could have achieved 103,000.

25 **MR TAYLOR KC:**

No, I'm not –

**KÓS J:**

I think you are criticising their farming?

**MR TAYLOR KC:**

No, I'm not. I'm not. I'm –

5 **WINKELMANN CJ:**

Are you putting in terms of failure – I thought you're not putting in terms of failure to mitigate, you're saying whatever farming they did was outside the scope –

**MR TAYLOR KC:**

Correct.

10 **WINKELMANN CJ:**

– of duty.

**MR TAYLOR KC:**

The operational and investment decisions which they made once they had purchased the farm are outside the scope of the duty that Mr Daly took on because his only duty was to prepare a document which provided information for provision to the bank to be taken into the, into their account by the bank when making its decision whether to loan the money. That was the sole purpose for which that document was requested by Mr Routhan. If he hadn't requested it, it almost certainly would never have been produced.

20 **WINKELMANN CJ:**

Would your answer be different if there was evidence that 103,000 was never achievable?

**MR TAYLOR KC:**

Sorry, if?

25 **WINKELMANN CJ:**

If there was evidence that 103,000 average was not achievable, using whatever farming system you had, so assuming Mr Cross' farming method continued...

**MR TAYLOR KC:**

Mr Cudmore's...

**WINKELMANN CJ:**

Cross, sorry Cook. Cook, yes, I'm messing up names, Cook and Cudmore.

5 I don't know who Mr Cross is.

**MR TAYLOR KC:**

I think that's – what I'd say to that, your Honour, is that it's really irrelevant because –

**WINKELMANN CJ:**

10 Yes, Mr Kalderimis effectively says, look, it was represented that 103,000 average was achievable and so we – so our – and that was necessary to the success of the business model” and you say, necessary to discover the business model outside scope, and we therefore proceeded to try and invest. We invested money to achieve this output when in fact we never could because  
15 this was an unusual farming – this is what Mr Kalderimis says – this was an unusual farming methodology that had been applied and we could never achieve it.

**MR TAYLOR KC:**

First answer no such representation. Should I – Mr Daly was never asked to  
20 advise on the merits of the purchase. He was never asked to advise and would not even have been qualified to advise on the farming system that ought to be adopted to achieve best production. He was not asked to and he never would have given any advice that Mr Routhan and his wife would be able to reach the same standards of management and skill of this property as Mr Cook who had  
25 been farming in the district for what 60 years had done. Absolutely no representation to that effect.

1230

If that had been the representation, then you would be talking about the scope  
30 of the duty because, and it would be closer, in fact it would be well over the top

of the advisor end of the scale where if you are asked to advise on all the risks of the transaction going forward and you negligently advise on that, then you can be liable for the consequences that flow from those risks materialising. That's fundamentally the *SAAMCO* principle, but the other end the cap, 5 *SAAMCO* principle, is that if you are simply providing information and you are not giving advice as to the merits of the transaction or whether to enter into that transaction, you are only responsible for the consequences of that advice being wrong. You are not responsible for all of the losses that flow following entry into the transaction, and that is in a nutshell the *SAAMCO* principle.

10 **GLAZEBROOK J:**

Can I just check with you, because in normal circumstances if Mr Daly had done this properly, he would've gone to, he would effectively have been making this misrepresentation on behalf of Mr Cook because it would, he would have been operating on information from Mr Cook?

15 **MR TAYLOR KC:**

Yes.

**GLAZEBROOK J:**

So are you saying that Mr Cook, having made that misrepresentation of 103,000, that the losses would only be the difference in purchase price, 20 because obviously when you make that misrepresentation you are assuming that someone will purchase it and that they will continue to farm it, so a bit like the, is it *Cemp*?

**MR TAYLOR KC:**

If all – yes.

25 **GLAZEBROOK J:**

That particular case, you don't just assume they'll buy it and sell it the next day –

**MR TAYLOR KC:**

No.

**GLAZEBROOK J:**

– and realise their loss, you assume they'll keep farming it.

**MR TAYLOR KC:**

Yes.

5 **GLAZEBROOK J:**

And I'm not sure that you can split off Mr Daly from Mr Cook that the position of Mr Cook, and I would've thought you'd have to say that the *SAAMCO* principle also would operate to stop damages for Mr Cook at the – or do you say there's a difference if Mr Daly had been just Mr Cook's mouthpiece?

10 **MR TAYLOR KC:**

No, I don't think it makes any difference whether it's Mr Cook or Mr Daly or PGG. It doesn't make any difference who it is that's making that misrepresentation. The damage is if the representation was made only for the purpose of providing information to Mr Routhan for the purpose of him taking it to the bank and getting finance for the purposes of the purchase and including in that, if you like, for the purpose of Mr Routhan being able to proceed with the purchase.

**GLAZEBROOK J:**

Well, and also thinking it's a good purchase surely?

20 **MR TAYLOR KC:**

Sorry?

**GLAZEBROOK J:**

Well, if you're making a representation and especially if you're making a misrepresentation, negligent or otherwise, you would expect someone to rely on it, not only just to get finance, but to think it's a good purchase?

25



**MR TAYLOR KC:**

Well, it'll be one of the factors that would be going into deciding whether to purchase but the *SAAMCO*, the principle, and it's – I'll be making submissions when we come to it – is fundamentally sound and fair as between the parties

5 because if you stand back and look at it, Mr Daly goes and sees Mr Cook, pulls this information together, negligently fails to confirm the accuracy of the historic production from the firm, from the farm, supplies it to Mr Routhan and basically that's the last he sees of it. That's he's done his bit, he's provided it for the purpose for which it was intended to be provided, and he can no doubt, it's

10 obvious in a sense, that somebody may, the bank or anybody, Mr Routhan, may take that into account in deciding one, whether to lend the money and two, whether to purchase the farm. That is the end of his liability. That is the limit of the scope of his duty, applying the *SAAMCO* principle, even as interpreted or applied by the United Kingdom Supreme Court in the *Meadows v Khan* and

15 *Manchester Building* cases, and while I'm on that, I will have to come back to the fact that I'm on a roll at the moment.

The *SAAMCO* principle, I was going to say my learned friend Mr Kós Kos, but actually I meant Justice Kós, posed the question to my learned friend yesterday

20 about the cloud of proximity hanging over all of these issues, and that really reminded me that if you look at Lord Hoffmann's judgment in *SAAMCO*, and I think again referred to by the United Kingdom Supreme Court in the *Manchester Building* cases, they really ground the principle about the scope of the duty and how it limits the liability of an information provider or professional

25 advisor, depending on what we're talking about, they ground it in the *Caparo* case and the *Caparo* reasoning, and Lord Bridge's judgment in particular in that, speech I should say, in that case is, reflects very much this basic enquiry. The case itself was looking at proximity. It was the case of auditors who produced the annual accounts for the audit, and then a shareholder comes

30 along and – well, not even a shareholder initially, I think they were described as a corporate raider, or something of that nature, but anyway –

**WINKELMANN CJ:**

But they were a shareholder, I think, and then they used it in a different capacity.

**MR TAYLOR KC:**

I think initially they were not a shareholder, but they acquired shares, and part of the argument in that case was whether a duty was owed to them in their capacity as shareholders as opposed to just corporate raiders, or whatever the terminology was. But the point is that the case was dealing with proximity. It was saying is there a duty owed to these people, and to determine that they asked, well, for what purpose were those audit accounts provided, and they all said, look it's perfectly foreseeable that an investor or somebody will look at those accounts and base a decision to purchase or sell shares based on those accounts, but the fact that that's foreseeable just isn't enough, and what they have to establish is that the purpose for which the audit was supplied was to inform them in making investment decisions of that nature, and the House of Lords very squarely said not in that case, and the House of Lords, Lord Bridge in particular, but some of the others as well, also said that the scope, the type of harm against which you are, a duty is imposed on you to protect against, is determined by the scope of the duty which in turn is determined by the purpose of the duty.

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**WINKELMANN CJ:**

You couldn't give us the reference to that, could you? Well, perhaps one of their learned juniors who are – they can give us...

**MR TAYLOR KC:**

I'll do it in the lunch hour. I've got it. I think there's several comments to that effect in the judgment.

25 **KÓS J:**

Could I take you up on something arising from that?

**MR TAYLOR KC:**

Yes.

**KÓS J:**

On the “but for” basis, but for this misrepresentation, these people would not have had the farm, so they are stuck with the farm as a result – because the advice, sorry, the information was given for the purpose of purchase, so now  
5 they have a farm.

**MR TAYLOR KC:**

Yes.

**KÓS J:**

All right, well, if on day one of their purchase after settlement they discovered  
10 the misrepresentation, then damages in terms of the difference in capital value to what they paid and what it was worth would reflect the most appropriate use of the farm. It would not assume the Routhans as inexperienced tyros were continuing to farm it. It would assume that a good purchaser would make, you know, the highest and best use type valuation, you might have a different  
15 method here, but it would not assume the Routhans continuing to do it.

**MR TAYLOR KC:**

Correct.

**KÓS J:**

So that loss of capital value would meet their loss if they discovered the  
20 misrepresentation promptly. And that’s all they would get, I think.

**MR TAYLOR KC:**

Yes.

**KÓS J:**

What do we do then in this case where we have four years of operation before  
25 they discover the misrepresentation?

**MR TAYLOR KC:**

Yes.

**KÓS J:**

Because it always had to be a risk here that your client must have appreciated, ought to have appreciated, that they might not discover the misrepresentation for some time.

5 **MR TAYLOR KC:**

Well, he wouldn't –

**KÓS J:**

So what do we do about this interim operational loss?

**MR TAYLOR KC:**

10 Well, the short answer to that question is that if you apply the *SAAMCO* principle you don't even have to consider it. You don't have to determine where you draw the line, as it were, because if you apply the *SAAMCO* principle this is an information provider, they are only liable for the consequences of that advice being wrong and the duty is not a continuing –

15 **GLAZEBROOK J:**

So Mr Cook is an information provider in the circumstance? I mean he's got skin in the game, hasn't he? I mean an adviser doesn't have skin in the game in the same way. I'm just thinking Mr Daly, but Mr Cook would have skin in the game because he's actually farming out a property that is actually worth a lot less and must assume that the purchaser, if they don't discover that – I just can't quite see why it's not in the scope of duty if Mr Cook – because he's not an adviser; he's got skin in the game. I'm not – and this is on my hypothetical that he provided those figures to Mr Daly which, of course, would be the normal way that should have been done if it had been done properly in accordance with the real estate conduct rules.

20

25

**MR TAYLOR KC:**

Well, if – in my submission it wouldn't make any difference in at least normal terms to the measure of damage and it wouldn't make any difference in – it wouldn't make any difference to the extent of his liability but I would – in the

circumstances of this case, because all it is is an inaccurate representation that he makes which leads to the purchase. He's not making a misrepresentation that they would be able to achieve it or that the historic production will equal future production. So you would measure the damage in the same way that the

5 Courts in *Coxon* and *Shabor* and *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA), all of those cases, you would measure the loss in the same way.

**KÓS J:**

That just doesn't seem right to me, I have to say here, because of the probability

10 that the misrepresentation would not be discovered for some time and that in an attempt to mitigate the difference which they can't explain they spend money making certain improvements, or attempted improvements. Now why is that not within the scope of the misrepresenter's duty?

**MR TAYLOR KC:**

15 Because the representer's duty is not to advise them on operational decisions. That is to advise them on – it is to provide information for them making a decision. Otherwise if you follow your Honour's logic, he makes the misrepresentation, it's handed over to the bank, put away in a drawer and the representation has not discovered it, or even the misrepresentation itself is not

20 discovered, or even reasonably discovered for 10 years, and they farm the property for 10 years which is essentially what is being argued here and the only reason we are liable is because they didn't discover there was a misrepresentation until 10 years later and that simply cannot be the answer. It cannot be right that that is the way in which you assess damages and it is

25 certainly contrary to the *SAAMCO* principle as outlaid by Lord Hoffmann in *SAAMCO* itself and as reconsidered recently so –

**KÓS J:**

I think you have to justify that in principle.

**MILLER J:**

And I think you're incorrect about that, are you not? If we look at *SAAMCO* itself at page 218 of the judgment we see that Lord Hoffmann is looking at the extrication cases and saying: "These cases are not concerned with the scope  
 5 of the defendant's duty of care. They are all cases in which the reasonably foreseeable consequences of the plaintiff's predicament are plainly within the scope of the duty." This is really a remoteness question we're dealing with rather than a scope of the retainer question.

**MR TAYLOR KC:**

10 Well, it's a very interesting comment, your Honour, because the academic commentary on the *SAAMCO* principle is very much to the effect that this is not a causation issue, it's a remoteness issue, and basically Lord Hoffmann in *SAAMCO* splits it between factual causation and legal causation but the academic commentary, and for which I have some sympathy, says that its real  
 15 place in the analysis is one of remoteness and it's basically saying you can't be liable except for the consequences of your advice being wrong and the scope of the duty is determined by the circumstances in which the relationship arose. It's also concerned with the subject matter and the nature of the advice or information that was given. So, for instance, if the Court were to find in this  
 20 case, and in my submission it wouldn't be open to it to find in this case, that Daly represented to them that this was a standalone, low input, whatever system that they could replicate, if that had been the advice, then the scope of the duty would have been wider because it would be advising them not only is this what it is, you can replicate it as well. But Mr Daly did nothing of the sort.  
 25 He provided some information, one piece of which was inaccurate.

**KÓS J:**

Is this the difference between buying a capital asset that's essentially some neutral asset like a building, commercial building –

**MR TAYLOR KC:**

30 Yes.

**KÓS J:**

– as opposed to something which is an inherently risky venture subject to fluctuation, subject to fluctuation according to your own effort?

**MR TAYLOR KC:**

5 Yes.

1250

**KÓS J:**

Is there something in that particular distinction here? The nature of the asset acquired? I mean there are greater risks associated with a business like this,  
10 clearly.

**MR TAYLOR KC:**

It could be, but I certainly say in this case it clearly isn't. It's, actually coming back to what Justice Glazebrook was saying before, it could be, if the vendor was the one that had made this misrepresentation, that maybe that the  
15 circumstances would dictate a wider scope for losses. But – and the other point I would make is that depending on the misrepresentation that is made, the prima facie measure of loss, which is difference in value, is not necessarily the only measure of loss. For instance, if the plaintiff can say, I relied on this advice, and I went and spent all this money in reliance on that advice that I would not  
20 have spent otherwise had I known, if that was the allegation, and that reliance for the purpose of spending a particular amount of money was established, then wasted expenditure, if that is what it was, could well be a recoverable head of loss and that, in fact, is recognised in, I can't remember which of the Court of Appeal cases in New Zealand, but the case was about a solicitor who gave  
25 negligent advice about the, or failed to discover a paper road on the property that the plaintiffs' purchased. The evidence was that the property they purchased they essentially purchased at an undervalue, and they could have sold in the market the next day and made money on it, and the Court therefore held in that case, and I can't remember which one it is, but I'll find it, said in that  
30 case, but if for instance they had, in reliance on that information, or not knowing of that information, gone and built their property on it, then they may have a

claim for wasted expenditure. So as the Court of Appeal in this case acknowledged, normal measures of damage are not the end of the story. The Court always has to look to what the proper measure of damage is arising from the wrong.

5 **WINKELMANN CJ:**

Looking at Lord Hoffmann at 218 he says that the extrication cases were not concerned with the scope of the defendant's duty of care because they were all cases in which the reasonably foreseeable consequences of the plaintiffs' predicament are plainly within scope of the duty.

10 **MR TAYLOR KC:**

Right, yes.

**WINKELMANN CJ:**

You could read that several ways but I think the point is that's not the focus of those cases. Scope is proven and then it's what flows although...

15 **MR TAYLOR KC:**

Yes, and there are problematic cases such as *Downs v Chappell* where it's questionable whether that would ever be decided in the same way in respect – well, two aspects to that case. One, the claim against the vendor was in deceit, so no question that they were entitled to recover the full consequences of what happened, but the claim against the accountant was in negligence, and the Court in *Downs* nonetheless applied the tort measure of damage in that case, and in the course of doing that asked itself the wrong counterfactual in reaching that conclusion. But that's something I'll come to after lunch.

25 I'm going to have to spend maybe 10 minutes just dealing with the reliance aspect of this case.

**WINKELMANN CJ:**

You're thinking about taking the lunch adjournment early? Perhaps before we can, can we get the reference from your juniors for Lord Bridge in *Caparo*.



**MR TAYLOR KC:**

Yes, I will find that in the lunch hour your Honour.

**WINKELMANN CJ:**

Your juniors don't already have it to hand.

5 **MR PARKER:**

I'm going to hand it up to the Court shortly Ma'am.

**WINKELMANN CJ:**

So you want to adjourn now and come back at two?

**MR TAYLOR KC:**

10 Yes.

**WINKELMANN CJ:**

We'll do that.

**COURT ADJOURNS: 12.55 PM**

**COURT RESUMES: 2.04 PM**

15 **MR TAYLOR KC:**

Just going to the road map that I handed out –

**WINKELMANN CJ:**

First can we do the work that your juniors slaved their entire lunch break on?

**MR TAYLOR KC:**

20 They were highlighting what – no, they were picking up where I had highlighted various aspects of the judgment but, yes.

**WINKELMANN CJ:**

So there was a – was there a case that you didn't give us the name of or there were two cases you didn't give us the name of. There's Lord Bridge's

references in *Caparo* but there's also a House of Lords' decision you didn't give us the name of.

**KÓS J:**

The paper road case.

5 **WINKELMANN CJ:**

Well that was a High Court decision.

**MR TAYLOR KC:**

That was a High Court decision. Sorry, I was meant to find that and I didn't.

**WINKELMANN CJ:**

10 No, actually your juniors were meant to find it. Right, well we're still waiting for those references but we'll wait a bit longer. Perhaps at some time can pass a note to you.

**MR TAYLOR KC:**

Just while we're on that, my learned friend or I think Mr Tan made some  
15 submissions about a mistaken reference to the *Shabor* case.

**WINKELMANN CJ:**

Mr Nelson?

**MR TAYLOR KC:**

Mr Nelson, I'm sorry, made some comments about it –

20 **WINKELMANN CJ:**

Your mistaken reference to it?

**MR TAYLOR KC:**

Yes, yes. In the *Shabor* case and basically he said that the quote that we were referring to was taken from the High Court judgment at page 231, which is I  
25 think the reference page we used, and he is correct that the quote that we were referring to was taken from a High Court judgment but it was expressly quoted

and adopted by the Court of Appeal at paragraph 55 of the judgment in *Shabor* and at paragraph 59 immediately after discussing that the Court of Appeal went on to say that: “Shabor had claimed the difference between the price paid and the value of the farm given its actually carrying capacity.” So, we've got the principle right and the application of it right, we just didn't quite get the footnote reference correct.

The paper road case is *Harvey Corporation Ltd v Barker* which I will be coming to briefly. Now your –

10 **ELLEN FRANCE J:**

What I have, Mr Taylor, is noting you talking about a House of Lords' case which talked about the type of harm against which in relation to the duty imposed on you.

**MR TAYLOR KC:**

15 Yes, that was *Caparo* I think.

**ELLEN FRANCE J:**

Was that *Caparo*, okay.

**MR TAYLOR KC:**

Yes, yes. And really *Caparo* was looking at the proximity issue that it was very clearly stating that the extent of reliability was governed by the purpose for which the information was provided and there is clearly that overlap. What I am going to do, obviously your Honours the road map has got various or extensive references to the evidence under various headings, and all I can do is ask your Honours to take note of those and address the submissions under each heading but what I do want to do is take you to issue 1. I've dealt with subparagraph 1: “There was no negligent representation by PGG that the Farm was a low input, standalone farming system...”.

Two things I would just add. If we go back to that proposal document, in referring to the fertiliser and the soil analyses, the document simply annexes

the same documents that were annexed to the CRT brochure which, of course, by that time were over a year out of date but in any event, as I took your Honours to earlier, Mr Routhan says he wouldn't have been able to make much sense of those documents in any event.

5 **KÓS J:**

And he knew that because he had the CRT thing in the first place?

1410

**MR TAYLOR KC:**

Well, he probably didn't know it because he got the CRT brochure, then gave it  
 10 to Mr Daly and Mr Daly – Mr Routhan's evidence was that he didn't see the  
 CRT brochure for several years thereafter. What I do want to focus on is the  
 second proposition under that heading of of "Factual Flaws in the Appellant's  
 Case" and that is that there is no contemporaneous evidence of reliance upon  
 the 103,000 kg for the purpose of preparing budgets or making operational or  
 15 investment decisions or the incurring of further debt in the 10 years' operation  
 of the farm, and the first point that I make there is that the budget prepared by  
 Mr Bishop – now Mr Bishop was the farm consultant who prepared budget  
 forecasts for Mr Routhan and was advising him on the purchase and indeed on  
 the farming system and stock choices that he was proposing to adopt, and  
 20 Mr Routhan, if we go to paragraph 55 of his brief of evidence – if we go to  
 paragraph 56 of his brief of evidence you'll see there that he says: "[We]  
 accordingly aimed, on the basis, beginning with the present 103,000 kgs, to  
 achieve around 112,000. The CRT Brochure (as I recalled)...Proposal  
 provided 260 cows," et cetera. "KFT should then be able to achieve an extra  
 25 9,000 kilograms with an extra 40 cows and cut silage," and then he says: "We  
 calculated that..." and if we go to paragraph 55 he states: "Mr Bishop worked  
 out the value of this run-off block to our operation. He later advised this to be  
 an additional 9,000 kg of milk solids production from the Cook farm."

**GLAZEBROOK J:**

30 Are we getting any of this up?

**MR TAYLOR KC:**

Sorry, you're not?

**GLAZEBROOK J:**

Has any of this come up?

5 **WINKELMANN CJ:**

It hasn't come up on our screen, on ClickShare.

### **THE COURT ADDRESSES MR TAYLOR KC – CONNECTION ISSUES**

**GLAZEBROOK J:**

You'll have to tell us where it is, sorry.

10 **WINKELMANN CJ:**

Paragraph 55.

**ELLEN FRANCE J:**

201.0010.

**WINKELMANN CJ:**

15 Mr Taylor, go ahead. We're all good.

**MR TAYLOR KC:**

Thank you, your Honour. So basic what Mr Routhan is saying there is that Mr Bishop first took 103,000 kg and then worked out that he could get an extra 9,000 kg for the Routhan property using the run-off on that property. Mr Bishop denied that he did any such calculation and you will see at the bottom of that page a footnote reference 10, which is from paragraph 58, where it stated: "The financial forecasts and analysis for purchasing both farms prepared by Mr Bishop were then provided to Rabobank," and one of the documents which is referred to is document 302.0864, you will see the reference there, and if we just bring that up.

**WINKELMANN CJ:**

What number is it sorry?

**MR TAYLOR KC:**

It's 302.0864.

5 **WINKELMANN CJ:**

Right, it's the first one in the footnote.

**MR TAYLOR KC:**

Now this budget that was prepared by Mr Bishop was prepared on the 28<sup>th</sup> of April 2010, and it was in respect of the Moynihan farm, which  
10 your Honours will recall was a farm that Mr Routhan was intending to purchase, but that fell through, and it wasn't until September when he started investigating the subject farm that we're talking about today. If you go to page 302.0865 of that document.

**MR KALDERIMIS:**

15 I'm sorry, I just have to object here. Mr Routhan corrected that footnote before his brief was read into evidence, so what you' are looking at is the brief before it was given in evidence, but when it was given in evidence the footnote was corrected, and so you are not being taken to Mr Routhan's evidence in the case, you're being taken to his uncorrected brief, which was corrected on that point.

20 **WINKELMANN CJ:**

So in the transcript it is corrected?

**MR KALDERIMIS:**

Yes, That's right, so the reference to the correction in the transcript is 203.0624, lines 17 to 26, and Mr Routhan had indicated he needed to make that correction  
25 in his reply brief at paragraph 74. So it was already announced that he'd made an error in the full citation, and he tidied that up.

**MR TAYLOR KC:**

Yes, that is not at all in dispute, but it's for my present purposes of no relevance. The footnote is in a paragraph where Mr Routhan gives evidence that he sent these valuations to Rabobank.

5 **WINKELMANN CJ:**

Well he referred to these valuations, so they're in evidence.

**MR TAYLOR KC:**

They are definitely in evidence, your Honour, yes, and the only correction is the footnote is making it clear that this report was not sent to Rabobank. So that's  
 10 what it was deleted in footnote 10. Fully accept all of that. What I want to suggest, however, is that this evidence that Mr Bishop arrived at this 112,000 by starting with the 103,000 kg, and then calculating a further 9,000 kg, is simply not correct, and it was emphatically rejected by Mr Bishop when he filed his brief of evidence in reply to Mr Routhan's evidence on this issue, and at  
 15 paragraph 24 of his evidence Mr Bishop refers to these paragraphs 55 and 58.  
 1420

**WINKELMANN CJ:**

What document number is that?

**MR TAYLOR KC:**

20 That is brief of evidence of Mr Bishop, 202.0361, paragraph 24. This assertion by Mr Routhan that that's how the 112,000 was calculated is not the first time that that assertion or allegation has been made, and I won't take you to it but I ask the Court to –

25 **WINKELMANN CJ:**

But this doesn't respond – are you not taking us to this as evidence that he rejected the proposition that that was how they came to the valuation for this, to the, sorry, budgets for this farm, because that's not saying that.

**MR TAYLOR KC:**

Yes, no, I'm coming, well that isn't but I'll explain, there are other aspects of Mr Routhan's – Mr Bishop's evidence where he explains that, well let me just go first to the page 302.0865, and if we look down under the heading "Cattle"

5 you'll see there there's a reference –

**GLAZEBROOK J:**

So is it, sorry, what document is this?

**MR TAYLOR KC:**

302.0865.

10 **GLAZEBROOK J:**

Yes, but –

**WINKELMANN CJ:**

It's the valuation.

**MR TAYLOR KC:**

15 This is the Moynihan budget that was prepared by Mr –

**WINKELMANN CJ:**

Yes, not valuation.

**GLAZEBROOK J:**

But what's it got to do with this farm?

20 **WINKELMANN CJ:**

Mr Taylor's explaining it to us.

**MR TAYLOR KC:**

Yes.

**GLAZEBROOK J:**

25 Okay.



**MR TAYLOR KC:**

What we are faced with is Mr Routhan saying Mr Bishop, my farm advisor, started with 103,000 figure and then calculated 9,000 kilograms to get to a figure of 112,000 which is what we believe we would be able to achieve on this property.

**WINKELMANN CJ:**

And where you're going to end up is with evidence from Mr Bishop that he did not do that?

**MR TAYLOR KC:**

Correct, because what Mr Bishop says in his evidence is this was a valuation prepared for another property and when I put this budget together and came up with that 112,000 figure, which your Honours will see under "milk" across from "milk solids" in this budget, I only use my assessment of historical average production from the West Coast data. So he says when I prepared this budget, that is what I was doing and I arrived at a figure of 112,000 kg, and arriving at that 112,000 kg I took into account production based on that average historical data for the run-off as well as the 105, the Moynihan property, which coincidentally had exactly the same area of 105 hectares as Mr Cook's property. Now this assertion that the farm advisor had calculated this 9,000 kilograms but based his projected or based prediction of 102,000 is not made for the first time in this trial in this brief of evidence. Exactly the same proposition was made to the arbitrator in the cow arbitration at paragraph 56 and –

**WINKELMANN CJ:**

So the proposition, as Mr Routhan has said, was made for the first time in the cow arbitration?

**MR TAYLOR KC:**

No.

**WINKELMANN CJ:**

Mr Bishop's?

**MR TAYLOR KC:**

I'm pointing out that that's the first time he made it and then it's repeated in his  
5 brief of evidence, strongly rejected by Mr Bishop, who says: "That's not what I  
did at all. I based my assessment on average historical production data for the  
West Coast area." The point that I am making is that that is almost certainly  
correct because at the time this report was done the average production for the  
season ending 30<sup>th</sup> of June 2010 would not have been known because this  
10 report was done three months before the end of the season and before the  
average figure for that period would have been known.

**WINKELMANN CJ:**

But that's the Moynihan report though?

**MR TAYLOR KC:**

15 Yes, it is the Moynihan report but what we get repeatedly in Mr Routhan's  
evidence is this assertion that the financial forecasts that were done by  
Mr Bishop were based on this 103,000 figure, average production figure, and  
that can't be right in respect of this document but it's very clear, unless it's  
complete coincidence, that the 112,000 figure has come from this budget in  
20 respect of another property.

**WINKELMANN CJ:**

Do we have the budget that was done for this property?

**MR TAYLOR KC:**

That is I've – there was no budget done at this time. I'm going to come to the  
25 budget –

**WINKELMANN CJ:**

Okay, right. Obviously, yes.

**MR TAYLOR KC:**

– that was prepared for this property and...

**GLAZEBROOK J:**

Did anyone make any findings about this?

5 **MR TAYLOR KC:**

No, not that I recall.

**KÓS J:**

I can't see it on the arbitration award I have to say.

**MR TAYLOR KC:**

10 It's at paragraph 44. It just records the assertion in the arbitration award.

**KÓS J:**

44, is it?

**MR TAYLOR KC:**

I'm sorry it's at paragraph – it's 144, I'm sorry.

15 **KÓS J:**

Yes, it doesn't evaluate it.

**MR TAYLOR KC:**

No. What it does is reflect the assertion that the 103 formed the basis and the 9,000 was a result of some separate calculation by Mr Bishop which Mr Bishop denies. The only other budget that was prepared by Mr Bishop was a budget  
20 that was prepared on the 10<sup>th</sup> of September 2009 and that was a combined budget forecast –

**WINKELMANN CJ:**

September?

**MR TAYLOR KC:**

September 2010, I'm sorry. And that budget, there were three versions of it, was a combined production figure or estimate or forecast for both the subject property and the Casa Finca property and can we just pull that document up.

5 1430

Now as you can see from that it is a draft budget for potential purchase, including Kokotahi, payout at \$7, and there were three other versions done of that with different payout figures but all based on the same forecast production.

10 When I refer there to "Kokotahi" I don't think there's any dispute that that is the 73-hectare run-off property that was owned, already owned, by Mr Routhan at the time. So if we could just go briefly –

**GLAZEBROOK J:**

And you say that Mr Bishop said that he didn't do that. You say that in respect  
15 of this budget or just the Moynihan – whatever it is.

**MR TAYLOR KC:**

Both.

**WINKELMANN CJ:**

Moynihan.

20 **GLAZEBROOK J:**

Moynihan.

**MR TAYLOR KC:**

His consistent evidence was that when he prepared the –

**GLAZEBROOK J:**

25 Well, you say that but what you took us to was only in relation to the Moynihan budget.

**MR TAYLOR KC:**

Correct, and his other evidence is that he used the same methodology with updated average production figures to arrive at the forecast production for the combined purchase of the subject farm and this farm, and if we go to that  
5 combined budget and we go to...

**GLAZEBROOK J:**

Are you going to take us to that later?

**MR TAYLOR KC:**

The combined budget is –

10 **GLAZEBROOK J:**

Or just give us the reference?

**MR TAYLOR KC:**

That's 302.1033. That's the one –

**WINKELMANN CJ:**

15 It's up on the screen.

**MR TAYLOR KC:**

Yes.

**GLAZEBROOK J:**

No, no. His evidence that he used the same methodology.

20 **WINKELMANN CJ:**

I think you are taking us to his evidence, aren't you, at some point?

**MR TAYLOR KC:**

Yes.

**GLAZEBROOK J:**

25 Okay, that's fine. I was just asking.

**MR TAYLOR KC:**

His evidence is at paragraph 10 of his brief of evidence which is 202.0361.

**WINKELMANN CJ:**

I take it he was cross-examined on that though, was he?

5 **MR TAYLOR KC:**

Yes, he was cross-examined on it and he stuck religiously to that statement that he did not rely on the 103,000 kgs, and my learned friend in his cross-examination of Mr Bishop took him through how he calculated his production figures for this combined budget and that is at notes of evidence at  
10 Bishop 203.1054.

Daniel, can you just help me where in that budget those figures are that you're referring to?

**MR KALDERIMIS:**

15 The correct references are on the previous page he's cross-examined about the Moynihan methodology. That's 1052, and then at 1053 he accepts he uses converse methodology with similar – with different interesting factors at 1053 through 1055, to get to his calculation for the farms, and if you bring up the budget itself which is 302.0864, I believe, or that might be the Moynihan one.  
20 Let me grab the correct reference.

**MR TAYLOR KC:**

I think I've got the correct one. I just can't find the figures.

**MR KALDERIMIS:**

No, that's the Moynihan reference. So the correct –

25 **WINKELMANN CJ:**

It is the Moynihan one there.

**MR KALDERIMIS:**

Yes, you're quite right. So the budget we are looking at is 302.1033.

**MR TAYLOR KC:**

5 Yes, and can you just point the Court to where those figures that you're referring to?

**MR KALDERIMIS:**

So skip a few pages along. So the page that you want is – in fact it might be easier to use the next budget in the list, so try 302.1040.

**MR TAYLOR KC:**

10 Yes, can we bring that up?

**WINKELMANN CJ:**

This is one of the three versions, is it?

**MR KALDERIMIS:**

15 And then look at 1048, and so what he's been cross-examined on is that the 245 of milk solids production in total has been arithmetically cross-checked by dividing it by the total effective hectares which are at the top of the page.

**MR TAYLOR KC:**

I don't think I need your assistance any further.

**WINKELMANN CJ:**

20 Thank you, Mr Kalderimis. The tricky bit of submissions advocacy there, but fair enough.

**MR TAYLOR KC:**

25 If we go to 302.1048 we've got a heading "Farm Description" and Mr Kalderimis in his cross-examination that I was just referring to you identifies that the 332 hectares is a combination of the subject farm, the run-off property, some Casa Finca leasehold land and Casa Finca farm itself, and they total, if you just

follow the logic of Mr Kalderimis' very good cross-examination on this, you get to a figure of 332.

1440

- 5 Then if we go down to the subheading "Cattle", you'll see there that milk solids of 245,000 is forecast. That is based on an average production per hectare of 738 kilograms per hectare, and Mr Bishop's evidence is that this budget was prepared in exactly the same methodology as the previous budget, the Moynihan one, presumably though with updated figures and he arrives at  
10 production of 738, average production figure of 738, and he multiplies that –

**WINKELMANN CJ:**

Per hectare.

**MR TAYLOR KC:**

Per hectare, yes. No –

- 15 **WINKELMANN CJ:**

What is it?

**MR TAYLOR KC:**

Yes, that would be right. Because he multiplies that 333 by 738 and he comes up with 245,000.

- 20 **KÓS J:**

That's nothing like the performance of the Moynihan which was 112,000 off 105 hectares.

**MR TAYLOR KC:**

- Well, no, but his evidence was that he was including in that, he put the 105 and  
25 put the average on the 112,000 as being the average of the 105, but he is very clear in his evidence that he was taking into account the run-off.



**KÓS J:**

Right.

**MR TAYLOR KC:**

And applying an average figure per hectare for the run-off and the 105.

5 **KÓS J:**

Okay, I understand.

**MR TAYLOR KC:**

And the figures he used, et cetera, might be right or wrong, and the conclusions he reached might have been right or wrong, but the point is that's how he says  
10 he arrived at those production figures in this combined forecast or budget. We'll call it a combined budget for both properties because at that time, that's what Mr Routhan was talking about supplying.

**WINKELMANN CJ:**

So Mr Kalderimis has taken us to 203.1054 of his cross-examination. It says:  
15 "And if you multiply 332 by 738, which is your now average milk solids per hectare number, much lower than that 1,000 figure that you'd used earlier...", I take it in Moynihan you get 245,000 so the equation is 332 multiplied by 738?

**MR TAYLOR KC:**

Yes, but the point is that calculation, which is reflected in this budget report  
20 itself, demonstrates in my submission the correctness of what Mr Bishop is saying that: "I used average production figures, I multiplied it across the total hectares for both farms, plus the leasehold, plus the lease, plus the run-off and that's where I got the 245,000 for."

**WINKELMANN CJ:**

25 So the converse methodology that's referred to in Mr Kalderimis follow-up question is as to how you make an allowance for the run-off, is that it? So he's using different figures but that's – "Instead of pumping up the milk solids figure from the area average to something very high to accommodate for the

synergies of the run-off, you are actually adding every single hectare that could be used in this operation, the leased area...and calculating the same amount of milk solids production from each of these hectares and that's how you get to..."

**5 MR TAYLOR KC:**

Yes, that's right, that's right. So he's applying exactly the same methodology. The unfortunate bit perhaps in the Moynihan budget is that he just – he puts his average figure based on the 112,000 as being attributable just to the 105 hectares but if you apply it on 178 hectares you get a much lower average  
10 figure than the 1,096.

Mr Routhan's evidence was: "We, Mr Bishop, when he prepared these budgets and I, based on Mr Bishop's advice that I could get 103,000 plus the 9,000 to an estimated 112,000" is based on his evidence that Mr Bishop had seen and  
15 relied upon and taken into account the 103,000 kg figure in his calculations. Mr Bishop denies that emphatically and says: "I don't recall ever seeing that document when I was preparing these budgets and I can't say he might not have given that proposal form to me but that is not the way I would have arrived at these forecasts." So that's his consistent evidence. Mr Routhan says: "I got  
20 the PGG proposal and I sent it to the bank and a couple of days later or a few days later Mr Bishop was driving past and I gave the PGG proposal to him." The problem with that evidence is not that he may have given it to him but he cannot have given it to him when Mr Bishop was preparing these budgets and the reason I say that is that the evidence of Mr Daly was that he delivered the  
25 proposal document on the 10<sup>th</sup> of September 2009.

**KÓS J:**

To Rabo?

**MR TAYLOR KC:**

To – no to Mr Routhan.

**KÓS J:**

To Routhan.

**MR TAYLOR KC:**

Mr Routhan's evidence was: "I received it, I sent it off to the bank" and then he  
 5 thinks two or three days later he provided it to Mr Bishop who was driving past  
 his house. What is important to realise, and I'll take you now to a September  
 email chain of 302.1021, and that is an email from Mr Bishop to Mr Routhan at  
 4.59 pm on the 10<sup>th</sup> of September and it is enclosing the draft budget, and you'll  
 see there that he says: "I had to dial production & payout back a bit as the  
 10 income side of the budget was looking too good! I've boosted expenditure,  
 making sure that more than enough fertiliser is applied, good levels of  
 maintenance can be met, feed costs are sufficient and per cow costs keep at  
 the upper end of parameters." There is simply no way, if Mr Routhan's evidence  
 is correct, that he received – well Mr Daly's evidence at paragraph 28 of his  
 15 brief of evidence, that he delivered the PGG proposal to Mr Routhan on the 10<sup>th</sup>.  
 1450

There is no way that this budget could have been supplied and formed the basis  
 for the budget calculations and forecasts made by Mr Bishop, and if we scroll  
 20 down in that email chain, the next email is dated 13<sup>th</sup> September, and it's as  
 discussed, here are the modified budgets. I thought I'd get them to you today  
 if I could. If there are some changes I can make and possibly get them back to  
 you before you made approaches to the financiers. So what he's doing in that  
 email is attaching two revised budgets, or amended budgets, and I think it's  
 25 common ground that the only change from the previous budget he'd supplied  
 on the 10<sup>th</sup> of September was to the per kilogram payout amount. So he's  
 forecasting revenue based on his assessment of average production from the  
 area applied to these properties.

**WINKELMANN CJ:**

30 But how far does this take you?

**MR TAYLOR KC:**

Well it takes us a long way in terms of the suggestion that Mr Routhan and Mr Bishop based these budget forecasts on the 103 k figure because Mr Bishop wouldn't have even had the proposal from Mr Routhan at the time he prepared  
5 these budgets.

**WINKELMANN CJ:**

Mr Routhan might say well, yeah, okay so that, or Mr Kalderimis might say, well that maybe so, but then I got representation which made it sound like that wasn't out of the ballpark.

10 **MR TAYLOR KC:**

Well he may say that but it's not what he, in fact, says. What he, in fact, says is, this 103,000, we relied on it in preparing our financial forecasts, and that led us down this garden track, and Mr Bishop says, no, that's not what happened. He said, I don't recall him giving me the proposal two or three days later, but he  
15 may have, but I wouldn't have used it. It's not the way I go about doing this, and of course that's highly likely because if you're a consultant and you're providing, preparing budgets, you wouldn't rely on the previous production figures for another farmer. You would take a safe approach and apply an average based on the average efficient farmer.

20 **MILLER J:**

I'm still not clear where it takes you. This is a no transaction case in which there are findings of fact that the purchaser's relied on the 103.

**MR TAYLOR KC:**

Yes. the point I'm making is that that is what we are being told, but it is not  
25 reflected in the evidence. It's –

**GLAZEBROOK J:**

Well there's a finding so that's just unfortunate because you haven't got leave to appeal against that finding.

**MR TAYLOR KC:**

No I don't –

**GLAZEBROOK J:**

But in any event –

5 **MR TAYLOR KC:**

I'm sorry your Honour I don't –

**GLAZEBROOK J:**

What the counterfactual may be is if Mr Bishop had been provided with the proper figures, might he have come to a different view.

10 **WINKELMANN CJ:**

Perhaps, Mr Taylor, can you respond to the first part of Justice Glazebrook's question, and then the second, which is the first part was in relation to the leave to appeal scope.

**MR TAYLOR KC:**

15 Well I don't recall a finding in the judgment that Mr Bishop relied on that 103,000.

**GLAZEBROOK J:**

No, no, that's not what I said. It's the purchaser relied on it, that's the finding, so whether or not he mistakenly thought that Mr Bishop was relying on it to is  
20 really beside the point.

**MR TAYLOR KC:**

Well, in my submission on such an important as this, if on the submissions and the evidence that's before the Court, it is entitled to form its own view, and what I am –

25 **GLAZEBROOK J:**

But to what degree. Do we then say, oh no, the Routhans didn't rely on this, when leave hasn't been given?

**MR TAYLOR KC:**

Well, I'll take you to the next document that I want to refer –

**WINKELMANN CJ:**

Mr Taylor, looking at the time, you might need to try and be more direct.

- 5 So what is the relevance of this point to your case because I raised with you my difficulty in following it and Justice Miller and Justice Glazebrook have also...

**MR TAYLOR KC:**

It goes to reliance. If we...

**WINKELMANN CJ:**

- 10 Well, so they relied on it. Is your point they relied on it for the purchase, the representation, but there's no – this shows – so they rely on it to make the purchase but they don't rely on it as to the business model they then run?

**MR TAYLOR KC:**

Correct.

- 15 **MILLER J:**

That squarely confronts the trial Judge's findings?

**MR TAYLOR KC:**

Well, I don't recall a finding that they did rely on it for the purposes of the budget, and if that was the finding it is, in my submission, contrary to the evidence, and

- 20 I'll take you to one final...

**WINKELMANN CJ:**

Well, it's contrary to the Court of Appeal's finding about scope of risk, isn't it?

**MR TAYLOR KC:**

Sorry?

- 25 **WINKELMANN CJ:**

Contrary to the Court of Appeal's finding about the scope of duty, scope of risk.

**MR TAYLOR KC:**

I don't think so, your Honour. Can I just –

**WINKELMANN CJ:**

No, yours is, your proposition isn't, the – because the Court of Appeal's  
5 effectively taken it back, the risk of the business, back out of the scope of risk.

**MR TAYLOR KC:**

Correct, but what I'm trying to address is this underlying assertion, which is not  
underlying, it's a blatant assertion that somehow reliance on this for the  
purposes of the budget has put them in this terrible position and what I'm saying  
10 is there was no reliance by Mr Bishop on that 103,000 kg figure and when  
Mr – this was a combined budget. It's the only budget that was prepared prior  
to the purchase by Mr Routhan and it was the only budget that was provided to  
the bank for the purpose of making their assessment and what happened later,  
without involvement of Mr Bishop, is that the Casa Finca deal fell through.  
15 So that ended up with a decision by Mr Routhan and the bank to proceed only  
with this transaction, and can I refer the Court to the Routhan notes of evidence  
at 203.0622 at 203.0729, and – sorry, 24 – I'll have to find the reference again.  
1500

**WINKELMANN CJ:**

20 Well your juniors could find it for you while you carry on.

**MR TAYLOR KC:**

I've found it your Honour. At 109 of the transcript and the document number is  
203.0729. So we have the scenario, this was after the purchase, or the  
agreement for sale and purchase of Mr Cook's property, but before the  
25 settlement date of the December 2010, and the Casa Finca sale fell over, finally  
fell over after the date of that settlement but it was on the cards that it was going  
to fall over at this time.

**WINKELMANN CJ:**

So Mr Routhan sits down with Mr Kelliher...

**MR TAYLOR KC:**

The bank manager.

**WINKELMANN CJ:**

The bank manager and they go through and just extract the relevant data out  
5 from the existing report using Mr Bishop as a backup when they had technical  
issues about how they do that, on the phone a couple of times.

**MR TAYLOR KC:**

Well no, I don't think –

**WINKELMANN CJ:**

10 They rang him either once or twice during those discussions but...

**MR TAYLOR KC:**

He said, his evidence is we got those budgets of Mr Bishop's, and that's  
referring to the combined budgets, and as I said in my brief, it was relatively  
easy to extrapolate out just the Cook information, and I think I had to ring  
15 Mr Bishop either once or twice during those discussions, and he specifically  
wanted to know if we kept the run-off.

**WINKELMANN CJ:**

Yes, as I said.

**MR TAYLOR KC:**

20 I'm sorry your Honour. But the point here is that these decisions made by him  
and the bank following the falling over of the Casa Finca sale, were not based  
on the \$103,000 figure. Those budgets that he's referring to weren't based on  
that figure, and what Mr Routhan is saying is we just did an extrapolation.  
Now there's no documentary evidence of that extrapolation, but that's what he  
25 said they did.



**WINKELMANN CJ:**

So that's the decision as to the business model are you saying, or the decision to purchase, because you've got a problem with the decisions to purchase because –

5 **MR TAYLOR KC:**

Well it's both.

**WINKELMANN CJ:**

Well we're not relitigating that, Mr Taylor.

**MR TAYLOR KC:**

10 Not relitigating?

**WINKELMANN CJ:**

The reliance for purchase. They relied on the figures. That's the High Court Judge's finding, isn't it, they relied on the figures to make the purchase?

**MR TAYLOR KC:**

15 Well, yes, yes, and that might be right, but the point is the consistent evidence of Mr Routhan is that all of these figures, all of this information was used for the purposes of these budgets, and that's what led us to making this purchase, and what I am saying is that it is clear on the facts that that just cannot be right. So –

20 **ELLEN FRANCE J:**

Mr Taylor, am I right that your submission depends on you being right about what Mr Bishop says he was doing?

**MR TAYLOR KC:**

25 It's not just that because it's also what he says he was doing, and the fact that he says, I wouldn't have used these for, when I was preparing these budgets, is borne out by the contemporaneous documents, delivery of the proposal –

**WINKELMANN CJ:**

Yes, but the same, it's us being persuaded that Mr Bishop's evidence was, should be accepted and was accepted on that point or...

**MR TAYLOR KC:**

- 5 Mr Bishop? Yes, yes, I am saying that, and what I'm trying to get across is that for, to ground a claim for damages essentially you'd have to prove, one, what the misrepresentation was. Two, that it was negligently made. Three, that you relied upon it to your detriment, and really what I'm saying is that the reliance aspect is highly doubtful in this case.

10 **WINKELMANN CJ:**

Yes, but really you've not, you're not really appealing that, though, are you, because your cross-appeal is not, is only, is to the extent of the damages. I mean we're going to be here a long time if we've suddenly got a completely different appeal.

15 **MR TAYLOR KC:**

I'm going to move off very shortly, I can assure you.

**WINKELMANN CJ:**

- 20 Because I can see the shape of an argument that, okay, he relied, that Mr and Ms Routhan relied on the 103,000 to make the purchase, but it's quite another thing to say they relied on it for the business that they were running, and you've got this evidence which shows the business modelling was done based on Mr Bishop's information.

**MR TAYLOR KC:**

Correct, and that's as far as I want to take it.

25 **WINKELMANN CJ:**

That's basically it?

**MR TAYLOR KC:**

That's as far as I want to take it. I'm not quibbling with the idea that they relied on it or probably relied on it to some extent for the purpose of the purchase decision, but for the reasons we'll come to in a moment on the SAAMCO  
5 principle that doesn't get them anywhere.

**KÓS J:**

Well, you're stuck with it, Mr Taylor. That's the fact of the leave decision. You've got concurrent decisions, reliance on purchase, that's it.

**MR TAYLOR KC:**

10 Yes, if – the thrust of my learned friend's submissions is that they relied on this information to make all these business decisions and whatever decisions going forward and that would be –

**KÓS J:**

Well, that's a different matter.

15 **WINKELMANN CJ:**

So Justice Kós was only responding to the notion that you were trying to undo the reliance for the purchase but you're not?

**MR TAYLOR KC:**

No, no, I'm not. But what I'm suggesting is it would be unsafe to go with the  
20 basis of reliance on the misrepresentations for all these separate business decisions that were made after.

Right, I'll move off the facts and my apologies, but I would encourage the Court to look at the other notes that I've referred to under this heading, in particular,  
25 for instance, it's absolutely plain on the evidence that Mr Routhan made a decision before he purchased or during the period after he purchased the property to stock 300 cows instead of 260 which was the figure that was in the brochure. He also made the decision, presumably based on advice from Mr Bishop or some other consultant that he would not use the Friesian cattle,

he would use cross-breeds, smaller cattle, and hopefully a higher carrying capacity, whatever. All of those decisions were made by Mr Routhan without any involvement of PGG.

**WINKELMANN CJ:**

- 5 So that decision to change the breed was post the termination of a lease?

**MR TAYLOR KC:**

- No, it was done at the time of the purchase, and in fact what happened was they arranged to lease cattle from Mr Cook but they didn't want his big Friesian cattle. They wanted cross-breed cattle, et cetera, et cetera, which was what  
 10 was supplied, and at the end of the day the cow lease was all about an alleged poor performance of those cows which were contributing to the lower production figures and just one other point that is worth clarifying is that in the arbitration Mr Routhan didn't lose because he didn't prove that some of the cows, approximately 70 of them, might have been producing at lower levels  
 15 than you would expect. The arbitrator refers to evidence that could have supported that view. He lost the arbitration because the arbitrator found that he couldn't cancel or terminate the lease for the lease to terminate in another year's time. So basically the arbitrator – because what Mr Routhan said was: "This is a two-year lease. I'll run it to the end of this lease but I'm not going to  
 20 continue with this lease at the end of that which is due to run for another year," and the arbitrator in his decision said: "Sorry, but you can't do that. You've got to cancel or not. You can't say: 'I'll cancel but it's only to take effect in 18 months' time.'" The arbitrator might have been right or wrong on that issue but the point is it's not the point that Mr Routhan lost on in the arbitration. There  
 25 was some evidence of low production from at least some of the cows that were supplied by Mr Cook.

1510

- In terms of the *SAAMCO* principle itself, I would simply strongly urge  
 30 your Honours to read paragraphs, and I know you will, paragraphs 22 to 46 of my submissions, which in my submission correctly set out what the principle is, and how it is to be applied.

**ELLEN FRANCE J:**

Could I just check, Mr Taylor, you seem to be making a distinction between “advice” and “information”.

**MR TAYLOR KC:**

5 Yes.

**ELLEN FRANCE J:**

Are you saying that distinction should be maintained, or is it more that you’re saying here, calling it “information” indicates the scope of the duty?

**MR TAYLOR KC:**

10 Yes, yes. If we go back to *SAAMCO* itself, Lord Hoffmann makes that distinction between the information and advice. Lord Hoffmann in the *BPE* case says, well, you know, it’s kind of nice. The underlying principle is clear, but trying to categorise – he says in a way well in all forms of information are in a sense forms of advice. So he doesn’t get much help from that. But the  
15 underlying principle is clear, and what I’m saying is here this is absolutely classically an information provision case, not an advice case. Not advising the recipient on the merits or otherwise of the purchase, the risks that are involved in purchasing a farm and carrying on a business, or the wisdom of borrowing circa \$6 million to buy two properties, but then deciding just to proceed with  
20 one.

So all I’m saying is, and I think I said it when I was opposing leave to appeal, the Supreme Court in *Manchester Building* and in *Meadows* but *Manchester Building* is probably the best one to refer to simply because it’s more akin to  
25 what we’re talking about here. they said in that case, look, rather than try and pigeonhole everything into an information category, or an advice category, this is a spectrum, and at one end of the spectrum you’ve got a situation where a person is advising someone on whether to enter into the transaction, and is required in order to protect the possible risk or harm that might arise from that,  
30 to give proper and full advice, and if they are negligent in doing so, then they can be liable at the extreme end of the spectrum for all the consequences of

entering into the transaction. At the other end is the information end where all that is happening is that the professional, in this case the real estate agent, is providing information, and all I'm saying is absolutely clearly in this case that's what it is.

5

On the approach that the UK Supreme Court said rather than pigeonhole, let's focus on what the purpose of the duty was. What was the representation. What was the purpose for which it was provided, and the Court of Appeal very clearly said, it was provided for the purpose of the purchase transaction, and it was the risk that it was designed or intended to protect against was not the risk of operational or other risk that might arise in the course of operating the farm, it was confined to that specific purpose of being provided for the purposes of the bank, and Mr Routhan to purchase the property, of course, if you look at the purpose of the information provision in that way, and apply the *SAAMCO* principle, it is unquestionable that the only losses they can be liable for, PGG can be liable for, is any loss arising out of the purchase decision as a result of that information being wrong, and what I am saying in my submissions at 22 to 46, and 63 to 73 of my submissions, sorry, 51 to 67 of my submissions, what I'm saying is that applying that principle, whether you adopt the scope of the or the purpose of the duty in order to – the purpose of the provision of the information or the – to determine the scope of the duty and therefore the extent of liability for which the provider is liable, whether you apply that approach or you just look at this and say, look, this is clearly an information case so this is clearly at the information end of the spectrum in my submission doesn't really matter much in this case. There may be other cases where the way in which the UK Supreme Court has suggested this six-stage analysis might call for closer examination but in my submission it's unlikely that that is the case.

So really what I am saying is unless the Court is somehow persuaded that the *SAAMCO* principle is wrong and should not be applied then in my submission the proper application of that principle provides a clear answer that the only loss that can be recovered is any loss proved to have been suffered as a result of over-paying for the property, which brings us back to the normal measure of loss in cases like this, whether in tort or in contract, price less value.

**WINKELMANN CJ:**

So you're now going to cross-appeal, are you, because I was going to ask you which particular articles – you said you were going to take us to some academic writing. Which particular ones would you like us to read with you in mind,

5 Mr Taylor?

**MR TAYLOR KC:**

To be honest, the point I was really going to make in respect of the academic articles is that Professor McLauchlan seems to have a view that the principle, the *SAAMCO* principle, is conceptually flawed and I think he said inappropriate

10 and that's – and he says that for a number of reasons. He says, well, you know, Lord Hoffmann, when he said that it, it would be a paradox if the measure in tort gave you wider relief than –

**WINKELMANN CJ:**

Warranty.

**15 MR TAYLOR KC:**

– the measure against somebody that sits down and gives a warranty, and I mean the conceptual argument I understand but in my submission what Lord Hoffmann was saying was instinctively it doesn't sound right that where somebody sits down and gives you a warranty of the correctness of something,

20 a contractual warranty, that the liability of that person should be less than a person who simply negligently provides inaccurate information and in my submission that's the general justice of the situation as Lord Hoffmann is seeing it.

1520

25

And bear in mind too that the whole rationale for the *SAAMCO* principle is that it is not fair or just or reasonable to impose all the consequences that flow from entering into a transaction in circumstances where the person who made the inaccurate or negligent misrepresentation was simply providing a bit of

30 information, important or otherwise, as Lord Sumption says in the *BPE* case,

and is not providing advice on the merits or wisdom of entering into the transaction.

**WINKELMANN CJ:**

Can I ask you one question?

5 **MR TAYLOR KC:**

Yes.

**WINKELMANN CJ:**

Was Mr Routhan cross-examined as to whether he was needing to push for this production to support his business model as opposed to achieve something that  
10 he believed could be achieved, so that the business model was at a certain level, it assumed a certain level of productivity? So Mr Kalderimis has been saying to us, well, look, he was doing all these things because he believed this was achievable. I'm asking you was he challenged that he was actually doing all those things because his model, as put together by Mr Bishop, required it?

15 **MR TAYLOR KC:**

Look, he was doing what anybody in that situation would be doing if he's getting less and less production than he expected to get. He would find – and he's being told by his advisers these are the reasons why – if he wants to stay on the farm and operate the farm he's going to take steps to improve production  
20 and it's not a question of Mr Routhan thinking: "Oh, it was all my fault and I kept on thinking it was my fault but in fact it was because of this misrepresentation of the 103,000 kilograms." It really doesn't make a lot of sense because he knows within a couple of weeks or I think four weeks of taking over the property that he's not producing at the same level as the 103,000 kilograms. That was  
25 his evidence, and he says: "Well, because of that I had to find reasons for it," and he found some reasons for it, or some possible reasons, the pasture, those sorts of things, and he takes steps to rectify them and it's apparent from those production figures that some of those steps were successful, at least in the sense that in some seasons he was getting more than he got in the first season  
30 of the operation.



So what I say emphatically is that for a loss to be claimed there has to be reasonable reliance on the representation in order to establish a claim for damages and if, based solely on the information provided in that PGG proposal,

5 Mr Routhan took from that that that amounted to a representation that this was a standalone, low-input operation which he could replicate, that, in my submission, is not reasonable reliance. That is assumptions he has made which, in my submission, can't seriously be taken from the contents of that PGG proposal, and if – sorry, your Honour?

10 **KÓS J:**

May I just explore something with you for a moment?

**MR TAYLOR KC:**

Yes.

**KÓS J:**

15 The Routhans thought the source of the information was Mr Cook. After all, it could hardly have been Mr Daly himself.

**MR TAYLOR KC:**

No.

**KÓS J:**

20 So they thought it was the Cooks.

**MR TAYLOR KC:**

Yes.

**KÓS J:**

If the source of information had been the Cooks, their claim would have been

25 in contract. It would have been probably for cancellation or if it was too late after four years then for damages.

**MR TAYLOR KC:**

Yes.

**KÓS J:**

What consequential damages would they have been able to obtain against

- 5 Mr Cook in a claim for a contractual claim, had Mr Cook been the source of the misrepresentation?

**MR TAYLOR KC:**

If the only representation was that this is our historic production because that's what it was, you would – the damages he would – might be entitled to receive

- 10 would be the difference between the price paid and the value of that land had the representation or the value of the land with the untrue representation, as it were.

**KÓS J:**

So you're saying that it measures the same in contract and tort?

- 15 **MR TAYLOR KC:**

Yes, and in just about all situations like this the diminution of value proposition applies both in contract and in tort and Professor McLauchlan in his second article which referred to...

**WINKELMANN CJ:**

- 20 Well you say it's different because you're saying he shouldn't be able to claim that difference but rather the difference between – what's your cross-appeal is different – is posteriorly a different... which I've lost the thread of.

**MR TAYLOR KC:**

And I'll come onto the cross-appeal. Before I do it though, and I've got another

- 25 15 minutes, what I want to –

**WINKELMANN CJ:**

Well, don't feel you have to expand to take up that time, Mr Taylor.

**MR TAYLOR KC:**

No, I certainly won't. One of my objections to the way in which this case has been presented by the plaintiffs is that it has been a continually moving feast as to what damages they are claiming and what the basis for that damages claim is. And if you go to paragraph 7(a) of the Court of Appeal's decision, the Court notes there the claim as it was presented in the High Court based on this alternative transaction theory and the claim there was for 3.2 million essentially and could I just – I was going to take your Honours to the actual cases but could I just take your Honours to or refer your Honours to the discussion of alternative transactions or loss of opportunity to purchase another property as a way of measuring the loss and there's two cases.

The first is Justice Henry in *Cox and Coxon Limited v Leipst* and the second is Justice Blanchard in the *Barker* case. The first reference is Justice Henry at page 26 of *Cox and Coxon* where he says, in a case where the purchaser would not have purchased the difference between the value of the property and the price paid is the prima facie measure of damage, and then he adds, or in some circumstances, the loss of an opportunity to buy another –

1530

20 **WINKELMANN CJ:**

Is there somewhere to put that up?

**MR TAYLOR KC:**

I don't know that *Cox* is in the authorities in this Court. Anyway, on that page 26, there is the statement: "... in some circumstances, the loss of an opportunity to buy..." another property. That may be a way of measuring loss and I would have to say when I first read that I wondered what his Honour was talking about but some elucidation of that can be found in *Harvey Corporation v Barker* in the judgment of Justice Blanchard at paragraphs 14 and 17. Now that authority is not in the case on appeal before the Court.

30 **KÓS J:**

It's in there now.

**MR TAYLOR KC:**

Is it? Could you bring it up then?

**KÓS J:**

Respondent's authorities.

5 **WINKELMANN CJ:**

That's your authorities.

**MR TAYLOR KC:**

Yes. The words I'm looking for, they "might have succeeded," because in this case the finding of the Court was that the value there was – they actually  
10 purchased it at undervalue and therefore they hadn't suffered any loss.

**KÓS J:**

That's paragraph 15.

**MR TAYLOR KC:**

You're absolutely right, your Honour. But there he's talking about the  
15 "no transaction" case and he says: "Furthermore, they would still have had to have shown a monetary loss – a failure to obtain a property of a market value equal to the price they actually paid – not merely a disappointed expectation of being better off than they now find themselves," and they say –

**WINKELMANN CJ:**

20 Are you on your cross-appeal now, Mr Taylor?

**MR TAYLOR KC:**

Pretty – yes and no, yes, but what I'm pointing out is that in the High Court this alternative transaction theory was taken to an extreme level because basically what it was saying is: "We would've purchased this specific farm, we would  
25 have saved ourselves a whole lot of interest, we would've saved our – we would've avoided all of these expenses that we incurred," et cetera, et cetera, and in my submission that approach to the claim in this case was misconceived

and the reason it's misconceived is pointed out by, well, is elucidated to some extent in the judgment of Justice Blanchard in *Harvey Corporation*, first at paragraph 16 and then again at 17 where he says: "This is what I'm talking about," or, "we are talking about, when we're looking at lost opportunity cases,"

5 and all I can ask your Honours to do is to read those because in my submission this idea, and we are seeing it before this Court, the Judge says in this case, I don't buy that you would have purchased this other specific property that you were talking about, so I don't think you've lost any opportunity but I believe you would have purchased another property, and what my learned friends are

10 saying here to this Court is well we would have purchased another property and if we'd purchased another property we would have saved all of these losses that are now put forward as being lost revenue expectations, avoided interest, et cetera, et cetera and in my submission that is not a proper application of the SAAMCO principle.

15

And if we are talking about an unspecified purchase we don't know anything about it, just that another purchase would have been made and because we lost that opportunity and we purchased this property instead we've incurred all these additional expenses and lost this additional revenue, that is in simple

20 terms nothing more than a but for test. It's simply saying we wouldn't have purchased this property, we would have purchased some other property and we wouldn't have suffered any of these losses as a result of it. In my submission that is an absolutely wrong approach on any view of the law, whether it's SAAMCO or the normal measure of loss in a no transaction case of the kinds

25 discussed in *Coxon* and *Shabor* and *Harvey Corporation* et cetera, well established law over many, many years.

30

So, I come now to the cross-appeal which I will be very brief with because my primary submission in the cross-appeal is that, although price less value is the normal measure in cases of this nature in applying the SAAMCO test, what you are endeavouring to do is attribute the extent to which the loss in fact suffered is attributable to the information being wrong and what we say is that the best way of doing that in a case where there are a whole lot of other non-connected or not sufficiently connected factors which contribute to any loss of value, for

instance, the pasture, lower production, whatever, the best way to assess that is to do the hypothetical exercise that Mr Hines was asked to do which was to compare the value of the property had the representation been true and the market value of the property if it was untrue and, in my submission, what that

5 does is strip out any other factors that may affect the value of the purchase and confine the measure of loss to the loss which is actually attributable to.

**WINKELMANN CJ:**

Well, if that's right then that should be the default measure of damages.

**MR TAYLOR KC:**

10 It's not the default measure. There can in –

**WINKELMANN CJ:**

But why? What's so special about this case?

1540

**MR TAYLOR KC:**

15 Well, there, isn't anything special about this case. What I'm saying is that diminution of value, providing it's a diminution of value which is caused by the information being wrong, is the proper approach to adopt and perchance that happens to be also generally speaking the normal measure of loss for misrepresentation, whether it's contractual or tortious, except the way you

20 assess diminution in value will be different between contract and tort and that's discussed in the articles by Professor McLauchlan, and then I'm saying but in this case the only sensible way is to say to what extent did this misrepresentation as to historical production affect or diminish the value of the property and our answer to that is 50,000 based on the exercise undertaken by

25 Mr Hines.

The Court of Appeal in principle was agreeing with that proposition but for the reasons indicated in its judgment seemed to think that 50,000 was a bit low and they went about arriving at this separate valuation which I think they were

endeavouring to apply SAAMCO principles to come up with their figure of 300,000 which –

**WINKELMANN CJ:**

I find it hard to follow what they were doing there but...

5 **MR TAYLOR KC:**

Well, I can see what they were trying to do but, as the Court said, it was somewhat unscientific, and really, in the written submissions on the cross-appeal, I have tried to explain why I think even adopting their methodology, if you accepted it was the right way to approach the issue and we  
10 say the right way is the \$50,000, adopting their methodology we still say the amount would be less than the 300,000 that they came up with.

The other point I would make is that for the reasons I've set out in the schedule to the outline of the oral argument, when you look at the valuations, and  
15 particularly if you compare them with the two contemporaneous September 2009 valuations which were done without the shadow or cloud of litigation, if we look at that schedule it is clear that Mr Hancock's valuation is an absolute outlier and should not be relied upon as the evidence of the best evidence of market value.

20

Should your Honours find –

**GLAZEBROOK J:**

What was the matrimonial valuation done for?

**MR TAYLOR KC:**

25 Sorry?

**GLAZEBROOK J:**

What was the matrimonial valuation done for?

**MR TAYLOR KC:**

I have no idea, your Honour. It's simply recorded in the valuation report itself.

**WINKELMANN CJ:**

It's Mr Cook's matrimonial valuation.

5 **MR TAYLOR KC:**

Yes, it would have been Mr Cook's matrimonial –

**GLAZEBROOK J:**

Well, no, it's just I'm not entirely sure that we can assume it's without the cloud of litigation, that's all.

10 **MR TAYLOR KC:**

Well, without the cloud of this litigation.

**GLAZEBROOK J:**

It's certainly without the cloud of this litigation.

**MR TAYLOR KC:**

15 And certainly Mr Hines' valuation which is the other one that was done in  
September, I'm not sure that it was made for matrimonial purposes, but the  
valuation he came up with was the 2.9 which is what Mr Cook put the property  
on the market for and there he used, instead of – Mr Mills in his valuation used  
the 87,000 average production, Mr Hines used the 95,000 average production  
20 figure in his based on his assessment that actual production might be too high  
a figure.

**WINKELMANN CJ:**

So your time is up.

**MR TAYLOR KC:**

25 It is.



**WINKELMANN CJ:**

Mr Kalderimis?

**MR KALDERIMIS:**

Thank you, your Honour. There are three important questions that have  
 5 emerged from the discussion. The first is what was the meaning of the  
 misrepresentation? That was the proposition discussed at point 11 of the  
 appellant's road map. The key High Court judgment paragraphs about that  
 were touched on yesterday but I'll remind the Court. The first one and the key  
 one was paragraph 140 which is in the road map at the bottom but then also if  
 10 you look at 140 it says: "The other misleading misrepresentations contained in  
 the PGG Proposal as set out at [132] above..." and that relates to all of the  
 issues that have been discussed. So that it "had not been run as a standalone  
 farm...the stocking rate was lower...half the herd was not wintered off early..."  
 but there was more rotation, there was "more dry feed" and there was "more  
 15 nitrogen." If you look, and I don't have time to go to it, the High Court Judge  
 makes careful findings at 58,175, 190 and 227.

Now, from what we heard this morning we really had a concession that if  
 Mr Daly had represented in context that this was a low input farm, then this  
 20 would be more like an advice case but that is what the High Court Judge found  
 had in context been represented, and you can see that from paragraph 190 as  
 well as other paragraphs. If you look at the last sentence of 190: "In fact, this  
 was a farm which was only capable of producing between 80,000 and 90,000  
 kgMS on a standalone basis...PGG's misrepresentation was a material  
 25 factor..."

Now her Honour the Chief Justice asked: "Well are you saying that the farm just  
 couldn't do 103,000?" Not at all. It could do 103,000 but not on these kinds of  
 inputs. That came up first in Mr Lewis – he was the Routhans' farm expert, one  
 30 of the two, Lewis and Glennie, in his first report at paragraph 38. That was  
 before all of the evidence was traversed about how the farm had actually been  
 run, and so based on the evidence that he had at that date, because Mr Cook  
 was still feeding through discovery information at the time that first brief was

written, he said the maximum you could get in a grass based orthodox manner would be 90,000. The reason the Judge moves that down in paragraph 190 by the end of the trial is it was clear even that maximum was optimistic.

5 So, when we – the Court has a choice as to how much it wants to go into the detail of revisiting the basis of those factual findings. If you are interested in digging around you can see that one of the things that unlocked a lot of the exploration was a reference in the Property Advisory valuation, I won't take you to the page, but you can have a look yourself. It's 301.0395. That –

10 **KÓS J:**

Sorry, that number again please?

**MR KALDERIMIS:**

At 301.0395.

**GLAZEBROOK J:**

15 0395 was it?  
1550

**MR KALDERIMIS:**

That's right, your Honour. At that page Property Advisory indicates, if you look at the bottom under paragraph 33, that the nitrogen being applied to farm 1 was  
20 400 kgs per hectare. You'll remember the recommended application following the guidelines was 146. None of the experts on either side had thought it could have been as high as 400 but Mr Davis, the consultant who my learned friend referred to this morning, not only confirmed that that was what was happening but he provided a whole lot more information during the trial and, in fact, if you  
25 look at the table of contents and just look right at the very end of it, just before volume 4 at the end of volume 3, you'll see documents 96 to 97, sorry, 95 to 97, the Living Land documents, and including 98, these are documents that Mr Davis produced out of nowhere in his own examination-in-chief, and in fact it might have been during cross-examination. He said: "Well, I've got some

documents here,” and it turned out that the fertiliser that was being produced was beyond any ordinary level.

**WINKELMANN CJ:**

Well, on your submission the most important misrepresentation that actually  
5 happened was in respect of the farming system and not the level of production.

**MR KALDERIMIS:**

We say it’s both but yes, there is real importance to the fact that the production didn’t come from the system. So we say that this is production in the context of a farming system, as is any sensible production figure. No one would take a  
10 production figure totally in the abstract. Dairy conversation is always about production in the context of systems. If your Honours are really interested in looking –

**KÓS J:**

I’m not sure how interested we really can be in this because of paragraph 140  
15 of the High Court judgment which gives you a bit of wriggle room in relation to the non-pleaded representations which you sought to add at the end of trial but –

**MR KALDERIMIS:**

Yes, I’m only responding. So I’m suggesting we are –

20 **WINKELMANN CJ:**

I mean the more you’re taking me to it the more I’m thinking that actually they would have suffered the loss without the representation because 98,000 would have been a significant overstatement.

**MR KALDERIMIS:**

25 No, that’s the second issue, so why don’t I come straight to that.

**WINKELMANN CJ:**

Yes.

**MR KALDERIMIS:**

So the first issue is what is the meaning of the representation. Our short answer is it's a meaning in context. The second issue is if the production representation had been true, if you could've got 103 from this described system, would the Routhans have got 103 themselves or was there some sort of magic Mr Cudmore factor that was relevant here? In other words, was it some sort of active act of fairy dust that produced the higher amounts that meant that even if this system had been followed the Routhans wouldn't themselves have got 103, and that was the submission. The evidence and the findings were contrary to that.

So again, paragraph 190 is the anchoring paragraph in the judgment, but then if you move from 190 to 225 through to 227, this is in the contributory negligence part of the judgment, and the judgment at 156 says it is dealing with the affirmative mitigation defence, absence of mitigation, together with contributory negligence. 188 is relevant to that too. At 225 through to 227 the Judge finds in accordance with the evidence given by Mr Lewis that the Routhans would have been able to get that production. They were capable of getting 103, getting 103 if 103 had come from these inputs and, in fact, what they were doing was getting about what you could expect on a grass-based system with these inputs. That's the relevance of the table at 226 of the judgment.

Mr Davis was cross-examined on whether there was some sort of magic factor. You don't need to go to it but the reference is 204.1107, lines 10 to 20, and he says it's really the farming system, it's not about whether you have some magical manager because farming is a science. You put the inputs in, you get the outputs out. There is a lot of evidence to that effect from all of the farming experts and the joint expert report is worth reading in that regard. You can see the views on the different inputs at paragraphs 4 through to 8.

So that brings us to the third issue which is did the Routhans act reasonably, or take reasonable measures to mitigate their loss in their years between 2010, coming into possession of the farm –

**WINKELMANN CJ:**

Was this actually in reply because Mr Taylor expressly didn't address it?

**MR KALDERIMIS:**

5 No, well then I won't take that any further. I'll just note that you can see from the chronology at the bottom of the penultimate page and at the top of the final page references to the steps the Routhans took because they certainly weren't sitting on their hands doing nothing. They were taking the steps that they were advised to do.

**WINKELMANN CJ:**

10 Well I think we've got that from your first submissions.

**MR KALDERIMIS:**

15 Then the only other points I have to make are firstly and very shortly about Mr Bishop. That is beyond the scope of the appeal but it may reassure the Court, if you look at paragraphs 41, 47 and 51 of Mr Routhan's first brief of evidence.

**GLAZEBROOK J:**

41?

**MR KALDERIMIS:**

20 41, 47 and 51. That he says he was given two copies of the PGG proposal and he gave one copy to Rabobank, sent it off, and he gave the other copy to Mr Bishop and Mr Bishop didn't deny that he may have received it. He just said he couldn't specifically remember it. The only other thing that the Court may –

**WINKELMANN CJ:**

It's not really a major point Mr Kalderimis.

25 **MR KALDERIMIS:**

Not a major point. If you did want to read the cross-examination you should definitely go to page 1055 where you can see how everything dovetails with

Rabobank's understanding and the High Court findings are 139, 221, 222 and 224.

5 Just two last substantive points I'll just mention, the shares came up. Again, just so the Court is reassured, the share number is not the amount you get recalibrated each year. It's the maximum you're allowed to sell into the dairy company. So 103 was the maximum that would be able to be sold and that was reassuring to the Routhans because they thought it was doing 103.

10 If we just bring up the road map and look at proposition 8. This is just on the legal submissions made at the very end now. Just to give your Honours two references, I won't go to it. If you just look at the very bottom of proposition 8 you can see a reference to *Harvey*. You were taken to paragraph 15. It's worth looking at paragraph 14 as well which makes a good comparison with the Court  
15 of Appeal's judgment at 122. Paragraph 14 is where the Court says: "Reliance expenses, including wasted expenditure are recoverable" and in terms of the criticism of the Judge in adopting not the alternative farm itself but a notional transaction, well that's exactly what Lord Justice Mustill said you should do in the penultimate paragraph of *East v Maurer*. And obviously this isn't a claim for  
20 warranty damages but what the Routhans have done and what PGG hasn't done is prepared a full counterfactual so the Court can be satisfied that the reliance damages they're calling are within what warranty damages would be if that's a relevant test.

**WINKELMANN CJ:**

25 So your time is up now Mr Kalderimis. Have you got anything you absolutely must convey to us?

**MR KALDERIMIS:**

Yes, in 30 seconds, the last thing I will say is in a FTA case like this it ought to be possible for the plaintiff to win and it ought to be possible for the plaintiff in  
30 bringing all of the evidence that they have brought, including a full costed municipal farm counterfactual, to be able to prove consequential losses. So the thing I say to this Court is please don't deliver a judgment that is different from

*Altmarloch* in the sense that consequential losses is something you can find in textbooks but you can't find in real cases because no matter what you do the bar is set so high they're found not to be proven or not to be within the scope of duty. I've got nothing further unless you have any further questions.

5 **WINKELMANN CJ:**

Thank you, Mr Kalderimis. Sorry, Mr Taylor?

**MR TAYLOR KC:**

Your Honour, just before you adjourn, I would just want to reserve PGG's position on the effect of their disclaimer in the PGG document and also on –

10 **WINKELMANN CJ:**

Isn't it a bit late for that?

**MR TAYLOR KC:**

In the event that the Court runs with the argument that all of these consequential losses arising out of the alternative transaction theory apply because the Court  
15 of Appeal, we appeal the Judge's contributory negligence findings, the Court of Appeal deal with one or two of them but said because of the way we've approached damages the rest of them aren't relevant. So really if the Court here were to adopt a different approach to the Court of Appeal for the assessment of damages –

20 **WINKELMANN CJ:**

I mean I suppose you could put in a notice defending it on – supporting the judgment on either grounds, couldn't you? Is your position that the limitation clause excludes those consequential losses? Pause Mr Kalderimis, just wait until Mr Taylor is clear as to what he's saying.

25 **MR KALDERIMIS:**

Yes.

**MR TAYLOR KC:**

To the extent that it relies on the other representations about the baleage et cetera, yes it does. It was argued in the Court of Appeal that it reduced liability or extinguished it in respect of the misrepresentation as to production  
 5 figures and they said no and for the reasons that they gave, and there's no cross-appeal or attempt to appeal that finding, but if the Court were to say –

**WINKELMANN CJ:**

Well, I think perhaps the way we should deal with it is that you should be allowed to put in two pages as to why you might be able to make, should be allowed to  
 10 make submissions on this point, and Mr Kalderimis you can reply as to why shouldn't I assume why he should not be permitted to do so and perhaps if you could put –

**MR TAYLOR KC:**

Yes.

15 **KÓS J:**

That's better, rather than rushing this.

**WINKELMANN CJ:**

Yes, and perhaps if you put that in within seven days Mr Taylor and you Mr Kalderimis within 10 days.

20 **MR KALDERIMIS:**

As the Court pleases.

**MR TAYLOR KC:**

Yes.

**WINKELMANN CJ:**

25 Because otherwise we'll – it's quite a technical point, I can see it, and we don't want to rush either party.



**MR TAYLOR KC:**

One further thing, your Honour, please don't take from what I said referring to Professor McLauchlan that I agree with his criticisms. I don't.

**KÓS J:**

5 I think we got that.

**WINKELMANN CJ:**

We didn't understand you to be agreeing with him.

**MR TAYLOR KC:**

10 But what I would commend to you as a very interesting read is chapter 3 of Professor Stapleton's three essays because she's got some very interesting thoughts as to where the principle fits in the analysis. She says it's really a remoteness issue and quite frankly –

**KÓS J:**

I think that's where my floating cloud came from.

15 **MR TAYLOR KC:**

Is it. There you go. Thank you, your Honours.

**WINKELMANN CJ:**

Well, our thanks to counsel for their excellent submissions we received and assistance and we are now going to reserve our judgment.

20 **COURT ADJOURNS: 4.03 PM**