

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2017-409-000213
[2019] NZHC 671**

BETWEEN

JASPER WINSTON CLARK,
JOAN CAROL CLARK and
JASPER ROSS CLARK
Plaintiffs

AND

RURAL LIVESTOCK LIMITED
Defendant

Hearing: 1-4 May 2018, 12 September 2018

Appearances: A D G Hitchcock for the Plaintiffs
H McIntosh for the Defendant

Judgment: 2 April 2019

JUDGMENT OF NATION J

[1] At least historically, it was often a source of pride amongst New Zealand farmers and stock agents that all that was needed to secure their dealings was a handshake. The experience of the parties to these proceedings may well suggest that should now be consigned to history and circumstances where farmers know what stock they farm and keep tallies.

Background

[2] The plaintiffs, Jasper Ross Clark (Mr Clark) and his parents, are a family farming partnership based near Milton. Mr Clark now runs the farming business. Over recent years, a significant part of the business has involved trading in dairy stock.

[3] The defendant (Rural) is a stock and station firm operating predominantly in the South Island. It is the biggest privately owned stock and station firm in the South Island and has a staff of 60 working in its livestock division. One of Rural's livestock agents involved with Mr Clark was John Williams.

[4] The plaintiffs' claim was particularised in an amended statement of claim of 21 December 2017. Evidence was heard at a trial of the proceedings over 1-4 May 2018. As the parties, through counsel, requested, there was then a delay for a further hearing when submissions could be presented but also to give the parties the opportunity to see if the issues between them could be resolved. The proceedings were not fully settled but the claims which the Court had to deal with were reduced. Counsel presented their final submissions on 12 September 2018.

Summary of claims

Claim for 176 undelivered or lost dairy cows

[5] In early winter 2015, following an approach by Mr Williams, the plaintiffs agreed to purchase 176 AB (artificially bred) fully recorded in calf dairy heifers in June and July 2015. Rural invoiced the plaintiffs and the plaintiffs paid Rural \$210,277.50 for 176 animals.

[6] The heifers concerned were never delivered to the plaintiffs' property. On Mr Williams' suggestion, Mr Williams arranged with Mr Clark for the heifers to be grazed elsewhere on "free leases". With free leases, in return for grazing the heifers, the farmer on whose land the stock are being grazed milks them and is entitled to their calves. The cows remain the property of the owner and are then available to the owner to sell, retain as part of their herd or perhaps to try and have grazed out on another lease.

[7] Mr Clark says that in 2016 the heifers were not on the farms where he understood Mr Williams had arranged for them to be grazed on free leases. He has never been able to recover the cows. The plaintiffs claim they paid Rural for 176 in calf heifers which were never delivered to them and which they say they have been unable to locate. As clarified in closing submissions, the plaintiffs claim \$344,080

including GST in damages for what should have been the value to the plaintiffs of 176 cows in 2017.

Claim for failure to arrange, when required, free leases of 253 calves and failure to provide the records that would have facilitated a sale of those heifers as AB fully recorded stock

[8] In late June or early July 2015, following an approach by Mr Williams, Mr Clark arranged for Mr Williams/Rural to purchase 253 AB fully recorded calves to be grazed on the plaintiffs' property near Milton on the basis they would then be put in calf. In early 2016, Mr Williams was to arrange for these then in calf heifers to either go out for grazing on free leases or be sold.

[9] The plaintiffs say that, in breach of Rural's obligations to them, Mr Williams did not attempt to put this stock out on free leases early enough in 2016 or advise the plaintiffs early enough of difficulties he was facing in this regard. The plaintiffs say that, as a result, the in calf heifers had to be sold close to winter in 2016 when their market value had materially dropped and they had to pay for unanticipated grazing. The plaintiffs also claim that Rural never obtained or provided the records that were needed for the stock to be sold as AB fully recorded, which also reduced their value. The plaintiffs claim \$265,346.89 including GST for such losses.

Claim for further undelivered stock and for heifers being in calf

[10] The plaintiffs say that, at the end of April or early May 2018, Mr Clark asked Mr Williams/Rural to purchase and deliver to the plaintiffs 100 empty dairy heifers. The plaintiffs say they paid Rural for 112 heifers. They say that only 72 heifers were delivered to them and 10 of those were in calf. The plaintiffs claim \$36,800, being the cost of 40 dairy heifers which they claim were never delivered to them plus GST.

Claim for loss of a teaser-bull and shortfall in credit

[11] The plaintiffs say that, through Mr Williams/Rural, the plaintiffs leased out eight teaser-bulls at a cost which was agreed between Mr Williams for Rural and Mr Clark of \$650 per head net of commission. They also say that, when the eight bulls were delivered to them, one was injured and had to be put down, a loss for which they

say Rural is liable and for which they seek compensation of \$1,750. The plaintiffs claim Rural credited them for \$650 per head less commission, \$5,520, when the credit should have been \$7,992.50. They seek \$2,472.50 for that loss.

Claim for 176 undelivered or lost dairy cows

[12] In essence, the plaintiffs pleaded that, in breach of contractual obligations Rural had to them, Rural:

- (a) failed to purchase and/or deliver stock when instructed to do so;
- (b) failed to properly record the detail of stock transactions;
- (c) failed to arrange or properly document the lease or agistment of livestock when instructed to do so; and
- (d) failed to sell the stock or account to the plaintiffs for the proceeds of their sale or to ensure the heifers were available to them at the end of the free lease period.

Alternatively, the plaintiffs also pleaded Rural was in trade and, by virtue of the pleaded breaches of contract, Rural's conduct was misleading or deceptive and likely to mislead or deceive. The plaintiffs thus claim damages under the Fair Trading Act 1986 (FTA).

[13] I accept Mr Clark's evidence as to how he came to purchase the 176 heifer calves and the other transactions that are the subject of these proceedings. He had a longstanding relationship with Rural and its agents, including Mr Williams. He said he had problems with Mr Williams providing him with the paperwork for transactions but considered Mr Williams was a good agent in terms of setting up deals. Many of the plaintiffs' purchases which resulted from initial communication between himself and Mr Williams occurred sight unseen, based on the description of animals given to him by Mr Williams. It was only on occasions that Mr Clark inspected the stock in question to make sure they were exactly what he needed. He put a significant degree of trust in Mr Williams and Rural doing all that was required of them. Often, he would never be told of who was on the other side of a sale and purchase transaction. Mr

Williams was aware the plaintiffs were wanting to expand their farming operation and suggested that he would arrange for stock the partnership was purchasing to be grazed off-farm on free lease arrangements so that, through such leases, the partnership could build up a significant dairy herd which they could then either farm or sell dependent on market conditions.

[14] It was in this way, in or about June 2015, Mr Clark asked Mr Williams to purchase 176 AB fully recorded in calf heifers and for those heifers to be placed on free leases on other dairy farms.

[15] An unusual feature of this case was that the agent, Mr Williams, whose conduct is under challenge, gave evidence for the plaintiffs. In his brief of evidence, Mr Williams said he ended his employment with Rural in August 2016 after ceasing transactions for clients around April 2016 and being on holiday for a time when he was on stress leave. There were areas of evidence which I accepted, some on which he seemed unnecessarily defensive or unhelpful, and some areas where his vagueness was of concern in my assessment as to his credibility on crucial matters.

[16] In his written brief of evidence, Mr Williams confirmed that, in or about early June 2015, Mr Clark asked him to arrange the purchase of some lines of AB fully recorded in calf dairy heifers and to have those dairy heifers placed on a free lease or leases. He said that approximately 90 of those heifers were leased to Russell Bouma of Clydevale but these were not bought by Mr Bouma. He said that, from memory, the remainder of the heifers were leased to a farmer in Canterbury. He said that, although Mr Clark had referred to the plaintiffs purchasing 176 heifers, he thought there were two lines of 90 and suggested that it was possible Mr Clark had not been correctly invoiced by Rural.

[17] On 20 August 2015, by email Mr Williams sent Mr Clark a lease agreement for 90 Friesian-cross in calf heifers to Chellma Ltd (Chellma), C/- R and T Bouma of RD 4, Balclutha, with those heifers apparently delivered on 14 July 2015.

[18] Shortly after the purchase, Mr Clark spoke with Rob Fowler, a manager from Rural, who told him to make sure that Mr Williams gave him the lease agreements for

the stock so he knew where they were. Mr Fowler also asked Mr Clark to send him the lease agreement so that Rural was kept in the loop.

[19] With an email dated 3 September 2015, Mr Williams gave Mr Clark a lease to “N Giers” of RD 6, Ashburton for 90 Friesian-cross in calf dairy heifers with the stock delivered at Balclutha. Mr Clark forwarded a copy of the lease to Mr Fowler of Rural on the evening of the same day.

[20] Mr Clark said he did not notice at the time that the numbers on the leases did not stack up, being for a total of 180 rather than the 176 for which the plaintiffs had to pay Rural.

[21] The evidence presented establishes that Mr Williams, for Rural, did negotiate a sale of 176 in calf heifers to the plaintiffs in 2015. There was no dispute that Rural invoiced the plaintiffs for the purchase of 176 in calf heifers.

[22] Just what happened to the stock after they had been purchased is more problematic.

[23] Under cross-examination, Mr Williams said that he had arranged the lease of 90 heifers to Mr Bouma and the remainder to a farmer in Canterbury. He said that he was under constraints through obligations of confidentiality in relation to his involvement in the investigation of the Serious Fraud Office (SFO) but that he was able to say the stock leased to a Mr Greers or Giers in Canterbury had ultimately “gone north”.

[24] Mr Clark said that, at the time the purchase was arranged, he thought some of the cows were going on free lease to Mr Bouma at Clydevale but he did not know where the other ones would be going. He said that, because of his relationship with Mr Williams, he did not feel any need to get a lease document straight away but that, when he received lease documents from Mr Williams and had been invoiced for the stock, he thought the stock had been accounted for and the plan for the stock agreed on with Mr Williams was in place and working.

[25] Mr Clark said that Mr Shepherd of Rural told him in April 2016 that he should find all animals he had transacted with Mr Williams. He then contacted Mr Williams but that was to enquire over an issue he was having in relation to 90 bulls which had been out on lease and had not been accounted for. In that conversation, he did not question Mr Williams about the 176 cows because he thought they had been accounted for. Mr Clark then made enquiries to see if an N Giers of Ashburton had purchased 90 in calf dairy heifers. The person he ended up speaking to was a Mr N Giera but this person said he had never leased any stock and specifically not 90 in calf dairy heifers in July 2015. He also said that he owned all stock on his property.

[26] Mr Clark also contacted Mr Bouma of Chellma. Mr Bouma told him that he had initially received 90 Friesian-cross in calf heifers on about 14 July 2015 on a free lease for one year but he had purchased the animals from the Clarks after calving in spring 2015 through a sale and purchase arranged by Mr Williams.

[27] Mr Clark did not know of such stock being sold and the plaintiffs had never been credited with any proceeds from the sale of 90 heifers. Mr Clark said he was never told who had previously owned the stock. He had not been provided with tag numbers and had no herd records so there was no way he could prove the particular stock the plaintiffs had purchased had gone out on lease to a Mr Giers, as represented in the lease document, or to Chellma.

[28] Mr Clark, in his brief of evidence, said that he relied on Mr Williams to make sure NAIT recording had been done in respect of transactions Mr Williams had negotiated. Mr Williams accepted that, in a lot of cases, that was so.

[29] NAIT is the acronym for National Animal Identification and Tracing. The people responsible for compiling and forwarding NAIT's records as to the transfer of stock is the person actually in charge of the animals (PICA).

[30] When explaining why Mr Clark would not have received the NAIT records for the 176 cows that had been sent for grazing, Mr Williams said that it would have been the graziers who were responsible for NAIT records. In that context, he described how Mr Bouma would have received the NAIT numbers when he "brought his ones

into his herd”. Mr Williams also mentioned how “we had written down the numbers of the animals which is the MINDA records which went personally to Russell Bouma and the other ones that went up the road”. He said that copies of these numbers were probably not provided to Mr Clark “because those animals would have gone straight to Russell Bouma and the likes”. At the same time, he suggested it was not necessary for a purchaser leasing out stock to get details of the initial stock because, as he said, the way a lease works is that the owner does not have to be given back the same animals provided he gets back equivalent animals. He said, to him, the initial profile of the animals was thus not a lot of use and that generally the owning farmer would be pretty happy as long as they got equivalent animals back. With that thinking, I recognise it is likely Mr Williams was not concerned whether ultimately Mr Clark took possession of the animals he had purchased, provided that, at such time as Mr Clark expected the animals back, Mr Williams could obtain what he regarded as equivalent animals from some other transaction he might then negotiate.

[31] MINDA is a system widely used in the dairy industry. It is an online database programme which is provided and maintained by the Livestock Improvement Corporation (LIC), a farmer-owned cooperative, headquartered in Hamilton. During the trial, a number of witnesses referred to the LIC identification information or numbers that are usually associated with dairy stock.

[32] Mr Williams said that, when he purchased the 176 or 180 cows, he had the full AB records for those stock. He said he personally had a copy of the records for the 450 or 500 animals they were selected from but he said that Mr Clark may not have received a copy of those records.

[33] Mr Clark said he never received and was never able to obtain tag numbers, NAIT or MINDA numbers for the 176 heifers the plaintiffs had purchased.

[34] The plaintiffs called Terence Cairns as an expert witness. Mr Cairns has worked as a livestock agent since 1972 and began his own livestock business in 1997. The business merged with another significant livestock trading company in 2017. The respect for him in the sector was evidenced by the fact that he was Chairman of the New Zealand Stock and Station Agents Association (NZSSAA) for 10 years. He

showed himself to be independent and impartial as between the parties in the way he gave his evidence.

[35] While Mr Cairns acknowledged all livestock companies operate differently, he considered himself able to comment on industry practices. To a significant extent, the opinions he expressed as to industry practices within the livestock agency business were accepted by Rural.

[36] Mr Cairns said that when dealing with livestock, the numbers for sale, purchase or lease should be made known to each farmer through tallying and listing of livestock. He said the tallies were generally done by either the farmer, agent or truck driver when the cattle were loaded onto the truck on the day or on the day prior to transport. He referred to the statutory requirement for NAIT recording which has to be completed before cattle are moved off farm. He said a specific number registered with NAIT identifies a PICA. There can then be an associated numbered ear tag linking an animal to a specific farmer and a specific property at a given time. He said that NAIT records have to be provided from the farmer at point of origin to the destination farmer or when cattle were being sent for slaughter or had died from any other cause within 48 hours for updating, but he said, in real terms, this timeframe was often not met. Although legal liability to register the movement lay with the PICA, often the agent would NAIT record the animals because farmers did not have the necessary wand (electronic recording device) needed to record the animals' numbers or did not understand the technology or have the computer skills to record NAIT movements.

[37] Mr Cairns considered that the paucity of information provided to Mr Clark about the 176 in calf dairy heifers Mr Williams was purchasing for the plaintiffs in 2015 was unusual and that it would also have been desirable for Mr Williams/Rural to have insisted that Mr Clark view the animals before purchase. He also regarded it as unacceptable for Mr Williams' manager, Mr Fowler, to have advised Mr Clark in July 2015 that he should make sure he got copies of the leases of those animals. In his view, it was Rural, through its administrative staff and managers, who were responsible for ensuring the lease transactions were properly recorded so it was not the plaintiffs' responsibility to chase up the lease agreements.

[38] Mr Cairns was of the opinion that the parties' inability to locate the stock which the plaintiffs had purchased was consistent with a failure to record fully the detail of the stock that had been purchased, failure to properly record details of the leases as well as potentially a failure to have actually acquired or delivered the stock that were purchased. Mr Cairns was also concerned that 90 in calf heifers had apparently been received by Chellma on 14 July 2015 on a free lease for one year but were then sold to Chellma in spring 2015 after calving without authority for a sale having been obtained from the plaintiffs and without an accounting for the proceeds of sale. He regarded that as involving a "fundamental breach of just about every duty owed to the plaintiffs".

[39] Mr Cox is the general manager, livestock of Rural, a position he has held since April 2016. From October 2009 to April 2016 he was regional livestock manager for Rural, with oversight of Rural's livestock business in Southland and later Canterbury.

[40] Mr Cox agreed it was not unusual for agents to NAIT record departing animals for the PICA. Mr Cox agreed that, as far as NAIT records were concerned, if requested by the PICA of the property that the stock was being moved from, the agent might scan the animals as they went on the truck. He also said the agent would then email that movement to the Rural office for processing with NAIT or to the PICA for them to then process that movement with NAIT themselves. He said Rural started doing this as a service to assist their clients when NAIT was first introduced but they withdrew from processing NAIT transfers for clients in February or March 2018.

[41] Mr Cox said it was not Rural's responsibility nor part of its business to hold detailed information, such as NAIT or MINDA records of stock bought and sold. He accepted that, with the plaintiffs' purchase of 90 cows on the Chellma lease, Mr Williams should have obtained full AB records for the new AB in calf heifers, including the mobile MINDA profiles for the stock and should have provided those to the Clarks. He suggested that the arrangement of a lease between the plaintiffs and Chellma should then have been negotiated directly between the plaintiffs and Chellma, that Mr Williams may then have arranged for the trucking of the animals directly to Chellma and then Mr Williams would have put through the sale note and Rural would have then issued the invoice and credit note accordingly.

[42] Mr Cox said that it “now appears” that Mr N Giers never existed but he did not provide any information as to what that belief was based on. He did not refer to his making any enquiry of Mr Williams for any explanation as to how Mr Giers’ name came to be on the lease which Mr Williams prepared or of any other enquiry Rural might have made to establish who could have taken delivery of the heifers that were sold to the plaintiffs.

[43] As far as the heifers bought by the plaintiffs and put out on free lease to Chellma were concerned, Mr Cox in his written brief said that, as a result of their investigations, they believed that 70 of those animals may have been sold by Mr Williams to Mr Bouma, as recorded in tax invoice 329552, and the proceeds credited to one of Mr Williams’ own fictitious accounts although not paid out to him. He said, if that was so, in principle, Rural would accept it must account to Mr Clark for such proceeds, but he said the whereabouts of the balance of the animals should be a matter as between the plaintiffs and Chellma.

[44] Mr Williams said that his accounts with Rural had been frozen by Rural so he did not have the benefit of any credit.

[45] In oral evidence, Mr Cox said the sale of 70 animals to Chellma was being investigated by the SFO but, due to continuing investigations, Mr Cox considered the sale of those animals had nothing to do with animals that Mr Clark had purchased and leased to Chellma. Mr Cox considered it highly likely that the 90 animals that were to be leased to Chellma did go there but said Rural had not physically checked this out.

[46] Mr Williams said that he may have helped transfer some of the records for the cattle that went to Chellma and believed he had provided some of that information to Rural at the time he was involved in the transactions. Mr Williams was critical of Rural not having tried to locate the animals through obtaining information as to the precise animals involved in the transactions through enquiries of the owners who had sold the stock, as referred to in the notices of sale. He said Rural had not made any enquiries of him or asked for his assistance in endeavouring to identify just what stock had been included in the 176 sold to Mr Clark.

[47] Mr Williams accepted that quite possibly Mr Clark was never sent any identification information as to the 90 heifers that had gone to Chellma. He said Mr Clark would not have been able to identify what cows he was getting back from Chellma unless he was provided with information as to that by Mr Bouma.

[48] Mr Williams said that, with access to the information as to the MINDA or NAIT records for the stock that went to Canterbury, although such stock may be in other people's herds or even have been killed, it would be possible to find out where the animals that went to "Mr Giers" are or where the proceeds of the kill had gone. He suggested such information might eventually be available through the SFO investigation. Both Mr Williams and Mr Cox said they were constrained from revealing information they had been privy to in connection with the SFO investigation.

[49] Mr Cairns described the way he would have expected a stock agency to accept its responsibility with regard to undelivered stock through trying to find out what had happened. He considered it very unusual that multiple agents and managers at Rural were unable to help Mr Clark trace the stock the plaintiffs had purchased and establish what ultimately became of the stock.

[50] I infer from Mr Cox's evidence, that Rural has endeavoured to find out what happened to the 90 in calf heifers supposedly put out on a free lease to Chellma and has been unable to identify the precise stock that would have gone there and has not established that there are any of those cows still on the Chellma property. The fact Mr Cox is now saying that the stock bought by Chellma were not part of the 90 head originally leased to it means there is uncertainty as to whether 90 in calf heifers were delivered to Chellma in 2015 on a free lease.

[51] Mr Clark said that, in the latter part of 2016 and afterwards, he had a number of conversations with Mr Cox and others of Rural to try and sort out what had happened. During those discussions, Mr Cox told him they could not find the 176 heifers.

[52] On the evidence, I am satisfied the plaintiffs have established, on the balance of probabilities, it has not been possible and could not have been possible for them to

identify whether the 176 heifers they purchased had been leased in their names and delivered to a property of “N Giers” in mid Canterbury or of Chellma near Balclutha. In the context of the relationship that a stock firm such as Rural has with its clients, it would have been reasonable to expect that, when Mr Clark found he could not locate the animals which the plaintiffs had purchased, Rural would have made reasonable enquiries to find out where those stock had gone, whether they were ever on the Giers’ farm in mid Canterbury or in Balclutha. Despite Mr Cox’s belief, they have not been able to do this.

[53] All the evidence establishes, on the balance of probabilities:

- (a) Mr Williams, as an agent for Rural, arranged the sale of 176 AB recorded in calf heifers to the plaintiffs, with a representation to Mr Clark that he would arrange for the heifers to be grazed out on free leases. Implicitly, with that representation, he represented that the free leases would be arranged with the animals being identified in sufficient detail to enable the plaintiffs to be able to:
 - (i) identify whether the animals subject to the leases were actually where they were meant to be; and
 - (ii) find and take possession of the animals which they were entitled to.
- (b) The plaintiffs paid Rural \$210,277.50 for those animals. Mr Williams, as agent for Rural, agreed to arrange for the transport of those animals to farms where they were to be grazed but still owned by the plaintiffs.
- (c) With the particular way Mr Williams had arranged the sale, he had to provide the plaintiffs with sufficient information as to the identity of the stock to enable the plaintiffs to identify where those stock had gone and to be able to recover them at an appropriate time. Such information was never provided to the plaintiffs.
- (d) The stock cannot now be located. The plaintiffs have thus paid for the stock but have never obtained possession of them and have therefore not received what they paid for.

[54] In denying liability for the loss the plaintiffs had suffered, Rural asserted that the plaintiffs had agreed to the heifers going out on free leases on other farms and that any loss they have suffered as a result of the animals not being available to them at the end of such leases was a matter for which the lessees, not Rural, might be liable. They argued that, if the leases had been arranged by Mr Williams, this was done by him personally and was not within the scope of the authority he had as an agent for Rural. Rural also claimed that any loss was due to, or at least was contributed to by the negligence or recklessness of the plaintiffs.

Can Rural be liable for Mr Williams' organising free leases?

[55] Under cross-examination, Mr Williams accepted that Rural would generally not become involved in providing a dairy leasing service but said on occasions they did. Rural was not going to receive any commission for the rental because, with a free lease, there was no rental. However, he indicated the arrangement of free leases was to Rural's advantage because Rural had received a commission for the stock being purchased and would receive a commission when the stock was sold. The leasing arrangements would make these transactions work. He accepted that the client could ultimately have chosen to sell the stock through another agency but indicated that, because Rural considered it had a good relationship with the plaintiffs and Mr Clark was a very significant client who was seeking to build up a substantial herd, he agreed to provide this particular assistance to the plaintiffs in the hope that Rural would continue to get the business associated with Mr Clark's decision to grow his herd off farm.

[56] Mr Cox said that Rural does not act as broker or as agent on stock leases. He suggested Mr Clark would have known this and said that, if Mr Williams had arranged leases for the Clarks, this would have been outside his authority. He observed that the leases Mr Williams apparently forwarded to Mr Clark in September 2015 were not Rural documents and did not have any Rural marking.

[57] Mr Cox however emphasised in his evidence that Rural's agent acted on the instructions of its clients. He said that a standard service that Rural provided for clients when required was the procurement of grazing or agistment contracts. When doing

this, Rural would arrange such contracts, charge commission for them and be involved in the return of stock from grazing in consultation with the parties at the end of the term of the contract or by mutual agreement between the parties.

[58] Mr Cox also accepted that Rural agents might well help to find farmers willing to enter into free leases for clients who were seeking to grow stock off farm and sell them later for a profit.

[59] The fact Rural would not receive a commission or brokerage fee for arranging such leases does mean that it was not within the scope of the agent's authority to make such arrangements. There was a financial incentive for them to do so through the way the facilitation of such an arrangement could lead to further business for Rural in the future through being asked to act as agent on the sale of the subject stock with the commission it would receive as a result. Rural also received a fee for the leasing of bulls for servicing cows where that was arranged by Rural. Mr Clark had previously taken advantage of Rural's services in this way.

[60] In closing submissions, Mr McIntosh for Rural submitted Rural did not arrange any dairy leases and the lease forms used were not Rural forms. He submitted Rural had no role to play in the leases. He submitted the leases "were nothing but a free favour done by Mr Williams personally for Mr Clark". In opening submissions however, Mr McIntosh had said the pleaded defence of lack of authority applied only to the 253 heifer calf transaction.

[61] Mr Cairns considered the duties of the stock agent and his company would normally include recording the full details of livestock purchased, arranging for the lease or agistment of livestock when instructed, recording the full details of the lease or agistment contracts, monitoring the performance of agents/stock, arranging for the sale and delivery of livestock when instructed, recording the full details of livestock sold and properly accounting for proceeds of sale.

[62] Mr Cairns said that, as a stock agent, he had arranged livestock leasing for clients including the leasing of dairy cows and he had previously arranged free leases of dairy stock when he had not received any payment for making the arrangement. He

indicated that it was part of the service the agent could choose to provide to a good and faithful client. Mr Cairns said that, when he had arranged leases of stock, including free leases, he did his very best to make sure that all of the leased stock were returned to the client owner and that he was well aware from experience that, if the stock did not come back, the agents would be the first cab off the rank in terms of a claim for animals that had not been returned. Mr Cairns said that, within the industry, clients would assume the agents would accept an obligation to make sure the stock would be returned at the end of a lease.

[63] I also accept there are a few hard and fast rules as to the limits on what a stock agent might do as an agent on the instructions of a client. For instance, both Mr Cairns and Mr Cox said that, because of the position of trust stock agents were in as between the vendors and purchasers of stock, and because of the way agents often acted for both vendor and purchaser, it was undesirable for agents to be involved in trading in stock on their own accounts. For similar reasons, it would be bad practice for an agent or company to operate a clearing account. A clearing account is an account in the name of an agent to which the cost of transactions might be debited where there was some doubt as to who the ultimate purchaser might be.

[64] Mr Cox said clearing accounts were essentially a temporary holding account dedicated to an agent pending clarification of the details on the buyer's side or else awaiting a buyer being found due predominantly to a "sale falling over" or a client requiring an urgent sale. He said that use of the clearing account in the latter circumstances meant that technically Rural was temporarily owning stock while a buyer was found. He said that Rural agents were allowed to hold stock in their clearing accounts for a maximum of three days and use of the accounts in that way were relatively uncommon and "usually" only with approval by the agent's manager. Mr Cox acknowledged that issues arising out of the current litigation showed that Rural's management had relied too heavily on its agents following the clearing account rules without close supervision. He said that, as a result, Mr Williams was able to use his clearing account and also his personal account to hold a very large number of transactions, with many of them holding stock concerned in his account for many months while they were out on farms somewhere. Mr Cox did not accept Mr Cairns' opinion that it was bad practice for a firm or agent to operate a clearing account but

accepted that Rural's management at the time failed to properly supervise and monitor the agents use of those accounts.

[65] Mr Cox acknowledged it was not uncommon for Rural's agents to buy or sell stock through Rural in his or her own right, as many of their agents had their own farms or an interest in farms. He however referred to internal guidelines which had been published to staff in December 2014 as to how such sales or purchases should be conducted to avoid agents benefiting from situations where there was the potential for a conflict of interest.

[66] Mr Cox spoke of concerns they had as to transactions in which Mr Williams had been involved and their investigating of such transactions. Mr Cox said that they suspected that the "N Giers", who was apparently the lessee of 90 of the 176 in calf heifers, probably never existed and was instead was only a fictitious person invented by Mr Williams as part of his irregularities. He said that they began the process of unwinding suspicious transactions but were constrained from disclosing information obtained as part of the SFO investigation.

[67] Mr Cox said that he considered Mr Williams had been involved in a number of irregular transactions for a small number of clients with whom he had been involved. He said a number of transactions on those accounts did not appear to be normal but it appeared "the majority of those transactions had been with the full knowledge of the account holder". Mr Cox said that Rural accepted its systems and management inadvertently allowed Mr Williams' irregularities to occur unnoticed and then failed to detect them for some time. He observed "that will often be the case in any trust based business where an employee secretly begins to engage in irregular transactions".

[68] At the end of the initial hearing, counsel for Rural sought leave to make an application for leave to call further evidence. An application was subsequently made for leave to call evidence from two witnesses. One was Mr Fowler, the Rural manager who Mr Williams had said in evidence had agreed to his arranging the free leases. The application was opposed by the plaintiffs. After hearing from both counsel, I declined leave, in part because the evidence was not fresh and because I considered that it was

what Mr Williams had said or represented to Mr Clark which was relevant to the issues I had to determine.

[69] I note however that, in the proposed evidence Mr Fowler was to say that, shortly after Mr Clark had purchased the heifers, he had talked to Mr Clark about the leases in the way that Mr Clark had described in his evidence. He was also to confirm that Mr Clark emailed the leases to him on 3 September 2015. Rural was proposing that Mr Fowler give evidence that he told Mr Clark that Rural was not in the business of providing such leases and that they would be Mr Williams' responsibility. Even if Mr Fowler had such a conversation with Mr Clark, it would not have changed the fact that, at the time the plaintiffs purchased these cattle, as arranged by Mr Williams, it was on the basis the cattle would be going out on free leases which Mr Williams would arrange. With that proposed evidence, Rural would still have been saying that it was permissible for Mr Williams, while an agent with Rural, to enter into a private arrangement with a Rural client for the leasing of that client's cattle.

[70] Ostensible or apparent authority is the authority of the agent as it appears to others. Whether there has been a representation by the principal, express or implied, that the agent has the authority to enter into the transaction is determined objectively. The matter is judged from the viewpoint of a reasonable person dealing with the alleged agent.¹

[71] It is also said:²

Broadly, in occupying a position or office, a servant or agent will appear to have the authority which is normal or usual. By appointing the person there is a holding out that he or she has such authority, and unless a third party is aware that the normal powers have been curtailed the principal will be bound by their exercise.

[72] I find that, at the time Mr Williams arranged for the plaintiffs, through Mr Clark, to purchase the in calf heifers and represented that he could and would arrange

¹ Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington 2018) at 637, citing *Credit Services Investments Ltd v Evans* [1974] 2 NZLR 683 (CA) and *Contractors Bonding v Snee* [1992] 2 NZLR 157 at 167.

² Finn, Todd and Barber, above n 1, at 638.

for them to go out on free leases, Mr Clark reasonably assumed that, as an agent for Rural, Mr Williams had the authority from Rural to do this.

[73] Rural cannot avoid liability for the loss which the plaintiffs have suffered through never obtaining possession of the stock they purchased on the basis that the leasing of that stock was outside the apparent scope of Mr Williams' authority.

To what extent did the plaintiffs contribute to the loss?

[74] Rural also contends that the plaintiffs contributed to their loss through the way Mr Clark failed to inspect the stock, identify them and receive the AB records for them before committing the plaintiffs to the purchase of them. Mr Clark relied on Mr Williams to attend to all such matters.

[75] Rural has not established that Mr Clark was negligent in this regard. He had a history of dealings with both Mr Williams and Rural where he had relied on Mr Williams to purchase stock for him, sight unseen. With his previous dealings, there was no reason why he should have distrusted Mr Williams on this occasion. Rural also trusted Mr Williams as their agent to act on the instructions of Rural's clients honestly and diligently. I accept, on all the evidence I heard, including the evidence of Mr Cairns, that it was not unusual for farmers to rely on agents in the way Mr Clark did when Mr Williams arranged the purchase of these heifers for the plaintiffs.

[76] Mr Williams said that a lot of his clients so valued his opinion about dairy stock that they were willing to purchase them on his advice, sight unseen.

[77] Consistent with Mr Williams' evidence, Mr Cairns said that purchasing clients would not necessarily inspect stock before purchase and some farmers left the purchase completely to their agent.

[78] Mr Cox accepted that one way in which agents can be of value to a prospective purchaser or a prospective vendor is through the knowledge the agents have of the farmer's stock, either what they are wanting or what they are selling, so both selling and purchasing farmers can come to rely on the agent's judgement in telling them about stock that are the subject of a potential sale.

[79] Mr Cox was critical of Mr Clark's conduct in this transaction, in particular, his failure to himself obtain the MINDA records backing up the AB status of the heifers, Mr Clark's failure to inspect the lines before purchasing and his failure to enquire as to who was actually selling the heifers.

[80] Mr Cox considered it would be rare for a farmer purchasing AB stock not to obtain the full records before or soon after the purchase and it would be most unlikely for him not to go and at least view the stock if they had immediately gone straight out on lease or grazing.

[81] Most of the particulars of negligence or recklessness Rural relies on in contending that it should not be liable for the loss the plaintiffs suffered through never receiving the heifers relate to Mr Clark's failure to check on the existence, identity and state of the stock after the purchases had been completed.

[82] I accept that Mr Clark was unduly trusting of Mr Williams, naively optimistic that all was in order as far as the free leasing of the stock was concerned and casual to an extent that differed from usual farming practices in never checking on the stock after he understood they had been delivered to a farm in mid Canterbury and to Chellma. It may well be that Mr Williams was aware of the way Mr Clark operated and would be likely to operate in this regard, and took advantage of that in the way he dealt with the stock that the plaintiffs had purchased. Such negligence did not however contribute to Rural's breach of its obligations in failing to arrange for the heifers to go out on lease in a manner and identified so that the plaintiffs could obtain the benefit of owning them.

[83] Section 3(1) of the Contributory Negligence Act 1947 provides for an apportionment of liability "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons". There is some uncertainty as to whether the Act applies where claims are in contract.³ I do not need to decide the point.

³ See discussion in Finn, Todd and Barber, above n 1, at [21.2.5(a)].

[84] If the Contributory Negligence Act were to apply, the situation for me to assess would be as summarised in *Burrows, Finn and Todd on the Law of Contract in New Zealand*:⁴

Once each party has been shown to be at fault, the plaintiff's damages are to be reduced "to such an extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".⁵ The main emphasis is on the comparative culpability or blameworthiness of the parties, but the "causative potency" of their conduct also is taken into account.⁶ In the case of a negligent breach of contract, any reduction for contributory negligence should turn on the nature of the promise and the circumstances of the transaction. The defence may fail where the defendant has guaranteed to produce a particular result of where the plaintiff knows little about the matter in question. But it may be appropriate for damages to be reduced where the plaintiff was in a position to exercise skill or judgment and failed to do so.

Ultimately, whether conduct constitutes contributory negligence is a question of fact and is determined by whether the plaintiff acted reasonably in all the circumstances.⁷

[85] I consider this is a case where Rural contracted to produce a particular result, the delivery to the plaintiffs of the 176 heifers with the information required for the plaintiffs to ultimately obtain actual possession of them. Rural, through Mr Williams, failed to do so. The plaintiffs, through Mr Clark, acted reasonably in relying on Rural to perform the contract in this way.

Quantification of damages

[86] The plaintiffs have sued for damages in the sum of \$344,080 including GST as being the loss they say they suffered through not obtaining cows when they claim the cows would have had this value.

[87] As the stock were sold and purchased as AB fully recorded dairy stock, Mr Cairns said that, assuming the stock had been AB fully recorded and in good condition, their value in 2017 would have been about \$1,500 to \$1,700 each, excluding GST. Mr Clark was willing to accept that as a fair value for the cows although he seemed to be speaking of their value at the time of the hearing in May 2018.

⁴ Finn, Todd and Barber, above n 1, at 881-882.

⁵ Contributory Negligence Act, s 3(1).

⁶ *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Helson v McKenzies Ltd* [1950] NZLR 878 (CA).

⁷ *Hooker v Stewart* [1989] 3 NZLR 543 (CA) at 547.

[88] In assessing what loss an innocent party might have, that party might have a restitution interest, a reliance interest or an expectation interest.⁸

[89] Here, there can be no suggestion that the plaintiffs are entitled to damages based on a restitution interest. There is no suggestion that Rural obtained any benefit from the plaintiffs' purchase of 176 heifers other than its ability to use the purchase price due from the plaintiffs to pay the sale price of the stock to the vendors.

[90] The reliance interest which could be one measure of the plaintiffs' loss is, in this instance, the amount they paid to purchase the heifers, \$210,277.50 including GST. It is not claimed the plaintiffs made any other payment or incurred any other loss such as the payment of grazing fees or veterinary expenses in reliance on their obtaining the 176 heifers. Although they understood they were buying in calf heifers, as the heifers were to go out on free leases, they would never have obtained the value of the calves that would have been born to those heifers.

[91] The claim the plaintiffs make is based on an expectation interest which they expected to have in the heifers after they had calved and been milked in the 2015/2016 and 2016/2017 seasons. Their value in 2017 would have been when their milk production potential, and thus value, was significantly greater than it would have been at the time of purchase when they were in calf heifers coming up for their first calving.

[92] In contract, the primary basis for calculating damages is by reference to the plaintiffs' loss of bargain. The plaintiff is entitled to be put into the position he or she would have been if the contract had been performed.⁹

[93] In claiming damages based on an expectation loss, there are various ways the loss could be calculated but, in such an exercise, the courts have emphasised the central importance of reasonableness in selecting the appropriate measure of damages.¹⁰ The plaintiffs' obligation to mitigate their loss is relevant to quantification.

⁸ As summarised by Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC) at 86.

⁹ Finn, Todd and Barber, above n 1, at 817.

¹⁰ *Ruxley Electronics Ltd v Forsyth* [1996] 1 AC 344; *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

[94] Rural pleaded that, in various ways, primarily through a failure to check on the heifers which should have been out on free leases, Mr Clark and the plaintiffs failed to mitigate their loss. There is merit in that submission. Mr Clark acknowledged that Mr Williams' manager, Mr Fowler, told him in about August or September 2015 that Mr Clark should check on the whereabouts of the stock and he should obtain copies of the leases. Mr Clark contacted Mr Williams and was told where the animals were out on free lease and subsequently received what purported to be lease documents. The lease documents were not on Rural letterhead, had not been signed by him and should reasonably have raised concerns on Mr Clark's part. They were headed "private leases".

[95] Mr Clark chose to continue to simply rely on what Mr Williams had told him without further checking on the stock and where they were. Mr Cairns was critical of the fact Rural put the onus on Mr Clark to make the necessary checks and inquiries but the fact remains that Mr Clark was put on notice that there could be a potential problem and did nothing independently of Mr Williams to check on where the animals were. His enquiries of Mr Bouma of Chellma were not made until July 2016 despite the fact he had bulls on lease to Chellma.

[96] Mr Clark should have, himself, checked as to whether the animals he had purchased were where they were meant to be. He should then have sought to obtain tag numbers or LIC/MINDA records sufficient to identify the stock and to confirm they could ultimately be sold as AB recorded stock. Had he taken those steps, given my earlier findings, he would probably have found the heifers were not where they were meant to be and that he did not have sufficient information to find out where they were. If he had done that, he would have been entitled to bring the problem to Rural's attention. He could reasonably have required and expected Rural to reimburse him then for the total price he had paid for the heifers. At that time, what the plaintiffs would have lost would have been the sums they had paid for the cattle.

[97] Mr Clark chose to sit on his hands through until later in 2016. There was no evidence that he made any enquiries in late 2015 or early 2016 as to whether the heifers were to be returned to him, sold or be leased out for another season after May 2016.

[98] Rural is liable to the plaintiffs based on a reliance interest only. Were I to have held that the plaintiffs were entitled to damages based on an expectation interest and a value that the cows might have had in 2017 or later after further calving, I would have reduced the award of damages by reason of the plaintiffs' failure to mitigate their loss. By reason of that failure, I would have reduced their entitlement to the amount they had paid for the heifers.

Exclusion clause

[99] Rural however seeks to avoid liability for those sums by reason of an exclusion clause which it says was a term of the contract it had with the plaintiffs.

[100] The exclusion clause Rural relies on was set out on the back of invoices issued to clients Rural was acting for. I accept that the exclusion clause would have been on documents that Mr Clark and the plaintiffs received during their dealings with Rural. Relevantly, the clause says:

Agency: Rural Livestock Ltd will not accept any responsibility at the suit of the vendor, purchaser or a third party either as principal or agent for any loss or damage either in contract, tort or otherwise concerning the sale or delivery of goods. Any person to whom delivery of stock may be given whether nominated or appointed by the purchaser or by Rural Livestock Ltd purporting to act on the purchaser's behalf, shall for all purposes be deemed to be servant of the purchaser and Rural Livestock Ltd shall not in any way be liable or responsible for any act or omission of such person. The rights and remedies of Rural Livestock Ltd under this agreement shall not be affected by reason of its having deducted commission and other legitimate charges and the purchaser hereby waives the right of set off as against the vendor.

[101] Relevant to issues in this case, Mr Cairns said that, after an agent's company has arranged a sale, the company will normally complete all relevant documentation and pay to the vendor the sale price, less commission and associated costs which could include yard fees and NAIT fees. He said the agent's obligation would be to pay the vendor, usually within 14 days of the sale, regardless of whether the agent had received funds from the purchaser or not. He said that businesses that are members of the NZSSAA actually guarantee payment to their vendor clients, whether they themselves are actually paid or not.

[102] Mr Cairns said for instance that, if at an auction in the sale yards a certain number of stock are sold at an agreed price but later there is a discrepancy in the number of stock actually loaded on a truck for the purchaser, the vendor still gets paid for what was sold. It is then for the agent to find out where the missing stock had gone and to “wear it” in terms of paying for the missing stock if, after enquiry, there is not some other way of resolving the discrepancy.

[103] Mr Cairns was clear that, if a sale has been negotiated through agents and the agent has invoiced the farmer for the stock the farmer is buying, the agency has an obligation to provide the stock. As he said, if “the farmer has paid for it, they most certainly do”.

[104] Mr Cairns said he had never had experience of stock agents relying on an exclusion clause to avoid paying out where there had been a shortfall against the number which it had been agreed would be sold, although he spoke of a relatively modest shortfall. He said that, for agents not to pay up on a shortfall in stock supplied would be “extremely unusual” and to rely on an exclusion clause for not paying up would mean that people would not want to deal with the agent.

[105] Mr Cox explained that, when a Rural agent arranged a sale, a sale note would be created by the agent recording the identities of the vendor and the purchaser, the number and type of livestock, the price, the agent’s name and the date when the sale note was created. The information on that sale note would then be inputted into Rural’s accounting software system and an invoice or credit note, as the case might be, would be generated for the relevant client account. The invoice or credit note would then be sent to the client account holder’s contact address and the client’s account would be credited or debited within the system accordingly. Mr Cox confirmed that standard client accounts of that nature required payment for debit balances on invoices or statements within 14 days. Importantly, he said credits were paid out by Rural within 14 days. He did not say that the payments out which Rural had to make were conditional on the purchaser paying for the stock.

[106] Consistent with Mr Cairns’ evidence, Mr Williams said that, if ever there was a dispute between the purchaser and vendor over whether stock which had been sold

and bought through Rural as agents had not accorded with the description on sale, e.g. as being AB fully recorded, the dispute had to be resolved not as between vendor and purchaser but as between the agent and the vendor. If any compensation had to be paid, Rural would send an invoice to the vendor for that amount and Rural would then pay the money to the purchaser, but no monies ever went directly from the vendor to purchaser. Mr Williams said that, in all his time with Rural, he had never seen that happen. He said this was because the whole idea of Rural being involved as an agent was that they were acting as the person in between, getting paid to do a service in between and thus had responsibilities for what they were doing.

[107] Where there is any doubt about what an exclusion clause means, the ambiguity will be resolved against the party claiming the benefit of it. Rural's exclusion clause in effect states that Rural is immune from any suit whatsoever. This cannot be correct. An exclusion clause that excludes liability for performance of the contract cannot be upheld. The parties could not reasonably have intended the exclusion clause to apply to total non-performance.¹¹

[108] As stated in *The Laws of New Zealand*, "the more serious the breach of contract, or the more important the term, the less likely it is for the parties to the contract to have intended an exclusion clause to apply".¹² In a similar vein:¹³

It is sometimes said that an exclusion clause must be construed in such a way as to be consistent with the purpose or objects intended to be effected by the contract.

One aspect of this main purpose rule is to allow the Court to reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract, in order to apply the exclusion clause in a way which does not defeat the purpose of the contract as a whole. The rule will usually justify the rejection of clauses which would deprive the parties' agreement of the legal characteristics of a contract; this is on the basis that it is illusory for a promisor to make a promise if the agreement totally excludes any liability for a failure to perform.

¹¹ *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 433.

¹² Rodney Gallen, Jeremy Finn and Christine French *Laws of New Zealand Contract* (online ed) at [137], citing *Wallis Son & Wells v Pratt & Haynes* [1911] AC 394.

¹³ At [143]. Citations omitted.

[109] Rural cannot rely on the exclusion clause to avoid its liability to the plaintiffs arising out of their purchase of the 176 heifers which they never received.

[110] I thus assess the damages to which the plaintiffs are entitled by reason of their never having received the 176 in calf heifers at \$210,277.50. They should also be paid interest on that sum as from 1 August 2015, the approximate date they were debited with the cost of the last of the 176 heifers.

Fair Trading Act claim

[111] The plaintiffs' claim was alternatively under the FTA.

[112] The representations which Mr Williams made to Mr Clark in arranging for the plaintiffs to purchase the 176 heifers were made in trade.

[113] Mr McIntosh for Rural submitted that the plaintiffs were not entitled to damages under the FTA because they had not pleaded any misrepresentation in their statement of claim. I do not accept that submission.

[114] In the plaintiffs' amended statement of claim, dated 21 December 2017, they pleaded the earlier allegations in the statement of claim and alleged:

- (a) at all material times the defendant was in trade; and
- (b) the defendant's conduct was misleading or deceptive or likely to mislead or deceive by virtue of the breaches.

[115] The breaches referred to there were the claimed breaches of contract with reference to the particulars they had provided as to the alleged terms of the contracts they had entered into. In this way, Rural was put on notice that the plaintiffs were claiming that, by his conduct in negotiating the sales, Mr Williams had represented that the stock the plaintiffs were purchasing would be going out on free leases, identified so that the plaintiffs would be able to:

- (i) identify whether the animals subject to the leases were actually where they were meant to be; and

(ii) find and take possession of the animals which they were entitled to.

[116] On the balance of probabilities, I find that, at the time Mr Williams arranged for the plaintiffs to purchase the 176 heifers, he did not intend to ensure the plaintiffs would obtain possession of the animals they purchased. I find that, at the time Mr Williams arranged the sale of stock to the plaintiffs, he considered that he and Rural's obligations would be satisfied if, at some stage in the future, the plaintiffs received animals the equivalent of what they had purchased. I find that, at the time he negotiated the sale, he did not intend to ensure the animals the plaintiffs were purchasing were identified and the plaintiffs would have the identification details they needed so they could ultimately obtain possession of the animals they purchased. I am satisfied that this must have been his thinking, given the plaintiffs and Rural's inability to find or trace the heifers the plaintiffs had purchased.

[117] I thus find that, through the way Mr Williams misled Mr Clark into believing that the 176 heifers the plaintiffs were purchasing would be going out on free leases, appropriately identified, he and thus Rural did engage in conduct that was misleading or likely to mislead.

[118] The plaintiffs are therefore entitled to a remedy under the FTA. Under s 9, "no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

[119] Under s 43 of the FTA where, if I have found that the plaintiffs have suffered loss by Rural's conduct, the Court may order Rural to refund to the plaintiffs the purchase monies which the plaintiffs paid for the 176 heifers and/or order Rural to pay to the plaintiffs the amount of the plaintiffs' loss.¹⁴

[120] As a general rule, expectation measure damages are not appropriate under the FTA. The FTA gives a remedy for loss resulting from a misrepresentation, not a remedy based on what the position would have been had the misrepresentation been true.¹⁵

¹⁴ Fair Trading Act 1986, ss 43(1) and 43(3)(e) and (f).

¹⁵ *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA), confirmed in *Zurich Australian Insurance Ltd v Withers* [2016] NZCA 618 at [36].

[121] There has been some suggestion that expectation damages might be awarded under the FTA where a defendant was under an obligation to perform the representation which had been made. In *Harvey Corporation Ltd v Barker*, Blanchard J summarised the position adopted in *Cox & Coxon Ltd v Leipst* in terms:¹⁶

The majority opinion ... was that a representation cannot give rise to a claim for a lost benefit or a loss of expectation where the defendant is under no obligation to perform the representation.

[122] It has been said expectation damages are thus not recoverable unless there is a legally enforceable obligation to perform the representation, and the measure of damages is to be assessed considering what would have happened had the misleading or deceptive conduct not occurred.¹⁷

[123] The misleading conduct for which I have held Rural liable under the FTA was not a misrepresentation that Rural arrange for the plaintiffs stock to go out on free leases for two years and would then be returned to the plaintiffs with the value they would then have as cows that had calved twice with the greater milk production potential that would usually come with such maturity. As such, I do not consider expectation damages to be available under the FTA.

[124] Under the FTA, applying s 5C, the plaintiffs' right to a remedy must override the exclusion clause in Rural's trade documentation. It was not suggested the exclusion clause should be given effect to in applying the provision of s 5D.

[125] The Supreme Court has said, with reference to the FTA:¹⁸

As [*Goldsbro*] has established, the court has a discretion under s 43 (it "may" make an order), and the proper exercise of that discretion may lead it to decide that part only of the amount of the loss or damage should be paid by the defendant to the claimant (or, in some cases of reckless behaviour by the claimant, even that no order for payment should be made).

The exercise of the power to make an order for payment under s 43 is, in the end, as Richardson J also said [in *Goldsbro*], a matter of doing justice to the

¹⁶ *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 at [13]; *Cox & Coxon Ltd v Leipst*, above n 15.

¹⁷ Lindsay Trotman and Debbie Wilson *Fair Trading: Misleading or Deceptive Conduct* (2nd ed, LexisNexis, Wellington, 2013) at [14.71].

¹⁸ *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [30]-[31], referring to *Goldsbro v Walker* [1993] 1 NZLR 394 (CA).

parties in the circumstances of the particular case and in terms of the policy of the Act.

[126] I have had regard to the plaintiffs' failure to mitigate their loss in the ways I have already referred to. I find that, under the FTA, the appropriate award of damages for the plaintiffs is a sum equivalent to the cost of those animals, i.e. \$210,277.50, together with interest at the rate of five per cent per annum from 1 August 2015.

Claim for failure to arrange, when required, free leases of 253 AB calves and failure to provide records

Failing to arrange free leases

[127] The claim was based on Rural's alleged failure to have the calves out on free lease from June 2016 and a failure on Mr Williams' part to tell Mr Clark that this could not be achieved so the animals could be sold before the end of May 2016.

[128] Mr Clark's evidence was that, in June or early July 2015, he asked Mr Williams to purchase some lines of AB fully recorded dairy calves. His intention was to have those calves grazed off-farm for the first season at the plaintiffs' cost. Over that time, they would be put in calf. He says he and Mr Williams agreed that, from the start of June 2016, the calves, which would then be in calf heifers, would go out on free lease. In their second year, from the start of June 2017, they would then go out as second calvers on a paying lease or be sold.

[129] Mr Clark said that he was comfortable that he would make a profit on the animals because by May 2016 they would be a year older and in calf, and "if we had to sell them they would be worth more than the purchase price". I accept from his evidence that, on purchasing these calves, Mr Clark was speculating that ultimately, at the time he chose to sell, the market for them would have gone up and he would have been able to make a profit on them.

[130] Invoices show the 253 calves were purchased in July and November 2015 and January 2016 at a cost of \$126,881.23 including GST. Through counsel's opening submissions, Rural admitted that through Mr Williams it had acted as agent for the

plaintiffs on the purchase of the livestock as recorded in the invoices pleaded and it debited the plaintiffs' account with the pleaded purchase amounts.

[131] Mr Clark said that he first learned in mid May 2016 that Mr Williams and Rural had not arranged to place these heifers on long-term free leases from 1 June 2016.

[132] Mr Clark explained why the non-arrangement of the intended free leases created a problem for the plaintiffs. Sales and purchases of dairy stock are usually implemented at the end of May but the purchase of stock is usually arranged by mid May. People wanting dairy stock for the 2016/17 season would usually have asked their livestock agent to arrange for a particular number of stock to be put forward for potential purchase before then. Mr Clark said the usual terms would be that there would be an on-farm selection process after the stock had dried off. The stock would then be scanned to make sure they were in calf and then the purchaser would be given the right to inspect the herd and reject a certain percentage if they had feet problems, mastitis or were not in optimal condition, and so on.

[133] Mr Clark said the key point was that by May everyone who wants dairy stock has signed up for it. He said, if this has not been arranged, the owner of in calf dairy animals out on lease will have a huge problem because the owner needs to find somewhere else for the heifers to be calved, milked and then cared for over the coming season. He said there is some market for dairy animals in May and possibly June but the value of the animals is significantly reduced. Purchasers expect a bargain because of the awkward situation the owner is in. Grazing for stock after 1 June over the winter period also becomes more expensive. He said that 2016 winter grazing was almost double the cost it had been over the preceding spring and summer.

[134] Mr Cairns agreed that Mr Clark would have found himself facing the predicament he described, that the market for dairy stock changes markedly by mid May and that generally farmers prepared to pay full value for stock have by then already entered into contracts to purchase for the coming season. In elaborating on that, he talked about farmers obtaining a reasonable market value if the stock had been put up for sale for instance in March or April but of very different values being obtained if they were sold or transacted in say June or July in any given year.

[135] Mr Cairns put it that he would expect that if a farmer knew at the beginning of May that no further lease had been obtained, the farmer would be “sweating profusely”.

[136] Mr Clark said he discussed these animals with Mr Williams at various stages through early 2016. He said that he had a similar arrangement with Rural in 2013, had bought calves on grazing organised by Rural, got them in calf and in that instance, because free leases could not be organised, the in calf heifers were sold in May 2014 through Rural. He said his expectation was that, if Mr Williams was not able to arrange suitable free leases for the stock from 1 June 2016, he would advise Mr Clark early enough so that the plaintiffs could arrange an advantageous sale of the stock for May 2016.

[137] Mr Clark said, on a number of occasions, he went to the property where the calves were being grazed, drenched the stock that were there, ran bulls with the calves and had them scanned to see how many were in calf.

[138] Mr Clark said that he was with a Mr Rowan when he scanned at least 250 of the heifers in early 2016. Mr Clark said he had simply told Mr Williams of the scanning and that the heifers were in calf but not necessarily for the purpose of him arranging the free leases. Mr Clark accepted that whether or not the stock could have gone out on free lease was very dependent on the market.

[139] On 30 April 2016, Mr Shepherd of Rural told Mr Clark that he should ensure that all stock he had transacted through Mr Williams were accounted for as soon as possible. At that time, Mr Clark knew the 253 heifers were being grazed at the same property where they had been after he purchased them as calves.

[140] Mr Clark acknowledged that, by 1 May 2016, he knew Mr Williams had not found a home for the heifers. He agreed that, at that time, Mr Williams had said he was trying and “don’t give up hope”. When pressed, Mr Clark accepted that he elected to take the risk as to what the outcome would be. He justified that by saying there were “always people coming out of the woodwork” wanting animals.

[141] When being asked about the 253 calves, Mr Williams described it as another example of the extra service he provided to Mr Clark for free to help secure his ongoing business. In his evidence, Mr Williams was obviously sympathetic to Mr Clark and wanting to assist him. Despite this, Mr Williams did not accept that he had promised and guaranteed to obtain free lease of the animals. He accepted he would have told Mr Clark that he would try his best to get them away on a free lease.

[142] Mr Williams said the ultimate goal with Mr Clark was to get these heifers out on free lease and not sell them but said, through his communications with Mr Clark between February and May, Mr Clark knew then it had not been arranged for them to go out on free lease at the end of May 2016.

[143] In giving evidence about his purchase of around 100 empty dairy heifers to go on the plaintiffs' property at Tuapeka Mouth in May 2016, Mr Clark said he had elected to purchase dairy heifers because at that time the dairy market was still depressed.

[144] The plaintiffs have not established that they purchased the 253 calves with a representation or an assurance from Mr Williams/Rural that Rural would ensure that the animals, as in calf heifers, would go to other properties on free leases at the end of May 2016. I accept Mr Williams' evidence that what he agreed to with Mr Clark was to use his best endeavours to get them out on free leases, but there was never a promise or guarantee he would do so.

[145] I accept the plaintiffs found themselves in a difficult and depressed market for the stock when they found they had to sell them in and after May 2016 and in winter. The plaintiffs have not proved this was because of the claimed failure of Mr Williams to advise them early enough that he would be unable to arrange free leases of the stock. Through Mr Clark, the plaintiffs knew this could happen but elected to take the risk.

[146] To avoid a sale on a depressed market, these 253 calves would have had to be on the market for sale not just in May but well before then, probably soon after they had been scanned to check how many were in calf. The scanning was carried out in

February 2016 but at that time Mr Clark and Mr Williams were still hoping to have the calves go out on a free lease.

[147] The plaintiffs have therefore not established that Rural has any liability to them on the basis that Mr Williams did not tell them early enough that the animals would have to be sold because it had not been possible to get them out on a free lease, or because Mr Williams and Rural had not been able to arrange free leases of the stock before the end of May 2016. In these respects, the plaintiffs have not established that Rural has any liability to them based on either a breach of contract or under the FTA for misleading conduct.

Failing to provide AB records

[148] The plaintiffs claim they also suffered losses because, in 2016, the heifers could not then be sold as AB fully recorded in calf heifers, despite Mr Clark having agreed to purchase the stock as AB recorded calves and Mr Williams representing to him that they were AB recorded stock.

[149] Dairy cattle have a higher value if they are AB recorded. Through AB records, prospective purchasers will be able to identify the sire and dams of the stock they are looking at and will thus have information as to the productive potential of the stock.

[150] I accept Mr Clark's evidence that he instructed Mr Williams to purchase 253 calves on the basis they would be AB recorded and Mr Williams sold them to him as AB recorded calves. Consistent with that, Mr Williams gave evidence as to the steps he took to try and obtain AB records for all the calves after they had been purchased and of his frustration at not being able to obtain the records for at least some of the stock. Ultimately, it became clear that some of the calves were AB recorded stock and records were available for them so they could be sold as AB recorded stock. For others, either there were no records available or the records were incomplete so they could not be sold as AB recorded.

[151] Mr Williams said that, in putting the calves out for lease in early 2016, they had a problem because they had been given only a part profile for some of the calves and, for some, they never got any records at all. But he also said the lack of AB

information was a problem not in terms of putting the animals out for free lease, but as to sale. He said the animals were hard to sell and not as valuable because it was hard to sell stock without records.

[152] Mr Williams said some of the stock were purchased through another agent who was a director and shareholder of Rural, Paul Mavor. Mr Williams said he understood there were issues over records due to a receivership sale or something along those lines. Mr Williams said he had not seen the records before the plaintiffs made their purchase in 2015 but he had taken Mr Mavor on trust. He said he spent months and months trying to get the records for the animals purchased through Mr Mavor but said what they had been told by Mr Mavor would happen had not eventuated. He said he kept being told that Mr Mavor was speaking to the receivers but nothing ever came of it.

[153] Mr Williams understood the receiver had problems obtaining the full MINDA records for the calves that had been purchased through Mr Mavor because the company owning the calves was in debt to LIC, and I infer in receivership, and its account with LIC had been frozen. They never got the records they were supposed to so that by June or July they had not seen the full records.

[154] Mr Williams said he could not remember if he ever told Mr Clark that they were not getting the records because the receivers were refusing to release them.

[155] Mr Williams accepted the stock had been sold as AB fully recorded and it was therefore an implied condition of the sale that the records would be transferred to the plaintiffs.

[156] Mr Williams said he thought that when an agent had arranged for the sale of recorded stock and the records had not come through, it would be up to the agents to go back to the original vendor. Mr Williams said that it was his experience that when a problem like that arose the agent sent an account to the vendor, the vendor paid Rural and Rural paid the purchaser. He had never seen monies go directly from the vendor to the purchaser in that situation because the whole idea of the agent's involvement

was that the agent was being paid to provide a service in between and responsibilities arose out of that.

[157] After the initial hearing of evidence, Rural applied for leave to call further evidence from Mr Mavor. In an affidavit setting out his proposed evidence, Mr Mavor recorded how he had been approached by accountants in Christchurch to sell the stock. He was to say that he noted no records for the calves were apparently available but, because of their history and circumstances, he thought records might exist and be obtainable from LIC. He was to say that, because of this, the animals were to be sold as unrecorded. He was to say that he could recall Mr Williams and another Rural agent coming to look at the calves in the cattle yards at a particular property they were on. He said he heard Mr Williams telephoning Mr Clark to tell him about the purchase opportunity. He acknowledged he could not hear Mr Clark's side of that conversation but said "I believe that in the course of that telephone conversation [Mr Williams] told Mr Clark about the circumstances of the calves". Mr Mavor also wanted to respond to Mr Williams' evidence as to the attempts Mr Williams had made to try and obtain records from Mr Mavor and the criticisms Mr Williams had made of Mr Mavor in not providing them.

[158] I denied Rural leave to call this evidence from Mr Mavor, in part because it was not fresh and could have been provided before the hearing but also because Mr Mavor's evidence, that Mr Williams had told Mr Clark of the calves being sold as unrecorded, was expressed only as a belief. As far as these proceedings were concerned, the issue was not as to what Mr Williams may have been told by another agent within Rural but what he had said to Mr Clark.

[159] I find that, with the sale of the 253 calves, there was a representation from Mr Williams/Rural that the 253 calves were AB recorded.

[160] The plaintiffs claim Rural were in breach of contract and have a liability under the FTA through their failure to provide the calves in accordance with that representation. I need deal with that claim only in terms of the FTA. Under the FTA, Rural would not be able to avoid liability for misleading conduct through relying on what purported to be an exclusion clause in their terms of trade. The plaintiffs could

be entitled to damages for the loss they have suffered by reason of misleading conduct as to the AB recorded status of the animals.

[161] In assessing any loss the plaintiffs have suffered as a result of that misleading conduct, it is helpful to discuss what happened to the 253 calves.

[162] Eighty-six in calf heifers were sold by the plaintiffs to another stock agency, Progressive, in June 2016, 35 at \$990 per head plus GST and 51 at \$860 per head plus GST. Mr Clark said that, after he was aware of a problem in May 2016, through inspecting the animals, he could read the tags and thus they were able to obtain information about those cows and were able to sell two lots of the heifers through Progressive as fully recorded. They were all sold as AB recorded stock. There was thus no misrepresentation or loss for which Rural could be liable in respect of those 86 in calf heifers. Mr Clark said the balance of the stock were “only half recorded or not recorded”.

[163] Forty-four in calf heifers were sold through Rural on 8 August 2016 at \$1,000 each plus GST, \$50,600 in total. Mr Clark had some criticism of the way the sale had come about but accepted that, with the circumstances they were in, the stock had to be sold. He said the price obtained for them was affected by the fact that these heifers could not be sold as AB recorded.

[164] As was put to Mr Clark in cross-examination, it is difficult for me to assess that there was any loss on the sale of those 44 head through it not being possible to sell them as AB fully recorded stock when the price obtained for them of \$1,000 per head was more than the \$990 per head and \$860 per head that had been obtained for the in calf heifers sold as AB recorded stock in June 2016.

[165] Seventy heifers were sold through Rural on 1 June 2017 at a rate of \$1,350 per head. Rural charged a commission of \$3,500, being \$50 per head.

[166] Thirty-eight heifers and another seven were sold a season later in August 2017 for \$1,200 per head. As will be discussed, this was less than what AB recorded heifers sold for in that season.

[167] Mr Clark said that one heifer has died and the plaintiffs had retained seven of these heifers at the time of the hearings in 2018.

[168] Mr Clark accepted that he had been assisted in trying to establish which of the animals were AB recorded by Peter O'Neill of Rural who he described as being very experienced in record keeping of dairy stock. Mr O'Neill had tried to identify just which of the remaining stock were AB fully recorded as such but identified that only a proportion could be. In early 2017, Rural recommended selling all stock on an unrecorded basis to overall obtain the best price for the remaining stock. I accordingly accept that the value of all animals retained after August 2016 was detrimentally affected by the fact not all of those animals could be sold as AB recorded.

[169] Mr Clark calculated the plaintiffs' loss on the basis that, as AB recorded cows, the in calf heifers should have been worth \$2,000 per head in 2017 and then, deducted from that value, the amounts for which the animals were in fact sold. As to the seven animals which Mr Clark says the plaintiffs retained, the plaintiffs say that, without AB records, they are worth \$1,000 each compared to the \$2,000 they initially claimed the cows would have been worth if they could be sold as AB recorded stock.

[170] The \$2,000 was the same value he had initially adopted for the 176 cows that had not been located. Mr Clark had however accepted the appropriateness of Mr Cairns' estimate of a value in 2017 between \$1,500 and \$1,700 per animal. Taking the average of these figures, the cows referred to would have been worth \$1,600, \$250 to \$400 more per animal than the plaintiffs obtained for the cows they sold in 2017.

[171] In submissions for the plaintiffs, Mr Hitchcock suggested it would be difficult, if not impossible, to quantify to what extent lower sale prices were caused by the sales being in winter and to what extent because of the lack of records.

[172] In closing submissions, Mr McIntosh for Rural ultimately addressed issues of potential loss on the basis Mr Clark had specifically requested AB recorded stock from Mr Williams and Mr Williams had advised Mr Clark the stock were indeed all AB recorded. He submitted the plaintiffs faced difficulties in being able to identify the actual number of 253 heifers that had never been properly recorded or for which there

were incomplete records and in quantifying any losses the plaintiffs had suffered as a result.

[173] Mr McIntosh for Rural accepted that, if it was held there had been a misrepresentation as to the calves sold through Mr Mavor, there would be 140 calves which were not AB fully recorded as they should have been. He submitted a starting point value of \$2,000 per animal was not realistic. He also submitted the starting point value for calculating the loss could not have been more than the \$1,600 per animal that could reasonably be adopted on Mr Cairns' evidence. He also pointed out that the value for the non-AB recorded portion of the 253 would not have been as high as the \$1,600 that might reasonably have been adopted for the 176 cows that were never located because those 176 cows would have been a year older in 2017 than the 253 which had been purchased as calves in 2015 and early 2016.

[174] Mr McIntosh also submitted the price at which the animals were sold was not necessarily less because they could not be sold as AB recorded animals. Market conditions generally could have been different at the time of sale. Potential buyers could have different views as to the importance of the animals being AB fully recorded. The actual sale price obtained was for herds with a mix of recorded, partly recorded and/or unrecorded stock, so the sale price obtained was not a measure of the actual value of all that stock as non-AB recorded.

[175] Mr McIntosh submitted that a notional way of fixing damages might be to allow a net sum, say \$200 per head, for all heifers that were not fully recorded and potentially apply that to 63 heifers which Rural were willing to accept as being not fully recorded or 140 if the number was to include those sold through Mr Mavor.

[176] Rural says the calves sold in part through Mr Mavor were not sold as AB recorded stock as far as the vendor was concerned. On that basis, the rate at which they were sold was \$350 per calf. Other calves, which Rural accepts were sold as AB recorded, from both vendor and purchaser's point of view, were sold at \$450 and \$500 per animal excluding GST. There was thus an apparent difference in their value as calves depending on whether they were AB recorded or not of between \$100 and \$150. On the evidence I heard, it is likely that their value as non-AB recorded stock would

have been detrimentally affected to an extent greater than this when they were on the market as in calf heifers or in calf cows in 2017.

[177] Where there has been misleading conduct of the sort that entitles a claimant to damages under the FTA, the assessment of loss is part of the process by which the Court has to do “justice to the parties and the circumstances of the particular case and in terms of the policy of the Act”.¹⁹

[178] Despite the difficulty of the exercise, the evidence was sufficient to establish that the value of the heifers and the price obtained for them, or a year later as cows, would have been less because they could not be sold as AB recorded stock.

[179] I assess that loss at \$250 excluding GST per animal for all but 130 of the 253 calves that ultimately could not be sold as AB recorded. The plaintiffs have not established any loss as to 130 of the calves because 86 were sold through Progressive in June 2016 as AB recorded stock and 44 in calf heifers were sold in August 2016 at a higher price than was achieved for those AB recorded stock in June 2016. In this respect, the plaintiffs have established they suffered a loss through a misrepresentation as to the stock being AB recorded for the stock which they sold or retained after the 44 cows sold in August 2016. That loss can be calculated at: $123 \times 250 = \$30,750$. In the circumstances, I make no award for interest on that sum to the date of judgment.

Claim for grazing costs

[180] The plaintiffs have also claimed that they suffered a loss through costs they incurred in having to find or provide grazing for this stock because they had neither been sold or gone out on free leases before 1 June 2016.

[181] The plaintiffs claim \$45,133.39 including GST for grazing costs incurred for 253 calves in the period from 17 March 2016 to 15 August 2016. The number of stock being grazed over that time varied, reflecting the fact that some 86 in calf heifers were sold in June 2016, some 44 in August 2016.

¹⁹ *Red Eagle Corporation Ltd v Ellis*, above n 18, at [31].

[182] The plaintiffs claim \$5,520 including GST for the cost of grazing and holding costs for 48 in calf heifers which were leased to Chellma. The plaintiffs had to pay Chellma \$100 per head to calve and milk the heifers which must have been in the spring of 2016. Ten of those heifers were not however part of the 253 that had been purchased as calves. They were 10 of a number that were purchased separately in 2016 as empty heifers to go to the plaintiffs Tuapeka Mouth property. I deal with those stock later in this judgment.

[183] The plaintiffs also claimed \$8,050 including GST as the cost of holding seven heifers on their own property.

[184] The plaintiffs have not established that these grazing costs were incurred because of the way Mr Williams had misrepresented all the 253 calves as being AB recorded. A portion of the grazing costs incurred between 31 May and 18 June 2016 were for heifers which were in fact for AB recorded stock and sold as such. I have already found that there was no representation from Mr Williams/Rural that all these cows would be out on free leases or sold before the end of May 2016. It is likely that a significant factor in their having to be grazed over that time was because of the way in which the market for selling dairy stock became much tighter over the winter.

Conclusion on 253 claim

[185] Although Mr McIntosh helpfully made submissions as to how the plaintiffs' loss might be calculated, he made it clear that Rural was not accepting liability for any loss, in summary, because:

- (a) the plaintiffs knowingly entered into a transaction that was high risk;
- (b) the plaintiffs took no steps to obtain or verify the records for any of the 253 at the time;
- (c) it was through the election made by Mr Clark that the plaintiffs found themselves in the forced sell down winter scenario;
- (d) the lack of records had nothing to do with the situation that the plaintiffs then faced;

- (e) in respect of the 77 plus seven cows, the plaintiffs had paid \$100-\$200 less than the price payable for the others; and
- (f) the plaintiffs had failed to take reasonable care to look after their own interests, a factor in the failure of the off-farm investment plan.

[186] Rural cannot avoid liability for the reasons submitted. I cannot find that Mr Clark “knowingly” entered into a transaction that was high risk. He told Mr Williams that he wanted AB recorded stock. Mr Williams sold him the calves as AB recorded stock. The 77 calves Mr Williams purchased through Mr Mavor were obtained at a lower price but that price was the more attractive to Mr Clark because Mr Williams had assured him the stock would be AB recorded. Mr Williams may well not have been as transparent as he should have been as to the risks Mr Clark would face in obtaining the necessary records for those animals, but it would have been through Mr Williams’ misleading conduct in this regard that Rural negotiated the sale and no doubt would have charged a commission for the sale accordingly.

[187] Mr Williams had arranged the sale on the basis the stock were AB recorded. As Mr Cairns explained, with the way stock agents act as between the vendor and purchaser, it was Mr Williams and Rural that had an obligation to ensure that the records were available. Mr Clark was entitled to rely on Mr Williams to do this. When Mr Clark became aware that there was a problem with the provision of records in 2016, it seems he did work closely with Rural to try and obtain appropriate records for the animals.

[188] I have taken Mr Clark’s election to continue trying to obtain a free lease of the heifers in the months prior to May 2016 into account in assessing the loss for which the plaintiffs are entitled to damages and in not allowing them to recover all grazing costs incurred for the stock after 31 May 2016.

[189] I have found that the lack of records did ultimately result in the animals being of lesser value to the plaintiffs than they would have been if Mr Williams had not misrepresented all the stock as being AB recorded. The loss for which I hold Rural is liable in damages is what I assess as being a loss for which the plaintiffs should be

compensated because the animals could not be sold as AB recorded stock, the basis on which Mr Williams had sold them.

[190] It may be that the plaintiffs incurred grazing costs or had to graze some stock themselves for longer than they had anticipated because a number of the calves they bought were not AB recorded or did not have the records to be sold as AB recorded. Mr Clark must have been put to considerable trouble in trying to sort out where there were records for particular animals and which animals could be sold as AB recorded. These problems for Mr Clark and the plaintiffs might well have been avoided if Mr Clark had placed less trust in Mr Williams and Rural, and had taken greater responsibility for checking on what Mr Williams had done and was doing. At the time Mr Clark dealt with Mr Williams, he was still employed by Rural. Rural were holding him out as someone who could be trusted to act competently and honestly as a stock agent for both Rural and farmers wanting to buy stock through Rural.

[191] It would not be just to reduce the damages to which I have held the plaintiffs are entitled because of the way it might be said Mr Clark's trust in Mr Williams was misguided.

[192] Under this head, the plaintiffs are thus entitled to damages from Rural under s 43 FTA in the sum of \$30,750.

Claim for further undelivered stock and for heifers being in calf

[193] The plaintiffs say they received only 72 of 112 heifers purchased between 3 May 2016 and 30 June 2016 at a total cost including GST of \$102,691.89. The heifers were bought at rates of between \$750 and \$959.20 each, GST exclusive. The plaintiffs claim damages of \$36,800, equivalent to a refund of the purchase price for 40 heifers at an average of \$800 per head plus GST.

[194] Rural admits that Mr Clark asked Mr Williams to purchase around 100 empty heifers and to arrange for them to be trucked to the plaintiffs' grazing property at Tuapeka Mouth. Rural admits the plaintiffs were invoiced for 112 empty heifers and the amount due on the invoices were debited to the plaintiffs' account. Rural admits

that the plaintiffs' records provided by Wynyard Transport Ltd show only 71 animals in total having been delivered by that firm to the plaintiffs' property at Tuapeka Mouth.

[195] Rural says the plaintiffs have not proved the non-delivery, Mr Clark not raising any issue about 40 undelivered heifers until mid September 2016. Even if it was in mid August as Mr Clark claimed, that would have been over two months after there had been the claimed non-delivery.

[196] In his initial brief of evidence, Mr Clark said he did not know whether or not 112 empty dairy heifers were purchased. He said they did not know who had previously owned the stock. The plaintiffs had no herd records. He said "all we know is that Rural Livestock arranged for delivery of 72 dairy heifers to the plaintiffs of which 62 were empty and 10 in calf". He referred to discussions he had with various people from Rural after Mr Shepherd of Rural told him on 30 April 2016 that Mr Williams had "lost the plot". The initial step he took was to talk to Mr Williams about 90 bulls that had gone out on lease and had not been returned when they should have been. He then tried to sort out what was to happen over the 253 in calf heifers that had not gone out on free leases. He said Rural billed them for 112 empty dairy heifers but Rural only arranged delivery of 72 and he could not get information from Rural as to where the balance of 40 animals were. He said Rural people advised him that Rural was in a difficult position because Mr Williams' record keeping for these various transactions was non-existent.

[197] In a reply brief, Mr Clark provided no further information as to how he had established there was non-delivery but made the point the plaintiff had not paid the invoices for them, rather Rural had deducted the full amount of the invoices for 112 dairy heifers from credits that were due to the plaintiffs from Rural.

[198] Mr Clark explained how many cows he had received primarily by reference to trucking invoices from Wynyard Transport but, when he was giving his evidence, in response to questions from the Court, he confirmed that he was saying he had been invoiced for 112 heifers and was saying that all he had received was 72 heifers. There was then this exchange:

Q: How do you know that?

A: Well, I counted them. I've got the trucking dockets. Well, I haven't got the trucking dockets. I've got the trucking bill. We only used one firm to do that work.

[199] Rural admitted that the plaintiffs' records provided by Wynyard Transport showed only 71 animals in total having been delivered by that firm to the plaintiffs' property at Tuapeka Mouth.

[200] In his evidence, Mr Williams said he had read the brief of Mr Clark and confirmed the content of the brief insofar as it related to matters that were within Mr Williams' knowledge. In his brief, Mr Clark said the plaintiffs had received seven tax invoices for the apparent purchases of 112 empty dairy heifers. The tax invoices he referred to were dated between 3 May 2016 and 30 June 2016. Mr Williams said in his brief that, from late 2015, Mr Fowler of Rural was responsible for processing all his sale notes. He said he could not confirm whether the plaintiffs were invoiced for more stock than they received as he had not had access to any Rural documents since his employment with Rural ended in August 2016. He did not remember preparing the sale notes for the 112 stock.

[201] The cost of the stock for which the plaintiffs were debited was significant. If the plaintiffs were debited for the cost of stock that were not delivered to them, Rural has received a significant sum which it would seem likely they are still holding in their account. There was no evidence from Rural connecting the amount which had been debited against the plaintiffs' account to payments that had been made or credited to the accounts of those selling the same animals through Rural.

[202] No sale notes for any of the empty heifers were in the common bundle or referred to by Mr Cox to show how Rural had obtained the 112 empty heifers which they say were purchased by the plaintiffs.

[203] There is no evidence as to how all the stock came to be selected, whether the purchases were arranged by Mr Williams or Mr Clark or any other agent. There is no evidence from Mr Clark or anyone else that the number of stock delivered to the property at Tuapeka Mouth were counted on delivery to that property.

[204] The plaintiffs have the onus of proving the shortfall but, in the context of the way farmers like Mr Clark purchased stock using Rural, it was Rural who should have had the records to show where the 112 heifers came from, when the sales were arranged and how the animals came to be placed on trucks for delivery to the plaintiffs who were paying for them. They were able to belatedly produce such documents for the 176 in calf heifers referred to earlier.

[205] Mr McIntosh for Rural, in his closing submissions, accepted that Mr Williams had apparently carried out the order and the plaintiffs were accordingly sent invoices for the 112 empty heifers and, in each case, 14 days later, no objection having been received from the plaintiffs, Rural debited each invoice to the plaintiffs' account in the usual way and they were recorded as paid.

[206] In submissions, Mr Hitchcock asserted "self evidently the plaintiffs were invoiced and paid for 112 animals and the transport documents only show 71 delivered".

[207] Counsel for both Rural and the plaintiffs refer to the number of stock purchased as being the number referred to in seven invoices. Rural acknowledges that the plaintiffs' account has been debited with the total amount shown in the seven invoices. Those invoices include invoice 334372 for a sale dated 17 May 2016 for 17 cattle, including one lot of nine empty heifers and another lot of eight empty heifers. In relation to the eight, the details were:

Tally	Description	Reference	Rate	Total
8	[empty] heifers, 436 kg @ \$2.20/kg	33205	595.20	\$4,761.60

[208] There was an error with that invoice in that a heifer of 436 kg at \$2.20 kg should have been invoiced at a rate of 959.20.

[209] There is then a further invoice from Rural number 334513 but with a different sale order number. The date remains 17 May 2016. That invoice is for:

Tally	Description	Reference	Rate	Total
8	[empty] heifers, 436 kg @ \$2.20/kg	33205	959.20	\$7,673.60

[210] Rural has thus corrected the mistake in the earlier invoice so there are two invoices for the same eight empty heifers. Although this was not referred to in cross-examination or submissions, I note from a Statement of Account dated 12 October 2016 in the common bundle that on 31 May 2016 the plaintiffs were credited with \$5,475.84. This is the amount, including GST, that they were debited for eight heifers in the incorrect invoice of 17 May 2016. The plaintiffs have therefore neither purchased nor have had to pay for eight of the heifers which are included in the 112 of which the plaintiffs claim 40 were not delivered to them.

[211] This would explain why an administrative assistant with Rural, Chelsea Dobby, as referred to by Mr Clark in his initial brief of evidence, said in an email of 12 October 2016:

We are still verifying the 104 heifers that you only received 72 of.

It seems some of the lines you were invoiced for are not the ones you received, so we are going to need to work through this.

I will keep you updated.

[212] In his brief of evidence, Mr Clark said Ms Dobby's figures were wrong, "the invoices clearly show we purchased or paid for 112 empty dairy heifers". It is apparent from the documents I have just referred to that the plaintiffs were debited with the cost of only 104 heifers.

[213] Rural say the plaintiffs cannot prove a shortfall simply by referring to the trucking records. They say the trucking records do not match up with the invoices.

[214] Wynyard Transport records refer to:

21-06-2016: cart 31 cows from Isla Station to Tuapeka Mouth

21-06-2016: cart 4 cows from R van Vugt to Tuapeka Mouth

[215] Mr Clark identified these cows as being purchased through Rural and as being part of the 71 that were delivered to him. There are no corresponding sale notes or credit notes that have been produced from Rural relating to sales for the benefit of R van Vugt or Isla Station. The plaintiffs were invoiced for 23 heifers on an invoice where the date of sale was referred to as 31 May 2016 and for eight heifers where the date of sale was referred to at 17 May 2016. It seems likely that at least the 31 heifers transported by Wynyard Transport on 21 June 2016 had been invoiced to the plaintiffs as if they had been purchased on or around 17 and 31 May 2016.

[216] Although trucking records do show that 31 cows were delivered to the plaintiffs' property at Tuapeka Mouth as Rural had invoiced the plaintiffs for, they show that the delivery did not take place until 21 days after the plaintiffs had been invoiced for 23 heifers and more than a month after the plaintiffs had been invoiced for eight heifers. I consider the combined documentation as to both invoice and transport of these cows provides an example of the plaintiffs being invoiced for cows when they had not been delivered.

[217] Rural submits that, by allowing the debiting of each invoice to proceed, the plaintiffs implicitly acknowledged to Rural that the invoices had been accepted, that the stock had been delivered and everything was correct.

[218] I cannot infer, from the fact Rural debited the plaintiffs' account with the amounts invoiced 14 days after the invoices issued, that at the point of debiting Mr Clark accepted that the cattle referred to in the invoices had in fact been delivered. There is no evidence that he carefully checked the details in invoices when they were received or any statements that were sent to him on a monthly or any other basis. The evidence suggests he did not exercise such care. Neither Mr Clark nor the Rural managers appear to have picked up what appears to be the double invoicing for eight heifers, as referred to earlier.

[219] Trucking records show 13 heifers were carted by Wynyard Transport on 10 May 2016 from R Mosley to Skinner Road. There is no corresponding invoice for 13 cows on 10 May 2016. The plaintiffs were invoiced by Rural on 6 May 2016 for two lots of 12 empty heifers. If one of those lots were part of the 10 that were transported

on 10 May 2016, again, it would be an instance of an invoice being issued for stock before they had actually been put on a truck for delivery. Again, there has been no reference to any credit or sale note showing Mr Mosley was due a credit for 13 heifers. In a summary of information prepared by Rural, that Rural managers discussed with Mr Clark, there was a note “no credit to Mosley – would have been vocal if missing”.

[220] Trucking records showed 23 cows as having been transported on 31 May 2016 from R Kenny to Tuapeka West. The plaintiffs were invoiced for 25 heifers at a rate of \$750 each on 3 May 2016. On 17 May 2016, they were invoiced \$750 for one heifer. The sale was referred to as being at 17 May 2016 but the invoice also referred to it as a “tally adjustment”. As Mr McIntosh submitted, this would be consistent with there having been one more cow actually delivered than the 25 referred to in an invoice as having been sold on 3 May 2016 at \$750 each. Again, Rural have not been able to produce any sale or credit notes for either the 25 or 26 heifers referred to in those two invoices. The trucking records for 23 cows transported on 31 May 2016 do not match up with the 25 invoiced on 3 May 2016 or at any other time. Again, however, it seems likely the plaintiffs have been invoiced for stock at a time when the stock referred to in the invoice had not actually been delivered to the plaintiffs.

[221] With all these problems with the documentation put before me, the fact the plaintiffs were invoiced for 104 empty heifers is not evidence that this number of cows were actually delivered to their property at Tuapeka Mouth.

[222] No evidence was led from Mr Clark as to the time and circumstances in which he said he had counted the animals to establish the shortfall. In this regard however, there was no evidence that Rural had asked for the stock to be counted at a time when Mr Clark was saying to them that there was a shortfall. I accept that one of the ways Mr Clark established there was a shortfall was by counting the cows that had been delivered to Tuapeka Mouth.

[223] In response to the question from the Court, Mr Clark said that they used only one firm to bring stock to the Tuapeka Mouth property. The statements from Wynyard Transport confirm it was used extensively to carry stock to the Tuapeka Mouth property around that time.

[224] Although Mr McIntosh strongly questioned the reliability of much of Mr Clark's evidence, he did not suggest that Mr Clark had been a dishonest witness. Mr Clark readily acknowledged he had used Clutha Transport to transport 10 heifers from the Tuapeka Mouth property to the Chellma property where they had to go to be milked. These were heifers that should have been empty but which turned out to be in calf.

[225] The Wynyard Transport trucking records together with Mr Clark's actions in counting the stock that were on the Tuapeka Mouth property establishes that Rural arranged, probably through Mr Williams as admitted, delivery of only 71 or 72 of the 104 empty cows for which the plaintiffs were invoiced. The plaintiffs claim was that they received 72 of the heifers. I deal with this claim on that basis.

[226] Rural contend that the plaintiffs' contract with Rural was simply for the purchase of the stock and not for their delivery. Rural also submitted that, even if non-delivery has been established, Rural would not be liable in contract for that loss because Rural was not a party to the contract and had not represented that it would be liable for the delivery of any purchased animals, and such a term could not be implied.

[227] I reject that submission. The plaintiffs were not told at the time of invoicing who was on the other side of the transactions for which they were being invoiced. Their liability for the amounts they were being invoiced for was to Rural. Rural's consideration for the sums being debited against the plaintiffs' account was that they would arrange delivery of the animals. Consistent with this, they did in fact arrange delivery of 71 or 72 cows.

[228] Rural cannot avoid liability on the basis Rural was not the vendor and any issue of non-compliance would be a matter only as between the vendors and the plaintiffs as purchaser. A crucial aspect of the way agents operated with both vendor and purchase was that the purchaser's liability for the price of the stock they were purchasing would be paid to the agent, just as the vendor using an agent would expect to be paid by the stock agency firm regardless of whether the purchaser had paid the stock agency. If there was a shortfall in delivery or say a problem with an animal not being in accordance with the description for the sale, then it would be for the agent to

fix the problem for the purchaser. For reasons already discussed, stock agencies operated, and both vendors and purchasers dealt with them, on the basis that the stock firm would be responsible to the vendor and purchaser separately for ensuring that they received what they were entitled to in terms of the transaction which the agency had negotiated.

[229] Consistent with that expectation, one of Rural's complaints is that Mr Clark did not notify it as early as it says he should have so that it could then establish what the problem was and then remedy it.

[230] Rural claims Mr Clark's alleged delay in raising an issue about non-delivery made it more difficult for Rural to resolve any issues between the transacting parties, that discovery or tracking of the non-delivered animals was made more difficult because Mr Clark had not NAIT recorded the delivery of the heifers that had gone to his property.

[231] Rural also argues that, if there is any liability in contract for short delivery then, because of Mr Clark's own actions in the matter, any award of damages should be reduced by 50 per cent because Mr Clark's actions have contributed to the loss.

[232] Mr Clark had been told around 30 April 2016 by Mr Shepherd that Mr Williams had "lost the plot" and he needed to check where the plaintiffs' stock was. After this, Mr Clark not only arranged to purchase more stock through Mr Williams but it seems he took no steps to ensure the stock they had purchased had been delivered to Tuapeka Mouth. He was sure that he had been present only when one lot of heifers was delivered. This happened at night. There was no evidence that he then counted the stock that had been delivered either then or shortly afterwards. He said a number of the deliveries were made to a neighbour's cattle yards but there was no evidence that he had arranged with that neighbour to check on what was being delivered. Nothing was done to NAIT record the stock actually delivered to the Tuapeka Mouth property and nothing was done to identify the stock that had actually been delivered.

[233] Certainly, in hindsight, Mr Clark was unwise to have relied on Mr Williams to purchase new stock for the plaintiffs after Mr Shepherd had told Mr Clark that Mr

Williams had “lost the plot” and he should check that all the stock the plaintiffs had purchased through Mr Williams was accounted for. However, Mr Clark instructed Mr Williams to purchase these further animals when Mr Williams was able to act as an agent in that capacity through his continuing employment with Rural. Rural invoiced the plaintiffs for the stock supposedly purchased through Mr Williams, presumably believing that invoicing was justified, given the information and documentation they had received from Mr Williams. Mr Clark might have been more careful in checking on the number of stock actually delivered to the Tuapeka Mouth property at the time of delivery. He did have obligations in terms of NAIT to record movements of stock but any deficiencies in this regard were not the cause of Rural failing to deliver to the plaintiffs 32 of the cows they were invoiced for. Mr Clark said he discussed issues as to a shortfall with Mr Cox and Mr Fowler of Rural in August 2016 and I accept that evidence.

[234] Rural was thus in breach of its contractual obligation to deliver 32 of the cows which it had invoiced the plaintiffs for.

[235] Rural also argued that liability for such a loss was excluded under the exclusion clause in the terms of sale.

[236] For reasons previously discussed, Rural cannot avoid liability in contract for the loss the plaintiffs suffered resulting from that breach of contract. Delivery of the animals they had to pay for was so fundamental to the obligations which Rural had to the plaintiffs that the exclusion clause could not have excluded liability for this breach of contract. Because the clause purported to exclude liability arising out of the transaction between Rural and the plaintiffs by which Rural agreed to deliver animals and the plaintiffs agreed to pay Rural for them, it is not clear what the exclusion clause meant. In contract, it then cannot be given effect to.

[237] Rural submits that, as far as a FTA claim is concerned, the complaint is of non-delivery as distinct from misleading or deceptive conduct and no such misleading or deceptive conduct was pleaded as to this claim.

[238] I reject that submission. The plaintiffs would also be entitled to damages under the FTA by reason of Rural's misleading conduct. With the issuing of the invoices, Rural represented that 104 empty heifers had been or would be delivered to the plaintiffs' property. That representation was misleading because only 71 or 72 cows were delivered to the property. The plaintiffs have established that they have suffered a loss with regard to the cost of 32 cows which were not delivered to the Tuapeka Mouth property.

[239] The plaintiffs are thus entitled to damages to the extent of that cost for breach of contract and, alternatively, under the FTA. It is reasonable and just that the loss should be calculated on the basis that the cost of those 32 animals debited against their account was \$800 per cow. The damages they are thus entitled to under this head is \$29,440 including GST. They are entitled to interest on the sum as from a date soon after the last invoice date for the purchase of that stock, i.e. 1 August 2016.

[240] The evidence establishes that Mr Williams/Rural sold the plaintiffs 104 cows as empty cows. On that basis, there was a representation to the plaintiffs from Mr Clark that the cows were not in calf. Mr Clark accepted the cows on that basis. It turned out however that 10 of the stock were already in calf. This meant that, around June or July 2016, they had to go to a property where they could calve and be milked, in other words to a property with a milking platform. Because of the time when this had to happen, Mr Clark had to pay a farmer to take the stock on. He arranged with Chellma to do this and 10 cows went to that property.

[241] There was no dispute that Chellma required \$100 per head to calve and milk these heifers, part of the 48 heifers that went to Chellma at that time. The other 38 came from the 253 calves that had not gone out on free lease or been sold before June 2016. That was a loss the plaintiffs suffered through a misrepresentation by Rural that the cows sold to the plaintiffs were empty.

[242] I thus find that the plaintiffs incurred costs of \$1,000 because 10 of the cows they had purchased as empty cows turned out to be in calf. In the circumstances, I make no award for interest on that sum.

Claim for loss of a teaser bull and shortfall in credit

[243] The plaintiffs say they agreed with Rural, through Mr Williams, to lease out eight teaser bulls for \$650 per head net of commission. Rural say the agreement was to lease eight teaser bulls at \$600 per head net of commission.

[244] The plaintiffs also claim that, when the bulls were returned to them from the lease, one of them was so badly injured that it had to be killed and that effectively it had to be treated as lost stock and Rural should compensate the plaintiffs for this.

[245] In an initial brief of evidence, Mr Clark said that around October 2015 Mr Williams asked him whether the plaintiffs would lease eight teaser bulls at \$650 per head net of commission to a client of Rural with the lessee to compensate the plaintiffs for any dead or lost stock. It is admitted that Rural did arrange for the lease of eight teaser bulls. On his evidence, the plaintiffs claim they had suffered a loss in that a credit note 351615 should have been for \$7,992.50 for eight teaser bulls at \$650 net of commission plus compensation of \$1,750 for one dead bull plus GST. Instead, the credit note was issued for \$5,520 for eight teaser bulls at \$600 per head with no compensation for the dead bull. The plaintiffs' claim is for \$2,472.50.

[246] In his reply brief, Mr Clark reiterated that the price he had agreed with Mr Williams was \$650 per head net of commission and said he could not understand why Rural had not given him credit for the dead bull. He said other stock firms deal with compensation for dead or missing stock in that way and that Rural had done this previously.

[247] Mr Clark said the amount he expected for the lease of the teaser bulls was \$650 because when leasing out normal bulls the price would normally be \$450 but for a teaser bull he normally asked for an extra \$200 to cover the cost of the vasectomy for the teaser bull. The teaser bulls were leased to a Mr Lawrence but Mr Clark had no direct contact with this person. The teaser bulls went to the lessee around October 2015 and he expected they came back around Christmas time when they would have fulfilled their purpose of identifying the cows cycling or on heat and thus ready for AI (artificial insemination).

[248] In cross examination, Mr Clark said that the injured bull had to be shot. He said it should never have been transported and the trucking company should never have carted it from Mr Lawrence's property back to the Clarks' property. He was asked how long it had lasted on the Clarks' farm before it was shot and he said "probably that day or the next day for dog tucker". He had not obtained a vet certificate.

[249] Mr Clark accepted that he might have been able to claim from the lessee but "it was done through Rural". He said it is an unwritten rule that it was up to the farmer on whose property the bulls had been sent to pay for them but "through the company that put them out". He considered it was for Rural to recover from Mr Lawrence, not him.

[250] Mr Clark accepted that, around the time he received the relevant credit note, he contacted Chelsea Dobby at Rural. He told her that they had processed the eight bulls at \$600 which he believed should have been \$650 net and "then \$1,000 for one that had to be shot".

[251] In his evidence as briefed, Mr Williams confirmed that in or about early October 2015 he asked Mr Clark if the plaintiffs would lease eight teaser bulls at \$650 per head net of commission to a client of Rural with the lessee to compensate the plaintiffs for any dead or lost stock.

[252] Mr Williams acknowledged that the credit note for the Clarks showed the lease rental paid by Mr Lawrence at \$600 a head but said it should have been \$650 net of commission. He also said that he had discussed this with Mr Clark in March or April 2016 and he agreed with Mr Clark that, because that animal had come back "crook and had to be shot", there had to be a change at the office. He was asked if he could independently remember that the price per head should have been \$650 not \$600. He said he had not relied on his independent memory but he had found a "little green Rural Livestock notebook" which he had since handed to the SFO and he had written down in it the issues there were with Mr Clark's account. However, he said this was a note of the meeting and what they had agreed at that meeting. He said the note would have recorded what his belief was. He could not say what else he knew at the time

that would have helped him remember that the price should have been \$650 net. He said, at the time he agreed this was the correct figure and that was what he had to get processed at the office. Mr Williams accepted that the deal would have been done back in October 2015, and the bulls would have returned home usually around January or February the following year but he said the transaction had not been processed until after the March or April meeting he had with Mr Clark when they were discussing issues with his account.

[253] Mr Cox said that, on 12 September 2016, Mr Clark had requested a statement of his account and copies of all records of transactions that had been processed over the preceding few months and Rural had then supplied Mr Clark with the statement and documentation requested. It was however accepted in cross examination that Mr Clark would not previously have seen the invoice issued by Rural to Mr Lawrence. What he had was the credit note for eight bulls at a net price of \$600 plus GST. It was in response to that Mr Clark said the price should have been \$650.

[254] Mr Cox said that he had personally reviewed the information Rural had about the claim. He decided the transaction recording a credit to the Clarks for \$600 per bull accurately reflected the sale note information supplied by Mr Williams to Rural. He said Rural was not responsible for the deaths of any bulls on a Rural bull lease. That was a matter between the lessor and lessee.

[255] The plaintiffs have established on the balance of probabilities that Mr Clark instructed Rural, through Mr Williams, to put their eight teaser bulls out for lease on the basis there would be a net return to the plaintiffs of \$650 per bull.

[256] The bulls were to be made available to a dairy farmer in this way over the period when cows would be artificially inseminated. That period would have been between approximately October 2015 to about January or February 2016 or slightly earlier.

[257] Mr Clark was clear that he expected a net return of \$650 per teaser bull. He based that on what he would have expected the net recovery to be for the leasing out

of a normal bull at \$450 per animal plus a recovery for the cost of the vasectomy at \$200.

[258] I am also satisfied that Mr Williams accepted this is what he had been instructed to achieve when he had a discussion with Mr Clark around March or April 2016 when Mr Clark was trying to clear up issues arising out of both debits against his account and credits which he thought were due. Mr Williams said that, in accepting the instructions from Mr Clark had been to lease the bulls at a net \$650, he had referred to a note he had made of issues that had been discussed at that meeting. That is not of much weight to me because that was a record of what had been discussed at the meeting, rather than what the instructions had been originally. Nevertheless, Mr Clark's clarity as to what his instructions had been and Mr Williams' apparent acceptance of that has been sufficient to establish that was the basis on which Rural was instructed to make these teaser bulls available to a dairy farmer.

[259] Mr Cox for Rural refused to accept that was the basis on which Rural was engaged to lease out the teaser bulls. In saying that, he referred to the credit note prepared within Rural and sent to the Clarks, an invoice sent to Dunbrook Dairy Company Ltd (Dunbrook) (a company associated with Mr Lawrence) dated 6 June 2016 and a sale note generated for the transaction.

[260] The sale note showed the vendor as Williams Clearing, the purchaser Dunbrook. The sale note was for five two-year Jersey service bulls at \$1,800, and "eight teaser bulls lease" at a price of \$600. The sale note showed delivery date "2 November 2006" [sic] and the date of the sale note "6 June 2016, agent John W". Mr Clark had not seen that document before he was cross examined about it.

[261] Mr Cox also referred to an invoice generated within their office to Dunbrook in respect of a sale, shown in that document as being 6 June 2016 for five two-year service bulls and eight leased teaser bulls. On that document, the bulls were shown as being leased at \$600 plus GST.

[262] Mr Clark said he did not know anything about what went on "on the other side of Rural Livestock".

[263] The documentation which Mr Cox relied on was not compiled until probably more than six months after the bulls had been made available to Dunbrook and probably four months after they would no longer have been of use to Dunbrook and were presumably returned to the plaintiffs' property.

[264] Mr Cox said the particulars of the transaction were conveyed to the Rural administration team by Mr Williams in the usual way although he nominated his clearing account as the counterparty to the transaction. Mr Cox said "unfortunately it was not then on-processed from there for some time".

[265] The sale note recording a transaction with Dunbrook prepared by Rural was, on its face, confusing. It described the transaction as being between Williams Clearing as vendor and Dunbrook as purchaser. The transaction over the lease of teaser bulls was not a vendor/purchaser transaction. The amount Dunbrook was to be invoiced for the lease of the eight bulls should have been recorded as being on account of the plaintiffs, not Williams Clearing.

[266] The reference on the sale note to the vendor as Williams Clearing was consistent with Rural managers being concerned at the time this document was prepared that there could be some difficulty or problems over the transaction, hence their attributing the benefit of the two transactions to the Williams Clearing Account, rather than to the plaintiffs. Mr Williams said that the five two-year service bulls referred to in the documents had been sold to Dunbrook on his own account.

[267] Even if the charging of Dunbrook for the lease of the eight teaser bulls at \$600 each plus GST reflected the basis on which Rural, through Mr Williams, had made the bulls available to Dunbrook, I am not satisfied that would have reflected the terms on which he had been instructed to lease out the bulls by Mr Clark. Because of the significant delay on Rural's part in invoicing Dunbrook for the bulls and in crediting the plaintiffs with an amount due to them, there was potential for Mr Williams to have given mistaken information to the manager or managers who were overseeing his record-keeping.

[268] I also accept that Mr Clark was reasonably prompt in contacting Ms Dobby of Rural after he had received that credit note and raising with her issues over claimed mistakes.

[269] Rural cannot avoid liability on the basis the lease contract was between the plaintiffs and Dunbrook. I accept Mr Clark's evidence that he did not know where the bulls had gone. This was not unusual. Mr Cox and Mr Cairns both accepted that where the parties to a transaction have entered into that transaction through a stock agency, they may well not know the identity of who is on the other side.

[270] Mr Clark had made these bulls available to Rural for it to lease out to one of their clients on the basis there would be a net return to the plaintiffs. Rural would have been free to charge a commission over and above the \$650 per bull. Rural could simply have made these teaser bulls available to a client as a service to that client with the expectation it could lead to other business with that client for the benefit of Rural, or for the personal benefit of the agent. Potentially that could have happened here in the transactions with Dunbrook. Mr Williams could have made the teaser bulls available to Dunbrook on a more favourable rate than Mr Clark had stipulated as an inducement for Dunbrook to buy the five two-year service bulls that Mr Williams was selling on his own account.

[271] No written lease was entered into but I am satisfied the teaser bulls were made available to Rural with the expectation, and on the basis accepted by Rural, that at the appropriate time Rural would ensure the teaser bulls were returned to the plaintiffs as the owners of them. This is what happened but there was then an issue over a bull which Mr Clark said he had to shoot.

[272] Mr Clark should and must have been notified that the teaser bulls would be returned. This must have been done either by Dunbrook or, more likely, by Mr Williams. Mr Clark was present when the bulls were returned. If, when the truck arrived at his property, the number of bulls had been less than it should have been or if there was a problem with an injury to one of the bulls, he should have immediately notified Rural so it could deal with the issue. Mr Clark was entitled to expect that, if there was a problem, Rural would put it right.

[273] I accept, with the way Mr Clark described the state of one bull on its return, that teaser bull was seriously injured and he had to put it down through shooting it. He was adamant that the bull should never have been put in the truck in that condition. Although there was no evidence from either the truck driver or anyone else that the bull had been injured in that way when it left Dunbrook, I accept that probably the bull did have this injury before it was put on the truck. None of the other teaser bulls had been injured.

[274] If Mr Clark had told Rural promptly that there was a problem as to one of the bulls, he could reasonably, in terms of his contractual relationship with Rural, have expected them to investigate what had happened and ultimately, if required, to compensate the plaintiffs for the loss of that bull. He did not contact Rural about this immediately. The only evidence as to an initial discussion with anyone from Rural over the problem was Mr Williams' evidence that Mr Clark was expecting an increased credit for this at a meeting he had with Mr Clark to discuss a number of issues in about March or April 2016.

[275] Had Mr Clark contacted Rural immediately and advised it of the problem, given his earlier deals with Rural, there may have been no controversy over his being entitled to a credit for that animal. Rural would then have sought redress from Dunbrook and Mr Lawrence.

[276] Mr Clark was also careless in the way he referred to the loss of this animal in his first brief of evidence when he said, as to this claim, "one bull died on the lessee's property".

[277] Mr Clark's carelessness in these respects did not however contribute to the loss of the teaser bull through the way it was injured while out on the lease arranged by Rural. It was a term of the contract between Rural and the plaintiffs that the teaser bulls would all be returned to the plaintiffs at the end of that lease and Rural would compensate the plaintiffs if this was not achieved.

[278] I accept that, through having to put down the teaser bull which was injured before it was returned, the plaintiffs suffered a loss to the extent of the value of the

bull at that time which I put at \$1,000 based on Mr Clark's own evidence in cross-examination.

[279] For reasons already discussed, Rural cannot rely on the exclusion clause to avoid this liability.

[280] Accordingly, the plaintiffs are entitled to judgment for the amount they should have received for the lease of the teaser bulls, an additional \$50 per head for the eight teaser bulls and \$1,000 for the loss of the bull. The total amount the plaintiffs are entitled to under this part of their claim is thus \$1,400 plus interest on that sum at five per cent per annum as from the date of the relevant invoice, being 12 October 2016.

Summary

Claim for 176 heifers purchased but never available to the plaintiffs

[281] The plaintiffs bought 176 heifers through Rural/Mr Williams in June and July 2016 for \$210,277.50. Rural/Mr Williams was to arrange for them to go out on free leases.

[282] It was a term of the contract for their purchase and represented by Rural/Mr Williams that the stock would be adequately identified and the plaintiffs would be given information sufficient to identify the stock they purchased. Neither the plaintiffs nor Rural have been able to locate these animals or trace where they went to. This was because they had not been adequately identified by Rural/Mr Williams and the plaintiffs had not been provided with information as their identity that would enable them to recover possession of the animals.

[283] As a result, the plaintiffs have suffered loss to the extent of the cost of these animals. They also lost what these animals might have been worth if they had gone out on free-leases and been available to the plaintiffs at the end of that lease as more mature cows. The plaintiffs contributed to the loss of the future value of these cows as mature animals through their failure to identify the stock and check where they were being grazed after they had been purchased. In that way, they failed to mitigate their loss.

[284] Rural cannot avoid liability through a clause in their trading terms which purported to exclude them from having any liability against any claim arising out of their role as agents in arranging the sale.

[285] Both in contract and under the FTA, a just way of compensating the plaintiffs for their loss is to require Rural to pay them damages to the extent equal to the cost price of these heifers, i.e. with interest at five per cent on that sum as from 1 August 2015.

Claim arising out of the purchase of 253 AB calves

[286] In 2016, the plaintiffs purchased 253 AB calves with Rural/Mr Williams misleadingly representing them as all being AB recorded so that the records for them as AB recorded stock would be available to the plaintiffs.

[287] Records were available for only some of the heifers when in the autumn of 2016 Rural attempted to put those then in calf heifers out on free lease.

[288] Rural was not liable to the plaintiffs for failing to have the heifers out on free lease before 1 June 2016. Mr Williams/Rural had never promised or guaranteed that they would arrange for the stock to go out on free lease before 1 June 2016.

[289] Rural was not liable for failing to obtain a sale of these heifers before 1 June 2016, or for failing to advise the plaintiffs well before then and before their market value was detrimentally affected by the onset of winter, that they would not be going out on free leases. The plaintiffs were aware or should have been aware the heifers were not going out on free lease but chose to take the risk of keeping them in the hope of obtaining either a free lease or achieving a sale.

[290] A number of the animals were not AB recorded but the plaintiffs have not proved that this was the reason the animals could not be sold before 1 June 2016. Nor have the plaintiffs proved that they incurred the cost of grazing for these animals during the winter of 2016 and afterwards because the animals were not AB recorded.

[291] A number of the animals were however worth less because they could not be sold as AB recorded, as Rural/Mr Williams had represented they would be. A just way of assessing the plaintiffs' loss in this respect is to award them damages in contract and under the FTA at \$250 for each of the 123 animals, the animals which they sold or retained after the 86 and 44 were sold in June to August 2016. That is total damages of \$30,750.

Claim for 40 empty heifers of 112 for which the plaintiffs say they were invoiced by Rural but never received

[292] The plaintiffs say they were invoiced for 112 empty heifers in 2016 at an average cost of \$800 per animal. They say only 72 of the heifers were delivered. The records produced to the Court show they had in fact been invoiced for and had been debited for the cost of only 104 heifers. Through the plaintiffs' trucking records and their having counted stock delivered, the plaintiffs have established that they received only 72 heifers.

[293] Rural was in breach of contract in failing to deliver to the plaintiffs 32 of the heifers for which they were invoiced and their account debited. Mr Williams'/Rural's conduct in invoicing the plaintiffs for 32 animals which were never delivered was also misleading conduct for which Rural is liable under the FTA.

[294] Rural is thus liable for damages, both in contract and under the FTA, for its failure to deliver 32 empty heifers. The plaintiffs are entitled to damages for this in the sum of \$29,440 including GST.

[295] Mr Williams/Rural also represented that the heifers sold to the plaintiffs were empty. In fact, 10 of them were in calf. As a result, the plaintiffs had to pay \$1,000 to put the heifers out for grazing/milking later in 2016. The plaintiffs are entitled to damages in that sum from Rural.

Claim for loss of a teaser bull and shortfall in credit

[296] Through Mr Williams, the plaintiffs agreed to Rural putting eight teaser bulls out for lease at a rate of \$650 net of commission for the plaintiffs.

[297] Rural wrongly credited the plaintiffs with \$600 per bull after deduction of commission. Rural arranged for the return of the teaser bulls to the plaintiff but, on delivery, one was so badly injured it had to be put down. The value of that animal was \$1,000. Rural are liable to the plaintiffs for the loss of that animal.

[298] Rural must pay damages to the plaintiffs for these breaches of contract in the sum of \$1,400 with interest at five per cent per annum on that sum from the date of the relevant invoice, namely 12 October 2016.

Goods and services tax

[299] Each of the claims for damages made by the plaintiffs included GST. It may be the plaintiff suffered no loss as to the GST portion of purchase prices because of the way they would have been able to claim a GST input credit from the Inland Revenue Department. However, Rural made concessions in its closing submissions relating to the quantum of damages, which have an impact on whether sums are awarded inclusive or exclusive of GST.

[300] In terms of the award for the 176 cows, the \$210,277.50 spent by the plaintiffs in purchasing the animals included GST. In its closing submissions, Rural submitted that, if there was liability, \$210,277.50 would be the appropriate quantum, rather than the higher expectation measure claimed by the plaintiffs. In those circumstances, the \$210,277.50 will be awarded in full.

[301] Likewise, in submissions relating to the claim for the 40 cows, Rural submitted that it had no issue as to quantum. The plaintiffs' claim was on a GST inclusive basis but for 40 cows. My judgment is for non-delivery of 32 cows. Given Rural's conclusion, my judgment is for a GST inclusive amount, i.e. \$29,440.

[302] In the other claims, relating to the 253 cows and the eight teaser bulls, Rural made no submissions as to GST. Those awards there are for damages and are GST exclusive.

Conclusion

[303] The plaintiffs are thus entitled to judgment against Rural for:

- (a) \$210,277.50, plus interest from 1 August 2015;
- (b) \$30,750;
- (c) \$1,000;
- (d) \$29,440, plus interest from 1 August 2016; and
- (e) \$1,400, plus interest from 12 October 2016.

[304] The plaintiffs' submission that interest should be imposed at the rate required by its bank is inappropriate without evidence to support it. Interest will be at five per cent per annum as per the Judicature Act 1908.

[305] The plaintiffs are also entitled to costs. If no agreement is reached as to those, a memorandum is to be filed by the plaintiffs within six weeks. A memorandum in response from Rural is to be filed within two weeks of its receiving the plaintiffs' memorandum. The plaintiffs are to file any memorandum in reply within two weeks of receiving Rural's memorandum. The memoranda are to be no longer than five pages. I will fix costs on the basis of those memoranda.

Solicitors:
AWS Legal, Invercargill
Hamish McIntosh, Barrister, Wellington.