

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

**CIV-2013-412-332
[2016] NZHC 2065**

BETWEEN

EWAN ROBERT CARR
First Plaintiff

BROOKSIDE FARM TRUST LIMITED
Second Plaintiff

AND

GALLAWAY COOK ALLAN
Defendant

Hearing: 9 May - 1 June, 3 June, 10 June, 13-14 June 2016

Appearances: F M R Cooke QC, P J Dale and S Cottrell for the Plaintiffs
M Ring QC, A Foote, C Shannon and D Hills for the Defendant

Judgment: 1 September 2016

JUDGMENT OF THOMAS J

*This judgment was delivered by me on 1 September 2016 at 3.00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors:

GCA Lawyers, Christchurch.
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Introduction

[1] This litigation was the result of a failed property transaction in 2007, in which the defendant, Gallaway Cook Allan, (GCA) represented the plaintiffs, Mr Ewan Carr, and Brookside Farm Trust Limited (Brookside). The plaintiffs claimed that they were entitled to around \$33 million dollars from the defendant for various different types of losses suffered as a result of GCA's failure to settle the transaction, and subsequent events and litigation stemming from that transaction.

[2] The plaintiffs' claims in negligence and for breach of an implied contractual term were initially disputed. GCA conceded liability on the weekend prior to the commencement of the trial. The only question now to be determined is the quantum of damages due to the plaintiffs, and the types of losses to which they are entitled.

Factual Background

[3] The main asset of the transaction was a dairy farm known as the Big Sky Farm (BSF). BSF was situated in the south eastern corner of the Maniototo Basin at Patearoa, Central Otago. As a whole it encompassed one of the largest milking platform areas in New Zealand. Productive capability was centred on the easy contoured areas directly adjoining the Styx-Patearoa and Puketoi Roads and the connecting Carr Road.

[4] The climate was dominated by winters of 120-130 days, hot dry summers and a low rainfall. Winter was too cold for any pasture growth. Spring growth, by comparison to down country lower altitude properties, was late due to the extended cold winter period. Without irrigation, the climate was considered to be the major limitation on pastoral production.

[5] BSF was made up of three farming units, Alnwick at around 435 hectares, Saran at about 320 hectares and Tercio at about 420 hectares, in 2007 all irrigated with either K-Line spray irrigation or Briggs Rotary travelling irrigators (roto rainers).

[6] The adjacent McSkimming farm had about 320 hectares of irrigation and was used by BSF for winter grazing, heifer grazing and feed conservation through silage

harvesting and grain growing. The Taieri River fringe on BSF also contributed to winter grazing.

[7] Mr Carr was the fourth generation Carr to own and operate assets in the Maniototo. His great grandfather came to Central Otago and Mr Carr's grandfather was a gold miner who was the first to acquire farm property. By the mid-1960s Mr Carr's father was operating both the Alnwick and the Fairview (now called Tercio) farms. Mr Carr grew up on the farms. He always had a strong interest in engineering and was exposed to all sorts of engineering and maintenance challenges on the farms which played a significant role in forming his interests and pursuits to this day.

[8] Around 2000, Mr Carr was a participant in a joint venture with two other parties, Mr Humphries and Mr Paterson. The joint venture involved the shared ownership and operation of BSF through Big Sky Dairy Farms Limited (BSDF). Mr Humphries separately purchased a farm known as Awataieri which was developed as a harvested feed block for providing silage and crops to BSF. The joint venture included other properties and companies.

[9] Tensions developed in the relationship of the joint venture parties. Following the death of Mr Paterson in 2003, the relationship between Messrs Humphries and Carr broke down further. In an attempt to terminate the joint venture, Mr Carr and Mr Humphries reached an agreement by deed, the effect of which was to reduce Mr Carr's shareholding in return for options to purchase BSDF's assets, and two other properties, known as the Styx Lodge and the Danseys Pass Coach Inn. Due to disputes about the purchase price, Mr Carr exercised his option but did not complete the transaction.

[10] Mr Carr then applied to the High Court to appoint liquidators to BSDF to ascertain its value. In March 2007 Murray Frost and Michael Horne were jointly appointed by the Bank of New Zealand as receivers and managers of all of the assets of BSDF.

[11] A settlement notice was then issued requiring Mr Carr to settle the purchase of the BSDF assets under his option. Again, due to disputes over the purchase price, Mr Carr did not do so and there was ensuing litigation. Before mediation scheduled

for May 2007, a settlement was reached. This culminated in an Amended Settlement Agreement (ASA), executed on 16 May 2007. Its purpose was to settle the disputes between the parties, to bring an end finally to the joint venture.

[12] Under the ASA, Mr Carr agreed to purchase:

- (a) all the assets of the Big Sky Group, including BSF, the land in the “Creek Block”, 1,147,583 Fonterra supply shares, irrigation entitlements, plant and equipment, and a house at Patearoa, for \$19.7 million plus GST;
- (b) 2,500 cows from Jarcel, Awataieri and Consultant Management Services (in receivership) for \$2 million plus GST;
- (c) all of the assets of Anesyds (in receivership) for \$1.87 million plus GST (which included the land, buildings, business, chattels, stock and plant of the Danseys Pass Coach Inn); and
- (d) all the shares in Brookside Properties Ltd, which owned the Styx Hotel, for \$220,000 plus GST.

[13] Essentially, the ASA allowed Mr Carr to purchase all of the property, land, buildings, dairy company shares, plant, stock, and all other assets owned by BSDF and Big Sky Livestock, based on payment of all of the debt owed by those companies. This meant that Mr Carr was buying the assets for debt rather than their value.

[14] Mr Carr nominated Brookside to be the purchaser of the ASA assets. Although the shareholding was held by various entities, the evidence was that, effectively, Mr Carr owned or controlled all the shares. As at May 2007, the director of Brookside was Mr Carr’s accountant, Stephen O’Connell. In 2008, Mr Carr replaced him as Brookside’s sole director.

[15] The ASA provided that settlement of all transactions was to occur by 4 pm on 31 May 2007, time being of the essence. Funding for the purchases was arranged from Hanover Finance Ltd (Hanover). In anticipation of settlement, Mr Carr ordered 642

cows from Progressive Livestock Ltd at a cost of \$746,605, with additional transport and winter grazing costs, bringing the total cost to \$935,151.

[16] Settlement did not take place by the time required and the ASA was cancelled by the Humphries' interests at 6.05pm on 31 May 2007. The High Court and Court of Appeal subsequently held that Mr Carr was in breach of the terms of the ASA by not completing settlement at the time stipulated and that the ASA was validly cancelled.¹ GCA has now conceded that settlement did not occur because of failures on its part, and no counterclaims for contributory negligence are being pursued.

[17] BSF and all other assets the plaintiffs were to purchase pursuant to the ASA, excluding the Styx Hotel (which has been the subject of other litigation) are now owned by unrelated interests.

[18] At all relevant times, GCA acted for Mr Carr, including in drafting the original deed, and the ASA.

The BSF Claim

[19] In the Further Amended Statement of Claim, filed without opposition in the last week of the five week hearing,² the plaintiffs said that the effective total price to be paid under the ASA was \$20,187,054, which was the price set out in the ASA of \$19,700,000 plus the additional liabilities the plaintiffs were paying on settlement, including GCA's fees (\$265,000), liquidator's fees (\$49,977), rent owed to Mr McSkimming (\$30,000), monies to be paid to clear a hire purchase agreement relating to farm bikes (\$37,077) and the net UDC debt liability (\$105,000 being an amount recovered by the plaintiffs from Mr Humphries following payment of the UDC debt).

[20] The price of the Fonterra shares under the ASA was \$7,528,000, being at the set market price of \$6.56 a share. No claim is made in relation to this element of the ASA.

¹ *Humphries v Carr* HC Dunedin CIV-2007-412-507, 29 February 2008; *Humphries v Carr* [2008] NZCA 391.

² Save as to one aspect discussed later.

[21] The claim in respect of BSF is for the difference between the total ASA price and “the true value” of BSF, “in light of”:

- (a) the difference between the ASA price and the “investment value” of BSF, \$27,453,946.³ This is derived from the value of BSF to Mr Carr, based on his estimated profit, claimed as \$48,141,000 plus the Fonterra shares, less the total ASA price;
- (b) the difference between the ASA price and the market value of BSF in the immediately following milking season, \$15,812,946. This is based on the market value of BSF being \$36,000,000 at that date, less the total ASA price. This valuation relies on evidence provided by a valuer, Paul Mills, in his affidavit sworn 3 April 2008.
- (c) the difference between the ASA price and the market value of BSF at 31 May 2007, the date of the defendant’s breach, \$8,107,946. This is based on the market value of BSF being \$28,295,000 at that date. This valuation relies on Mr Mills’ valuation dated 30 June 2007, as revised following expert conferral.

[22] GCA said that the market value as at 31 May 2007 was the appropriate measure of the plaintiffs’ loss, and the appropriate range of values to adopt in calculating damages was about \$20 - \$22.5 million, including the Fonterra shares. On this basis, the difference between the ASA price and the actual value of BSF was about \$1,000,000.

[23] To assess market value, GCA said the Court needed to take into account whether there was enough water legally available to irrigate fully the 1200 hectare milking platform of BSF and whether the water was sufficiently reliably available such that it did not impact on market value. GCA said, as a result of BSF not having adequate reliable water supply, the average efficient production of milk solids estimated by the plaintiffs was not possible.

³ This figure was subsequently amended.

[24] By contrast, Mr Carr stated that the assets should be valued at the value they would have had in the hands of himself as the purchaser. Mr Carr claimed that he would have been able to make more profit from BSF because of certain water rights, personal to him, which would have allowed increased irrigation, and therefore increased productivity and value of BSF, as well as his historical involvement in BSF which gave him particular skills in exploiting its potential.

[25] Mr Cooke QC appeared for the plaintiffs. Nine years ago, he said, GCA assisted the plaintiffs to enter the ASA, including the process of assessing the value of the assets for financing purposes. Yet nine years later, GCA maintained the transactions it promoted, and the valuations it supported, were fundamentally flawed. Mr Cooke described GCA's defence as seeking to isolate individual elements relevant to the value of BSF (such as the reliability of water and support land) and suggesting that each element should be applied to undermine the true value of the assets. In his submission, there was a lack of reality about the defendant's approach to damages and it was an unrealistic and unreasonable approach.

[26] Mr Ring QC appeared for the defendant. In his submission, there was a need to step back and assess the reality of Mr Carr's claim. Mr Carr had claimed Mr Humphries, a savvy businessman, was prepared to sell BSF to Mr Carr for a substantial discount in order to avoid an investigation into his business practices. However, by 31 May 2007, settlement did not take place because Mr Humphries would not agree to it. When put on that basis, the case simply did not make sense, in Mr Ring's submission.

Other claims

[27] The plaintiffs also claimed for the value of the Patearoa House and Creek Block properties, and farm and equipment. They said these assets were to be transferred to the plaintiffs pursuant to the ASA but no specific cost was allocated to them. GCA accepted the claim for the Patearoa House but disputed the other claims.

[28] Under the ASA the plaintiffs were to purchase 2500 cows from the receiver. They claimed the difference in value between the ASA price, allegedly an under-

valuation of the cows, and their estimated “real value”, a loss of \$1,375,000. GCA said that the ASA value of the cows was correct.

[29] The plaintiffs also claimed for money expended as a result of the ASA which was wasted following the failed settlement. In particular, the plaintiffs sought \$1,285,681 plus interest for cows purchased by Mr Carr’s interests on the basis of the ASA settling and subsequently sold at a loss, and the costs of all subsequent litigation attempting to resolve the ASA. GCA rejected these claims on a number of grounds.

[30] Mr Carr also sought to claim the wasted costs of an arbitration undertaken between his interests and GCA, attempting to resolve the question of the defendant’s liability for negligence. GCA said that as a matter of law, these costs could not be recovered and otherwise disputed the amounts claimed.

[31] Mr Carr sought \$100,000 in general damages. GCA said that the appropriate award was no more than \$40,000.

[32] GCA counterclaimed against Mr Carr for money had and received and claiming a constructive trust. The counterclaim is for the sum of \$215,471, based on money that GCA’s insurer, QBE, lent to Mr Carr for litigation costs that it says was misapplied. GCA said that these advances were a loan and should be off-set against any damages award.

This judgment

[33] In contract and in tort, the successful plaintiff is entitled to be placed in the position in which he or she would have been had the contract been performed, or the duty of care not breached.⁴

[34] The plaintiffs claim expectation damages for the difference between what they would have received had the transaction settled and what they in fact received. In this part of the claim, the difference is between the value of the assets the plaintiffs would

⁴ *Marlborough District Council v Altmarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [23]; *Attorney General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).

have acquired, less the money they did not in fact have to spend on acquiring them. There was no contention between the parties as to that measure.

[35] The key question for completing that assessment is, therefore, determining the value of the assets which the plaintiffs would have received under the ASA. Assessing the value of the assets as at 31 May 2007 requires evaluating their market value. The plaintiffs and defendant have offered competing expert evidence toward the value of the assets. I have already outlined the general factual context. I then assess the lost value of BSF, considering the evidence as to water, the size of the milking platform and the skills of Mr Carr, and considering the different bases offered for that assessment. I next determine the value of other assets which would have been acquired under the ASA, before assessing the damages for costs incurred as a result of the failure of the ASA and finally I examine the counterclaim.

[36] Most of these issues involve findings of fact. Where this is in the context of a legal question, I have incorporated the relevant law as part of the analysis.

Part I – Water on BSF

[37] In order to assess the market value of BSF, its productive capability must be considered. The productive capability of a farm is driven by the size of the milking platform, which in turn is governed by the amount of water legally and physically available to irrigate the land. Therefore, before assessing the valuation evidence, it is necessary to analyse the evidence about water availability to BSF.

[38] I first assess the different water sources available to BSF, before turning to evaluate the expert evidence.

Water Sources

[39] In 2007, what was regarded as the permitted water take for BSF was as follows:

- 218 litres per second, (l/s) from the Sowburn Creek;
- 55 l/s from the Taeiri River (Carr/Beattie right); and

- 235 l/s from Maniototo East Side Irrigation.

The Sowburn

[40] BSF held a 59/60th share of consent 2001.382 for 222l/s from the Sowburn Creek, meaning it could take 218 l/s (59/60th of 22l/s) of water from it.

[41] The Sowburn supply race was an old mining race which was used to abstract irrigation water from the Sowburn Creek, about 3 km upstream of the Sowburn Bridge. Mr Carr had consistently worked on developing and maintaining the Sowburn race with his grandfather and father. John Beattie, a neighbouring farmer, gave evidence that, when Mr Carr returned from America in about 1983, he largely took over the management of the farms and began a very ambitious farm and irrigation development. He said that return flows to the Sowburn Creek from the race were lower due to Mr Carr's increased maintenance and upgrading of the race. Mr Carr continued to develop and maintain the take until the spring of 2005.

[42] Mr McSkimming, another neighbouring farmer, described the Sowburn as being the most valuable water source in the area because it has a very big catchment from the south east where the rain comes from. Russell Pope, irrigation manager, said the Sowburn was a very good water right because water could be taken all year round, despite having some poor flows at times in summer.

[43] The defence raised issues about the reliability of the Sowburn water supply. This is addressed in detail below, in assessing the various expert witnesses' evidence.

The Carr/Beattie water right

[44] BSF held a 50 per cent share of water permit 3518, which entitled it to take 200,000 l/hour (55.5 l/s) from the Taeiri River, forming approximately 13 per cent of the water available to the milking platform. There was an issue as to the legality of this water take as at May 2007.

[45] The original water right had been due to expire in 1999 and an application was not made to the Regional Council to renew the right in sufficient time. Eventually, in

April 2008, the Regional Council issued a supplementary right, meaning the permit lost priority (permit 2008.193). Mr Carr was ordered by the High Court to assign the right to the liquidator for the benefit of BSF.

[46] Mr Carr's affidavits in various proceedings appeared to suggest that the right no longer existed as at May 2007 and therefore, the defence said, Mr Carr could not rely on it in valuing BSF. Despite the right not being renewed at the time, the Mills 2007 valuation of BSF (discussed below) assumed it was in existence. Mr Carr said he must have had an indication from the Regional Council that the right would be renewed and he would have relayed that information to Mr Mills. He did not accept there was any doubt the right would be granted at all, notwithstanding reference in one of Mr Carr's affidavits that in 2007 the Regional Council was considering whether or not to grant the application. It is fair to observe that Mr Carr's affidavit evidence in other proceedings had the objective of attempting to minimize the value of BSF.

[47] In any event, Mr Carr did not accept that, without the Carr/Beattie right, his forecasted production was not achievable. He said water supply was a dynamic system and other measures would have been taken, for example, storing water and providing additional feed. He said that for most of the year BSF could have a 1200 hectare milking platform even without the Carr/Beattie right, referring to the fact that the current owner of BSF does not have the benefit of that right and yet is exceeding Mr Carr's forecasts.

[48] As the plaintiffs' solicitor, GCA was asked as part of the loan offer by Hanover to Brookside to address water consents and entitlements in respect of BSF. By its letter dated 30 May 2007, GCA advised as follows:

The Borrower presently derives water via three separate mechanisms:

1. Beattie/Carr permit no. 3518;
2. Alnwick Dairy Limited permit, consent no. 2001.382 (the Sowburn permit);
3. Shares held in Maniototo Eastside Irrigation Company Limited.

...

We know of no reason why the relevant rights might not be renewed when they come up for expiry. If a right holder applies for a replacement right at least six months prior to the existing rights expiring, then such rights are automatically carried over the continued until any new application is determined (section 124 of the Resource Management Act 1991).

The situation with the Beattie/Carr permit is slightly more complicated. The existing permit is noted as having a term expiring on 1 April 1999. Yet, that permit is still being exercised by Beattie and Carr as if it were still current. An application to renew the Beattie/Carr permit was lodged prior to its expiry (8 February 1999)...

The Otago Regional Council has acquiesced in the right continuing to be exercised as if it were current...

The Maniototo Irrigation Company Limited, the Maniototo Irrigation East Side Company Limited, and Trustpower have all provided their written consent to the renewal of the Beattie/Carr permit under section 104(3) of the Resource Management Act 1991. It is almost inevitable that the Carr/Beattie permit will be renewed in some form, but it is not possible to predict at this time what conditions might accompany that renewal...

It is apprehended that Hanover's concern is whether the Farm's water supply can be relied upon for farm management purposes. All water rights are subject to conditions concerning drought or "low flow" situations. Regional Councils have additional powers that can be exercised in a drought emergency, even in respect of deemed permits (old mining privileges). Aside from the circumstances of the Beattie/Carr permit described above, we know of nothing unusual about the water rights in this case that affect their reliability.

[49] Hanover also sought advice about the potential for dividing the water rights, should BSF be subdivided into three properties. GCA engaged a Cromwell-based water consultancy, Water Resources Otago Limited, to address that issue. In its letter dated 30 May 2007, Water Resources Otago reported as follows:

Gallaway Cook Allan has supplied information concerning the renewal process for the Beattie/Carr water right. For the purposes of our advice to you, we have assumed that all of the rights are current and able to be exercised. We believe that assumption to be a reasonable one.

...

We may therefore report that ownership structures could be devised so that any of the three sources of water allocation may be legally applied to any of the land holdings should the farm be subdivided into three separate properties.

[50] Although Mr Mills had not seen this correspondence at the time of his 2007 valuation, it can be inferred that Mr Carr would have had that advice when he discussed the water situation with him.

[51] Mr Ring stressed that in 2007 the Carr/Beattie right was not legally available. He pointed to Mr Kirkwood's conditional tender for BSF (discussed below) as evidencing the approach a prudent purchaser of BSF would take, that is, requiring satisfaction as to the availability of the right and reducing the tender price if the right were not available. Mr Ring submitted Mr Kirkwood's approach, as a purchaser intending to farm the land was more reliable when assessing market value than Hanover, a short term financier.

Findings

[52] I accept Mr Carr's evidence that the Regional Council never took any steps to stop the use of the water while the right was in the process being renewed, as the Regional Council accepted some responsibility for the time taken to process the application.

[53] I am therefore satisfied that the Carr/Beattie water right was in fact able to be used throughout the relevant period, even though it was undergoing a consent renewal process at the Regional Council. The lack of a permit was a risk factor to be weighed up by any prudent purchaser.

The Maniototo

[54] In 1975, construction of the Maniototo Irrigation Scheme (the Scheme) began under the control of the Ministry of Works to provide irrigation to farms located in the Maniototo Basin. The Scheme was officially halted in November 1984.

[55] Mr Carr then obtained all of the working drawings of the Scheme, and considered the possibility of privately completing the Scheme and irrigating the Beattie and Carr farms and a number of other smaller properties nearby. Mr Carr engaged an engineer and they designed the extensions to the Maniototo Eastside irrigation scheme as well as the Waipiata extension, flowing on from the section of the Scheme completed by the Crown.

[56] The private scheme had to be fully funded because very few of the farms had the ability to pay for the works up front. Two companies were formed, the Maniototo

Eastside Irrigation Company Limited (MEICL) and the Waipiata Irrigation Company (WICL) to own the respective developments and complete the works. Mr Carr underwrote the Eastside Scheme to allow construction to be completed. Mr Carr then sold the excess shares to other farmers, who subscribed for shares to obtain the water they wanted. The extension of the MEICL and WICL schemes was completed for 10 per cent of the original Government estimates, just over \$1.65 million.

[57] Mr McSkimming told the Court that, initially, he and most of the other farmers were sceptical but eventually Mr Carr convinced them to back the project. Mr Beattie explained that Mr Carr spent a great deal of time on this project as it involved all the difficulties of co-ordinating 16 or 17 individual farms as well as convincing everybody that the work could be done for the estimated price. He said Mr Carr showed great tenacity in succeeding in pulling all the threads together in spite of much scepticism.

[58] Russell Pope managed the supply of water to shareholders of the companies and oversaw maintenance issues. Mr Pope said the Scheme had performed very well since its inception, with only three short lived occasions of rationing, in which the maximum allocation was reduced to 75 per cent. Between 2000 and 2010, the Maniototo East Side and BSF operated on a 20 day roster providing for a 200 day irrigation period between September and April. Peak demand was generally between December and the end of February but every year was different. The result of the Scheme was that a maximum of 60 per cent of a farm's allocation was available over the peak period. Rights under the Scheme may be transferred.

The Community Water Agreement

[59] In order to facilitate the Scheme, Mr Carr entered into an agreement with neighbouring farmers which resolved arguments as to the use of the water in the Sowburn Creek. These arguments had arisen following the truncation of the Crown Scheme, and as a consequence of Mr Carr's increased maintenance and capital works on his water supply. Messrs Beattie, Herlihy and Greer sought to resolve issues as to the priorities in the Sowburn Creek before the Scheme went ahead. Agreement to allow the construction of the Scheme over their properties was essential and was reached when Mr Carr agreed to surrender his main water right and apply to replace it

with an ordinary water permit under the Resource Management Act 1991 (RMA). The agreement became known as the “Community Water Agreement” (CWA), and was formalised by documentation in 1989 and 1990.

[60] The 1989 agreement, as set out in a letter dated 17 March 1989 from the law firm Ross, Dowling, Marquet and Griffin, recorded that the agreement was conditional upon construction of the east side extension of the Scheme. In essence:

- Mr Carr agreed to reduce or discontinue his abstraction of water pursuant to right 2570 or any right obtained in substitution, when asked to do so by Messrs Herlihy, Greer and McSkimming to ensure their water right 1457N was satisfied.
- Mr Carr was to buy Mr Beattie’s share of water right 2170N.
- Mr Carr was to surrender right 2570 and the others would not oppose his application for a replacement right.
- Messrs Carr and Herlihy were to apply for a joint water right. Mr Herlihy was to surrender water right 2554N.
- Mr Beattie was to give necessary easements as required for the Scheme.

[61] The 1999 document, dated 12 January 1999, between the holders of water right 1457N and Maniototo Dairy Farms Holding Limited (MDFHL) recorded:

- MDFHL acknowledged water right 1457N (McSkimming, Greer and Herlihy) had priority over water right 3606.
- Due to water efficiency considerations, rather than release water at the end of intake 3606 for the superior privilege, Mr Carr was to supply the holders of WR1457N with water from the Eastside Irrigation race to make up the full supply.

- The agreement was without prejudice to any future action by the holders of WR 1457N to exercise priority.

[62] A memorandum of agreement dated November 2009 was entered into, apparently because the 1989 agreement could not be located. It recorded the background to the competing priority claims in respect of water rights and the Scheme, and the key elements of the 1989 and 1999 agreements (although it erroneously stated that Mr Carr's ability to take from the Sowburn and replenish the holders of WR1457N from the Scheme was recorded in the 1989, not the 1999 agreement). The document recorded that the 1999 agreement related only to domestic water quality for the Greer family and that it ceased to have effect when MDFHL sold its assets in 2000.

[63] The memorandum provided that the 1989 agreement remained operative if Mr Carr or entities directly associated with him acquired ownership of BSF. The rights were not capable of assignment without the express agreement of Messrs Herlihy and McSkimming.

[64] The parties also agreed they would act towards each other in good faith and continue the agreement "for as long as it remains reasonably in the interests of the respective parties to do so".

[65] MDFHL was a party to the 1999 CWA, not Mr Carr himself. It was put to Mr Carr that, as at May 2007, his preferential rights did not include the 1999 Agreement and those rights belonged to BSF regardless of Mr Carr's involvement. Mr Carr would not accept that proposition, saying the agreement was personal to him to reflect all his efforts in getting the water system up and running.

[66] Mr Carr also rejected the notion that some priority holders were not parties to the CWA. He said they may not have signed it but all attended the meetings and there had been no issue. Mr Carr said he had had retained Water Right 2170 in order to protect his position. He explained that right 2170 was the second in priority after 1457N. He purchased it but did not intend to use it. He retained it for use if anyone who was not party to the CWA, wanted to challenge the CWA.

[67] Mr McSkimming recalled the 1989 and 1999 arrangements but did not sign or appear to have seen the 2009 Agreement.

A Effect of the CWA

[68] Three situations were discussed:

[1] BSF without the CWA: Mr Carr said this would allow sufficient Sowburn flow to the downstream permit owners before it could be used by BSF. It was, therefore, for BSF, an unreliable take but would allow BSF to keep its Maniototo share and the Carr/Beattie Right.

[2] BSF plus CWA: This would mean that BSF could use water from the Sowburn without in practice having to worry about the 1457N water right holders or any other right holders. If BSF took in priority into the 1457N water right holders, it had to replace that water from its share of the Maniototo supply.

[3] BSF with the McSkimming land and its water rights: This would allow 1/3 of 1457N to be used by BSF with any shortfall being topped up from the Maniototo.

[69] In Mr Carr's opinion, all farmers in the Scheme and the parties benefitted from this arrangement greatly and it worked without any major issues from 1989 through to 2007 when BSF was placed into receivership. Mr McSkimming considered that the arrangement was a good solution for everybody as it provided a reliable source of water for all the farmers in the Eastside irrigation scheme. He did not recall there being any major issues.

[70] Troy Pope was involved with the BSF irrigation systems from 2000 through until 2004, working for the receiver from August 2007 until BSF was sold to Harvard in 2010 and then remained as irrigation manager until December 2012. He was responsible for the maintenance, operation and development work associated with the irrigation systems. While he was irrigation manager to BSF until the 2007/2008 and

the 2008/2009 irrigation seasons, to the best of his knowledge there was never a problem with the CWA or with the ability of BSF to use water from the Sowburn race.

B Findings on status of the CWA

[71] I agree with Mr Cooke's description that, rather than an "agreement", the community water situation is best termed an "arrangement". This is confirmed by the fact that there were various changes to the arrangement and inconsistencies in the way in which it was expressed at different times. The point is that all those involved agreed that they were bound by the arrangement which they had reached with Mr Carr. I have no doubt that, had Mr Carr purchased BSF, the arrangement would have continued. Having heard from almost all those involved in the CWA, I am satisfied that Mr Carr had the necessary relationships with the other water right holders that the position he asserted could, had the circumstances required it, have been properly documented and made of legal effect.

[72] It was, in my assessment, very much a personal arrangement reflecting longstanding relationships between the parties. That included their ability to work through contentious issues. Mr Carr had retained one of the priority rights "up his sleeve" for use should there be any issues surrounding the CWA.

[73] The question is whether the CWA should be taken into account in assessing the open market value of BSF. Mr Mills took the CWA into account in valuing BSF but conceded he had not actually viewed any of the documents. The two other valuers did not taken the CWA into account and the defence position was that it should not be taken into account in assessing market value. In Mr Cooke's submission, a vendor of BSF would seek to assign the CWA. However, given the loose wording and that the agreement was expressed to continue as long as it was in the interests of the parties, in my assessment any purchaser would allot quite some considerable risk to the concept of having the benefit of the CWA. The current owner of BSF, The Harvard Endowment Fund (Harvard), has reached some form of arrangement with the relevant parties and, on a practical level, a third party purchaser might well be able to do the same. However, when it comes to assessing the value of BSF, in my assessment, a

prudent purchaser would bid for BSF on the assumption that the CWA would not be available, with any later arrangement being considered a bonus.

McSkimming land

[74] Mr McSkimming's farm is immediately adjacent to BSF and comprises 426 ha (the McSkimming land). He leased it to BSDF in 2000.

[75] The McSkimming land had access to two water sources from the Sowburn Creek, being rights WR1457N and WR 3548N. WR1457N was a joint right originally shared between the Greer, Herlihy and the McSkimming families, holding one third of the shares each. It permitted the take and use of water at a rate of 111.2 l/ per second. It is now held 2/3 by the Herlihys and 1/3 by McSkimming Farms Limited. WR3548N was a right held 50-50 by McSkimming Farms Limited and the Hall family which allowed a take and use of water at a rate of 41.1 l/s. The respective rights were issued in 1874 and 1912.

[76] McSkimming Farm Limited held 150 shares in MEICL with that water being used alongside the above rights to irrigate about 320 hectares of the McSkimming land.

[77] The lease of the McSkimming land included the McSkimming water rights, although there was an issue as to whether the water could be used on BSF, or solely on the McSkimming land. Mr McSkimming was of the opinion that the water should be used on the McSkimming land although he understood the reality, expecting his water rights to be used to benefit BSF and he confirmed that could occur. It was clear that, in practice, BSF used the McSkimming water rights.

[78] The lease of the McSkimming land to BSDF was due to expire in March 2008. In 2007, Mr McSkimming and Mr Carr agreed to a two-year extension, with two year rollovers. The lease still operates for the benefit of the current owners of BSF.

[79] There was considerable discussion about the McSkimming land and the fact that the position as at 31 May 2007 was that the lease would expire on 31 May 2010, with no security of renewal after that. The McSkimming and Carr families'

community relationships and friendships dated back to the late 1900s, with Mr Carr and Mr McSkimming's grandparents. Those associations endure to this day. Mr Carr was confident that he would always have that land available. Furthermore, he and Mr McSkimming agreed that he had a right of first refusal on any sale. Mr Carr accepted that his operation of BSF was dependent on the McSkimming land for water and as support land for BSF for wintering cows and crop growth.

Findings

[80] The dependence of BSF on the McSkimming land was by no means unusual and indeed common practice in farming. The impact of it was a cost of the business.

[81] I have no doubt that Mr Carr would have been able to secure a long-term lease from Mr McSkimming. He also had a first right of refusal to purchase the land. I am also satisfied that, if there were any real issue in this regard, Mr McSkimming would have agreed to the McSkimming water being used on BSF.

[82] I also accept that any prudent third party purchaser would seek to secure a lease of the McSkimming land for grazing, crops and water purposes. Mr Kirkwood did so when he tendered for BSF in 2007, as discussed below.

[83] I accept there was a real prospect of a third party purchaser being able to secure a lease of the McSkimming land, at least in similar terms to the leases previously granted. This possibility was evidenced by both the receiver and Harvard obtaining a renewal of the lease, and Mr Kirkwood's evidence that he reached an agreement with Mr McSkimming prior to his 2007 tender. I accept that, in the circumstances of the benefit offered by the McSkimming land both in terms of land and water rights and its proximity to BSF, it would be entirely logical for a BSF owner and Mr McSkimming to come to a suitable arrangement. It is also reasonable to infer that, had Mr McSkimming sought to sell his property, any owner of BSF would have used considerable endeavours to purchase it. Again, in my assessment, it would be a matter of risk assessment for a third party purchaser.

Expert evidence on water availability

[84] In considering the expert evidence on irrigation of BSF, the following technical terms were used:

- Profile Available Water (PAW): the term used to describe the water in the soil profile that can be accessed by the plant cover. It is usual in the design of irrigation systems to ensure that PAW is not depleted below a trigger point. The assumption is that maintaining soil moisture levels above these levels will not result in production loss from soil moisture stress.
- Return Periods (days): the time that is taken to return to the start of an irrigation block from the date when irrigation started on that block. Irrigation systems can be designed to have return periods which are longer than the optimum return period, but there will be some penalty in reduced production from time to time. The return period adopted is a choice made by the operator.
- Peak demand (mm/dd): depending on climatic conditions, the potential water use by the crop or pasture will vary. Where possible, the rate at which water is supplied to the irrigation system should match the peak demand. If not, some production loss will occur.
- Dry matter: a measure of the fibre containing the carbohydrates, proteins and other trace elements that are available after the moisture content is removed from grasses or any other crops.

Dr Davoren

[85] Dr Anthony Davoren was an expert witness for the defence. He has a PhD in engineering science, and 30 years' experience in soil moisture, irrigation management, groundwater and surface water research and other related consulting.

[86] Dr Davoren's overall opinion was that BSF did not have access to sufficient water to irrigate the dairy platform effectively, because what he said was the available water, 508 l/s, was 187 l/s less than the required 695 l/s to meet peak demand in

November to February. Even if this total take were available, BSF could effectively irrigate only 878 ha, in Dr Davoren's opinion. His assessment was based on the assumption that the CWA was enforceable and that the milking platform was 1200 ha, as the plaintiffs maintained.

[87] Furthermore, Dr Davoren considered the Sowburn and Taeiri (the Carr/Beattie right) takes were unreliable – the Sowburn because of other permits with priority, and because it naturally ran dry in the summer months, and the Taeiri because of doubts in 2007 that the consent would be renewed. The result, he said, was that BSF had only 235 l/s of reliable irrigation water coming from the Maniototo, sufficient to fully irrigate about 406 ha, about 1/3 of the milking platform.

[88] Finally, Dr Davoren concluded that the irrigation infrastructure in 2007 was inadequate to irrigate BSF effectively, noting that the largest irrigated area was irrigated with K-line irrigation which he considered had a very low potential efficiency.

A Water requirements for BSF

[89] Dr Davoren calculated that there needed to be a return period of 4-5 days, based on 5 mm of water use by pasture per day during periods of peak demand. This required an instantaneous take of water of 695 l/s, during, at least, November to February.

[90] Dr Davoren explained that if the peak demand were not met from either soil moisture storage, rainfall and/or irrigation, the pasture would be subject to moisture stress, pasture growth rates would decline, and milk solid production might not reach optimum levels unless additional (supplementary) feed were brought in.

B The Sowburn

[91] Dr Davoren obtained all the flow data for the period 24 January 2007 to 9 May 2012 from the Otago Regional Council for the Sowburn Creek to analyse the reliability of the take(s), given the resource consent conditions and the flow required for the McSkimming take.

[92] Dr Davoren concluded that, of the six seasons for which flow data was available and considering the 2014/2015 season when there was a full flow restriction on both the Sowburn and Taieri Rivers, there was not a single season when the Sowburn was not restricted. The number of days of restriction varied from 19 in 2011-2012 to more than 119 days in 2014-15. This meant, he said, that 100 per cent of the Sowburn take was available on average 53 per cent of the time between the irrigation season, 1 November to 31 March.

[93] For the same seven seasons, there were three when there was insufficient flow for the McSkimming land permit, where the flow would have to be supplemented from BSF's Maniototo supply. The number of days varied from 1 to 84 days.

[94] In Dr Davoren's opinion, there was between 527.3 l/s and 471.3 l/s of higher priority water before BSF could access water through its consent. He concluded that BSF's ability to use 218 l/s from the Sowburn was as a result of goodwill, favourable growing season(s), good luck or lack of understanding by the deemed permit holders.

[95] Dr Davoren raised concerns regarding the CWA, and the availability of rights under it did not alter his assessment. He was of the opinion that Sowburn water was not a reliable source, and could not be relied upon to provide sufficient water for the effective irrigation of BSF.

C The Taieri

[96] Dr Davoren interpreted the relevant water permit as requiring the Taieri River to be flowing at a rate greater than 1056 l/s before water could be taken. From his analysis of the records held by the Otago Regional Council in relation to the Taieri River flow rates, Dr Davoren noted brief periods during which such flow was unavailable, and concluded that the consent allowed BSF to irrigate reliably a further 95 ha of the milking platform.

D Maniototo

[97] Dr Davoren calculated that the Maniototo East Side Irrigation shares permitted BSF to use the equivalent of 356mm over 1200 ha, sufficient to irrigate about 612ha, or about 50 per cent of the planned milking platform.

[98] Dr Davoren noted that Harvard planned to build a 1,000,000m³ storage pond to provide water when the Sowburn and Taeiri River water was restricted, at a cost he estimated of around between \$3.5 to \$5 million. This, he said, would overcome to a large extent the unreliability of the Sowburn.

E Assessment

[99] Mr Carr's permitted take was any flow over 121 l/s with priority given to water right 1457N owned two-thirds by Mr Herlihy and one-third by Mr McSkimming.

[100] Dr Davoren produced graphs showing when, in his opinion, water in the Sowburn would not have been available for BSF because of priority takes. The graph included the provision of 70 l/s for the fishscreen flow, although that water was not extracted and was therefore available to satisfy other takes. He was referred to Mr Carr's evidence that he could elect not to take the McSkimming land water (to which he would have access through the lease). Dr Davoren accepted that, in that case, his graphs would require amendment to reduce the occasions on which the full BSF allocation was unavailable.

[101] Dr Davoren was of the opinion that the Sowburn water supply was particularly precarious because there were permitted takes in priority to BSF's resource consent. He referred to eight priority rights. However, the second, he conceded, was not operated; the third was owned 2/3 by Mr Herlihy and one-third by Mr McSkimming; and the fourth was Mr Carr's "insurance policy". Dr Davoren accepted that the fifth to seventh rights, owned by Mr Herlihy and located further down the river where, most of the time, the Sowburn runs dry, could not be considered operative. The eighth priority was jointly owned by Mr Hall and Mr McSkimming.

[102] Dr Davoren produced a table analysing the number of days when the full take was not available between the seasons 2006/2007 and 2014/2015. However, as seasons 2012/2013 and 2013/2014 were unavailable, those years were not included, but the 2014/2015 season, a particularly dry one, was. I accept the criticism of the analysis as an averaging tool because two seasons were omitted.

[103] Dr Davoren's table showed an average of 52.9 percent of the irrigation season 1 November to 1 April when the flow was greater than 343.2 l/s. The table was not a true picture of the season because it excluded October, when there was no water shortage, although it did paint a picture of the stress months.

[104] There was also the issue that, with the exception of 2006/2007, all the data related to time **after** the critical date of 31 May 2007. If the issue is the value of BSF as at 31 May 2007, it is questionable how much weight should be given to evidence of water availability subsequent to that date.

F Maximum hectares

[105] Mr Cooke challenged Dr Davoren's conclusion that, because on average only 684 ha of BSF could be irrigated, a maximum production of 877,000 kg of milk solids (kg/ms) per year was possible. Essentially, Dr Davoren's conclusion was that Mr Carr's projected production of 1.25 million kg/ms pa could not be produced by the pasture on BSF alone.

[106] It was put to him that, based on his analysis of the amount of dry matter necessary to produce 877,000 kg/ms, the production of 1.2 kg/ms would require about 4 million kg of dry matter (kg/dm). Dr Davoren conceded he had not checked whether that was, in fact, the amount of dry matter required by the farmers to achieve the production on BSF they had over the years.

[107] It was then put to Dr Davoren that, on his evidence, it was impossible to achieve more than 877,000 kg/ms per year. Dr Davoren was then asked to consider the actual annual production figures from BSF against his assessments. He considered that his projection of 877,000 was not far from 927,000 kg/ms achieved in 2006/2007, and 953,000 kg/ms, the production in 2007/2008. Dr Davoren accepted that the actual

production figures were inconsistent with his estimate and speculated that water which was not consented was being used or a great deal of dry matter was being brought on to BSF.

[108] The experts agreed that, assuming there was sufficient irrigation infrastructure to cover 1200 ha, the “AusFarm” modelling procured by Dr Heiler, expert for the plaintiffs, accurately modelled dry matter production from BSF with restricted irrigation. Dr Davoren was asked about the AusFarm model results showing that a soil PAW of 45 mm and watering at 3.7 mm/d by K-line produced 12,059 kg/dm, and with roto rainers produced 12,120 kg/dm per ha.

[109] Taking the lower of those two production figures across the proposed 1200 ha results in 14,470,800 kg/dm. In contrast, if water were used over 878 ha on an unrestricted basis, which was Dr Davoren’s comparison, it would result in 11,759,932 kg/dm. This is almost 3,000,000 kg/dm less than if the water were used over the larger platform. Dr Davoren conceded the point and agreed that a farmer would, in those circumstances, not confine himself to a platform of only 878 ha.

[110] Dr Davoren’s calculations used 45 mm PAW on the basis of the Grow Otago S Map, a macro-scale assessment not based on actual testing of BSF. In contrast, Dr Eger, expert for the plaintiffs, took soil samples from BSF at three locations. The actual PAWs were 93.5 over 6.7 per cent; 59.7 over 18.5 per cent; and 77.8 over 62 per cent.

[111] Dr Davoren emphasised that his conclusion as to effective irrigation of 878 hectares was similar to other reports - Mr Greenwood in 1997 (850 hectares), the Irricon Report (878 hectares), and Mr Hamilton’s evidence for the plaintiffs that approximately 1,000 hectares could be effectively irrigated.

G Irrigation equipment

[112] Dr Davoren’s analysis assumed, based on a document from the 2007 tender process, that there was sufficient equipment on BSF in 2007 to irrigate only 710 hectares. He did not check it against the actual equipment on site (understandably, as he did not visit BSF until 2010); nor did he check it with those involved at the time.

Troy Pope's evidence was that there was plenty of equipment to cover 1200 hectares; the sharemilkers said there was always enough equipment; and the tender documents were, in any event, different from the schedules attached to Mr Mills' valuation, which were relied on by Dr Davoren for other matters.

[113] Dr Davoren accepted the reality that a prudent farmer would do his best to have equipment available to irrigate the maximum amount of land in circumstances where water was an issue and that not to do so would be a failure.

Dr Heiler

[114] Dr Heiler is a professional water resources engineer with a PhD in agricultural engineering. He has over 40 years' experience in large and small scale water resource development projects, many involving irrigation. He was an expert witness for the plaintiffs.

[115] Dr Heiler explained that design of an irrigation system takes account of the water supply, and systems designed to meet extreme conditions are able adequately to irrigate larger areas in the shoulder seasons (prior to and after mid-summer) but cannot keep up with the requirements of larger areas in the middle of the growing season.

[116] Dr Heiler advised the plaintiffs to commission a modelling investigation of irrigation scenarios on BSF to make estimates of irrigation water requirements and consequential dry matter production under irrigation and dryland conditions. He considered that the modelling using AusFarm was vital because it could realistically simulate the effects of soil and climate on irrigation water requirements, accommodate different levels of water supply and types of irrigation equipment, and produce estimates of grass dry matter production over a long sequence of climate records (1972-2015), thereby capturing the year to year variation in these parameters.

[117] The model was also able to characterise the operational features of different types of irrigation equipment used in the irrigation operation, and to capture the significance of any constraints imposed by the equipment or adequacy of water supplies.

A SoilWorks/Greenwood report and parameters

[118] Dr Heiler addressed the Greenwood/SoilWorks report (SoilWorks) which Mr Carr had used in the early development of what became BSF. That report used a daily soil moisture modelling approach to estimate irrigation water requirements and to assess adequacy of water supplies. The modelling carried out by SoilWorks used slightly different data from AusFarm, including water availability and requirements, and did not have the same capability of estimating dry matter production in different scenarios. It also used a different evapotranspiration rate.

[119] The SoilWorks modelling found that the estimated annual water requirement to satisfy needs in 90 per cent of the seasons was between 600 and 645 mm dependent on soil type; the seasonal availability of water was sufficient for 1200 ha; the number of irrigations per year ranged from 12/13 in dry years to 9/11 in wet years; equipment should be designed for an irrigation return period of nine days; the return period needed to cover 1200 ha had to be extended to 13 days, and there would be some effect on production in some years; and a choice had to be made as to whether to irrigate 850 ha with no production penalty or to irrigate the 1200 ha and accept some per hectare production losses.

B AusFarm modelling

[120] The data inputs to the AusFarm model included a period of simulation 1 June 1972 to 31 May 2015; daily rainfall time series from Waipiata; reference evapotranspiration from Ranfurly; three soil PAWs – 45, 80 and 110 mm (the lowest PAW has the highest annual irrigation demand); 600 ha of K-line irrigation and 600 ha of roto rainer irrigation; two assumed irrigation system capacities – 4.5 and 3.7 mm/day; application depth at each irrigation varied depending on equipment; return periods assumed were 14 days for the K-line and 12 days for the roto rainer.

[121] The selected PAWs of 45, 80 and 110 mm used for modelling covered the range of likely values, with 45 mm representing soils which are shallow and difficult to irrigate, 80 mm being based on the PAW estimate in the SoilWorks report (65 and 85 mm); and the 110 mm referenced in the Irricon Report, which used estimates of PAW of 105 and 102 mm.

[122] The AusFarm model assumed a permitted take of 512 l/s whereas the SoilWorks model assumed 497 l/s. Dr Heiler concluded that the difference was inconsequential in terms of model estimates. The AusFarm model was run again with the lower total take of 497 l/s, and confirmed his conclusion.

[123] The two system capacities of 4.5 mm/day and 3.7 mm/day were selected to represent a situation where system capacity was adequate (4.5 mm/day, requiring a water supply rate of 625 l/s) and compare that to the actual system capacity that reflected the available water supply (3.7 mm/day with a water supply rate of 512 l/s) and to assess the sensitivity of the results to these two figures.

[124] The results were:

Table 8 - Estimated annual pasture production (kg-DM/ha) and percentage loss in production relative to the unrestricted irrigation case

Soil PAW (mm)	System capacity (mm/d)					Dryland
	Unrestricted	K-Line (4.5mm/d)	K-Line (3.7mm/d)	RotoRainer (4.2mm/d)	RotoRainer (3.7mm/d)	
45	13394	12518	12059	12808	12120	1788
45		6.5%	10.0%	4.4%	9.5%	86.7%
80	13461	13380	13058	13383	13157	3460
80		0.6%	3.0%	0.6%	2.3%	74.3%
110	13422	13422	13238	13419	13229	3494
110		0.0%	1.4%	0.0%	1.4%	74.0%

[125] The AusFarm simulations addressed whether it was better to irrigate to a level where growth was not affected by moisture stress, or to irrigate a larger area and accept lower per hectare production. The results showed that the high system capacity (4.5 mm/day) produced higher dm estimates than the lower system capacity (3.7 mm/day), but the differences were less for higher PAWs. The model estimated average dm production (K-line), with a system capacity of 3.7 mm/day, of between 11,000 and 13,000 kg dm/ha, depending on PAW⁵. In Dr Heiler's opinion, these estimates lined up with the potential identified for drybread soils by Rex Dolby of AgroScience Consultancy Services Limited in his 1997 report on BSF of 11,600 to 12900 kg dm/ha (the Dolby report).

⁵ The lower figure of 11,000kg/dm/ha came from Dr Heiler's Table 9 which was the estimated 1-in-10 year pasture production.

[126] In Dr Heiler's opinion, the AusFarm model outputs in terms of annual water requirements and estimated dry matter production were realistic, but said the test was whether it aligned with actual production data from BSF.

C Relationship of dry matter production to milk solids production

[127] Dr Heiler explained that estimates of dry matter production can be converted to estimates of milk solids. The conversion factor is dependent on how efficiently the dry matter was utilised, so the range of conversion factors will vary from farm to farm and within years on the same farm subject to different management. The production of milk solids from a farm in any one season will clearly depend on a number of factors.

[128] After considering two academic sources, Dr Heiler adopted a figure of 10.5 kg/dm per kg/ms. Given the range of dry matter estimates from the AusFarm modelling of BSF (11,000 – 13,000 kg/dm per ha) he concluded:

- (a) Total annual dm production from the 1200 ha BSF would be between 13.2 million kg/dm and 15.6 million kg/dm;
- (b) The equivalent milk solid production would be in the range of 1,260,000 to 1,480,000 kg/ms from the 1200 ha.

[129] Dr Heiler noted the actual production from BSF over the period 2002/2003 to 2013/2014 ranged from a low of 930,000 to 1,516,000 kg/ms,⁶ and averaged 1,150,000 kg/ms. He concluded that the estimation of milk solid production from the AusFarm modelling compared reasonably well with actual production from BSF, given that the former came from 43 year model simulation and the latter from a 12 year production period.

⁶ This figure has been adjusted from reported production of 1,636,000 kg/ms in the 2013/2014 season on the basis that the reported figure included production of 120,000 kg/ms from an additional property (Willowview).

D Conclusion

[130] Dr Heiler concluded, from the reasonable agreement between model estimates and other estimates of water requirements, that the model realistically estimated the water requirements on BSF. He further concluded that the model estimates of dry matter aligned well with independent expert estimates specific to BSF and the region. Finally, in his opinion, the model estimates of milk solids were in reasonable agreement with the actual production from BSF.

[131] Dr Heiler therefore concluded that, as at May 2007, the 1200 ha milking platform on BSF was capable of full and reasonable irrigation under the assumptions of water availability and equipment available, albeit at levels that were less than optimum than if all of the inputs were unlimited.

Observations

[132] The main difference between Dr Heiler and Dr Davoren was the return period adopted by each. Dr Davoren adopted a return period of five days which, in Dr Heiler's opinion, was out of line with practice. Dr Heiler noted that a 14 day return period seemed to be used by farmers in the area and by Troy Pope. He considered that to be industry practice and was, therefore, why he undertook his model on that basis.

[133] Evapotranspiration is the rate at which moisture is lost through growing plants and soil and it varies depending upon the climatic environment. Dr Heiler explained that in the Maniototo, evapotranspiration can be as high as 7.8 or 9 mm per day, but that models are never designed for those rates. In essence, he said that the level adopted depended upon what was being designed for, which would depend on management objectives. He said that it can be expected that, if water is spread more thinly over a larger area, more grass will be grown than if the amount of water is confined to a smaller area, depending upon the response of the grass to the water and the degree of shortfall.

[134] Dr Heiler explained that it was very unusual for water resources to be 100 per cent reliable in terms of irrigation supplied to large schemes in the international context. The AusFarm model assumed 512 l/s water was available every day when

irrigation was needed and was 100 per cent reliable. Dr Heiler said, if that were not the case, the results would depend upon the quantum of the reduction and its timing.

[135] The AusFarm model allowed for 1,500 kg/dm per ha to be unharvested and left behind for regrowth. Dr Heiler was cross-examined about actual cow consumption as opposed to available consumption. Dr Heiler referred to the anecdotal evidence of high grass usage in the Maniototo as compared to other areas because it was not as wet and there was less trampling of the grass. Mr Carr said that 95 per cent food utilisation was the rate in the Maniototo because the ground was hard and generally dried in winter.

[136] The defence suggested that the industry standard approach was that only 75 per cent of grass grown was actually consumed by the cow, and that, of the unused 25 per cent, 15 per cent loss was attributable to inefficient consumption. Dr Heiler could not comment on the industry standard, but accepted that, if the 15 per cent figure was correct, then his conclusion of annual production of between 1.068 to 1.260 million kg/ms would require reduction by 15 per cent. Dr Heiler observed that 15 per cent for consumption inefficiency seemed high.

[137] Although, outside the 2012/2013 and 2013/2014 seasons, actual production was not within 100,000 kg/ms of the bottom of his range, Dr Heiler was of the opinion that the numbers were close in the circumstances. The bottom of Dr Heiler's range was 1,260,000 and the closest actual production was 1,150,000, around a 10 per cent difference which Dr Heiler considered remarkably accurate.

Mr Hamilton

[138] Mr Hamilton, consulting engineer, was an expert witness for the plaintiffs. He has worked in river, flood and erosion control, irrigation water supply, engineering hydrology and water resources for 46 years. Mr Hamilton concurred with Dr Heiler's statement that "it is rarely economic to supply water at the rate needed to meet isolated very high daily demands; and in some cases the water supply itself is not adequate to meet these high daily demands."

[139] Mr Hamilton explained that half a litre per second per ha is the generally accepted standard in Otago, but depended upon each farmer's risk profile. This equates to 4.3 mm a day which, assuming reliable water flow of 508 l/s for BSF, would lead to a milking platform of 1,016 hectares. Mr Hamilton stressed this was dependent on the farmer and that it might be better to spread the water more thinly as a slightly stressed platform might result in an overall higher production.

Dr Eger

[140] Andre Eger is a soil scientist/pedologist at Landcare Research and was an expert witness for the plaintiffs. He undertook an analysis of the three soil types located on the BSF. In the expert conferral with Dr Davoren, he agreed that it was appropriate to treat BSF as having an effective soil depth of 40 cms.

[141] Dr Eger was asked about the AusFarm model. He said that, if a PAW of 45 mm were used, in fact the water would spread down to around 60 cms although unevenly. If the soil depth were changed to 40 cms, the PAW would be less than 45 mms. Dr Eger explained that soils hold water as long as they have a depth of around 30 cms, and that PAW is important as it represents water stored in soil, but provided there was a soil depth of 20 to 30 cms, soil depth was irrelevant. Within a depth of between 20 and 30 cms, a PAW of at least 60 mm is achievable, he said.

[142] In his opinion, the table produced by Dr Heiler did not represent reality and a PAW of 80 mm would be realistic for BSF. If a PAW of 45 mm were assumed, readily available water was at 22.5 mm.

[143] Dr Eger accepted the PAW of soil can change as irrigation is applied over time. However, there was insufficient data to predict changes. Irrigation improves PAW as organic matter builds up (as Mr Carr said in his evidence) although it is possible for irrigation to lead to decomposition of organic matter.

Carr and others on water availability

A Mr Carr's background evidence

[144] From 1983 through to 2001/2002, in the course of laying water mains across BSF to support the expanding irrigation system, Mr Carr excavated trenches over blocks of the entire farm up to one metre deep, where, he said, the soil profiles became obvious.

[145] In 1997, Mr Carr engaged Dr Philip Greenwood of Soil Work Limited (who produced the SoilWorks report discussed above) and Dr Rex Dolby (to whose report Dr Heiler referred) to assess BSF as to soil moisture. While the Dolby report was not complete, it provided a similar conclusion to the SoilWorks report, in that around 800 to 850 ha of land could be effectively irrigated at peak demand.

[146] The planned total mixed ration dairy farm system project for BSF was abandoned in early 2001, and the irrigation application strategy changed. Mr Carr said that there was a conscious decision, based around the SoilWorks report, to irrigate a larger area than was considered to be optimum, recognising there would be times of constraint and a risk of the soil moisture falling below the 40 per cent wilt point.

[147] The SoilWorks report noted "Thus the water supply (7,731,000 m³) is likely to just support an irrigated area of 1200ha for full irrigation (to 40 per cent AWC) for 90 per cent of the time". Given the various mitigation mechanisms available and his ambitions to increase water harvesting and storage, Mr Carr concluded this was an acceptable risk in deciding on the larger milking platform area of up to 1250 ha when designing the underground reticulation systems.

[148] Mr Carr said it was well known that, when irrigation development, pasture establishment, improved fertility and the actual farming of crops and pastures took place, there was a continuing build-up of vegetative organic matter in the soils which added considerably to the soil structure's density and ultimately to its soil moisture holding capacity. Mr Carr had observed this over the years since 1983, when he placed the first spray irrigation systems on BSF. This resulted in the irrigated areas gradually requiring less frequent irrigation.

B The Sowburn

[149] Mr Carr's evidence was that, from the 1990s (as Maniototo Dairy Farms) through to the formation of BSDF in 2000, and right through until the appointment of the interim liquidators in March 2007, there was generally always sufficient water to achieve the production levels upon which his valuations of BSF were based. He acknowledged minor periods of constriction in the availability of the full Sowburn flows but they were mitigated by the use of other management tools.

[150] Mr Carr's evidence was, once the Scheme was available to the farmers with deemed permits from the Sowburn, they took water from the Maniototo and competition for the Sowburn resource was effectively subsumed by the Maniototo Scheme supplies.

[151] Mr Carr's contention was that, without the CWA, there might be difficulties in abstracting reliable quantities of water from the Sowburn during the later spring, summer and early autumn periods due to other right holders exercising priority. In any event, he said, obviously Harvard satisfied itself that BSF, even without the CWA, had sufficient water given the purchase of BSF as a result of the 2008 tender.

[152] Troy Pope's duties on BSF involved the upkeep of the Sowburn supply race. He accepted that in the years 2007-2012, once the water was metered, BSF could not take the full water allocation. Although Mr Pope did not know about the arrangement under the CWA, during his time on BSF he was not aware of any occasion when a lack of water availability in the Sowburn meant Mr Carr had to use his Maniototo water to top up the water supply to other farmers. Mr Pope said periods of stress, when there was insufficient water in the Sowburn, occurred a few times every year.

[153] Similarly, a sharemilker on Saran, Mr Roberts, confirmed that in the 2004/2005 drought, he reduced his effective platform but Sowburn water continued to flow because of Mr Carr's management of it.

[154] Mr Beattie was asked about the reliability of the Sowburn in 2007. In his opinion, the headwaters were reliable but he noted that the water did run out at the lower levels. He rejected entirely the information that Dr Davoren had received from

the Otago Regional Council that, on about half of the days during the peak season, the full entitlement could not be taken from the Sowburn. His evidence was that he never saw the Sowburn dry at a point lower than Mr Carr's abstraction site.

[155] From June 2008 to September 2010, Gregory Nelson had full day to day control of the management of BSF. Mr Nelson said BSF's water issues were around reliability, with both the Taieri (Carr/Beattie water right) and the Sowburn water sources having restrictions. He said that, even without restrictions, there was still not enough water to have fully efficient irrigation levels at BSF for the highest pasture growth, without the need for significant capital investment in water storage and a more efficient method of water application.

[156] Mr Pope confirmed that in the 2008/2009 and 2009/2010 dairy seasons there were water supply difficulties which had not occurred while Mr Carr was operating on BSF, which Mr Pope attributed to the CWA and other rights-holders claiming priority to the Sowburn take. The receiver, Mr Frost, described water from the Sowburn becoming more of an issue throughout the receivership period and in March 2008, the Saran farm struggled due to limited flows from the Sowburn. Eventually the McSkimming lease allowed use of the McSkimming water entitlement.

C Water from the McSkimming land

[157] Mr Baker thought the McSkimming water had been used on BSF in one year but not during the three years when he was a sharemilker or when he was involved in managing for the receiver.

[158] Mr Le Fleming, who sharemilked Alnwick between 2002 – 2006, described the peak water period as being approximately three to four weeks of intense heat in February but said the heat dropped off quickly. The McSkimming land was used to grow crops and for grazing winter cows primarily, although it did supply more water to BSF, he said.

[159] Mr Nelson considered that the McSkimming water was necessary, and without it, a farmer would either have to reduce the stocking rate or buy in additional feed.

D Milking Platform

[160] Mr Carr agreed with Dr Davoren that ideally BSF needs 5 ml of water per day during the peak period. However, in Mr Carr's opinion, less than that would not necessarily result in a yield loss. Mr Carr sought to put a practical and realistic context around the expert evidence, explaining that in practice farmers do not design around "optimum growth". In his opinion, BSF could reliably and economically maximise production by growing grass for approximately 95 per cent of the time.

[161] When asked about Dr Davoren's conclusion that the supply was not adequate to maintain the desired water soils' status at periods of peak demand and that only up to 860 ha could be fully irrigated, Mr Carr again referred to the practicality of farming - that systems are not designed around peak demand as, he said, that would result in water wastage. He accepted the result was that in some years there was insufficient water for peak periods but that, he said, was a management issue requiring mitigating measures and more often than not, growing feed from the milking platform. In his opinion, it was better to grow grass over 1200 ha than focus only on 860.

[162] Mr Carr pointed out that, while BSF was under the control of Mr Frost, it was able to be irrigated to near 1200 ha in all but one year, when there were significant challenges due to drought, without the benefit of Mr Carr's priority use of the Sowburn water.

[163] Mr Pope described BSF as having about 1200 to 1250 ha irrigated under spray irrigation. He said that when Mr Carr was ensuring irrigation supplies and managing distribution, BSF was able to be well irrigated, although in the very driest parts of the driest summers, moisture stress was visible. He said the stress periods were generally short, with management tactics in place and irrigation coping well most of the time. He supported Mr Carr's evidence that there was plenty of irrigation equipment available to cover the milking platform area by a mixture of K-line and roto rainers.

[164] During his involvement with Stationview, MDFH, and then as a sharemilker on the Tercio Farm, Mr Baker's experience was that the 1200 to 1250 ha was irrigated reliably despite occasions in the middle of summer when things got a bit tight. Mr Baker said, in his opinion, "reliable" irrigation meant that every now and then there

would be less water than required, accepting this would result in yield loss for short periods.

[165] Mr Roberts confirmed that off farm grazing for young stock and for winter grazing was a method employed by all South Island farms in contrast to farms in the North Island where there was still growth during winter. In this way, the milking platform can be maximised, he explained.

[166] During his sharemilking of the Alnwick property, Mr Le Fleming said they were generally able adequately to irrigate their farm. In very dry periods, there would be a lot of evidence of soil moisture deficit and they would have to adjust their management of the water resources accordingly, for example, to prioritise the better and more productive areas, he said.

[167] Mr Yardley, a farming consultant to BSF, was of the opinion that there was enough water to irrigate the developed areas of BSF including McSkimming, on the basis of a 1200 ha milking platform.

[168] Mr Beattie said that, except during the Maniototo supply rationing and/or extended nor-westerly conditions, BSF was well irrigated with good pasture cover.

[169] Mr Frost approved the tender document which referred to BSF's potential of more than 1200 ha and Mr Frost confirmed his understanding that BSF had a milking platform of 1200 ha.

E Production

[170] Mr Carr said that the production levels in the five years up to the date of the ASA were all achieved without the introduction of significant supplementary dry matter over and above that which had been normally utilized in the Maniototo and many other irrigated dairy farming areas of the South Island.

[171] He noted that, in the period from 2007 to 2010, BSF was under the control of the receiver who did not have the benefit of the CWA and priority use of the Sowburn water and yet was still able to achieve adequate production levels being: in 2007/2008:

953,000 kg/ms; in 2008/2009: 1,101,000 kg/ms; and in 2009/2010: 1,178,000 kg/ms (very dry season).

[172] Even with water challenges, combined with a very limited capital spend during the receivership, Mr Frost lifted production from what Mr Carr considered the deliberately constrained production before receivership of 920,000 kg/ms to approximately 1,178,000 kg/ms in the 2009/2010 year. That was a lift without any significant resources being applied apart from improved management and Mr Pope's irrigation management, in Mr Carr's opinion.

[173] Mr Carr referred to Harvard's situation, being subject to the superior water priority holders, and observed that it was able to achieve production of: in 2010/2011: 1,098,700 kg/ms (under receiver's control until Sept); in 2011/2012: 1,156,000 kg/ms; in 2012/2013: 1,469,220 kg/ms (good season); in 2013/2014: 1,636,000 kg/ms (estimated 90,000 from the use of another property, Willowview).

[174] Mr Carr discussed the tools available to mitigate effects on production in periods of stress. These tools included condensing the irrigation area, reducing the return time to meet evapotranspiration demand, feeding conserved crops to maintain full feeding of the stock, purchasing and feeding high density feeds, such as meals and grains to supplement the cow intakes until full irrigation could be re-established. Generally in hot, dry conditions, pastures will grow in increased rates when adequately irrigated, which often results in similar overall production, albeit from a reduced area, he said. He observed that the Maniototo was renowned for very high pasture growth rates in late spring and summer, with daily growth rates regularly exceeding over 100,000 kg/dm per ha per day.

[175] A number of witnesses took issue with Dr Davoren's opinion that:

To achieve the potential milk solid production of 1.25 million kg/year and greater as suggested by various experts would require introduction of supplementary DM. These potential MS production yields could not be achieved from pasture production alone without improving the irrigation infrastructure and mitigating the unreliability of the Sowburn water source.

[176] Mr Baker did not accept Dr Davoren's conclusion, saying BSF only needed to be tidied up, and properly funded. Mr Roberts said he grew 18 tonne of dry matter on

his farm and that everybody brought in supplementary feed at the start and end of the season (the shoulders). He said that there were many other factors which required consideration before reaching Dr Davoren's conclusion.

[177] Mr Yardley disagreed with Dr Davoren's assessment based on two matters. First, he said production of extra feed on farms in the Maniototo could be done effectively in the two shoulder seasons and secondly, although water was very important, many factors were involved in milk solid production.

[178] Mr Le Fleming described running a very successful operation on the Alnwick farm. By his last year, no additional feed was required and he "had that baby humming", producing 480,000 kg/ms which, extrapolated over the three farms, would have resulted in 1.5 million kg/ms. Mr Le Fleming acknowledged, however, that Tercio was "a tougher" farm. Mr Le Fleming was a compelling witness, a colourful, straight talker who was clearly a very capable farmer. After starting as a share milker, he now owns farms and, indeed, had bid for BSF. Mr and Mrs Le Fleming were seriously interested in some form of joint venture with Mr Carr on the basis they could farm the Alnwick Farm.

Conclusion as to the size of milking platform which could be adequately irrigated

Plaintiff's submissions

[179] Mr Cooke submitted that, in the absence of Dr Davoren actually being able to provide evidence that there was a reliable reading of the water flows from the Sowburn, his evidence could not be accepted as being based on reliable data.⁷

[180] In Mr Cooke's submission, Dr Davoren's assessment of the available water flow wrongly included the fish pass flow within the demand on the water and did not include Mr Carr's ability, through the McSkimming lease, to access the one third share of water permit 1457N. Dr Davoren's percentage approach was unsound, said Mr Cooke, because it ignored all the water available to BSF when it was slightly below

⁷ He referred to paragraph 3 of the Code of conduct for expert witnesses, which provides that an expert witness must describe any examinations, tests, or other investigations on which the expert witness has relied and identified, and give details of the qualifications of any person who carried them out.

the maximum permitted take and only counted water if it was above the maximum take.

[181] In Mr Cooke's submission, the issue was ultimately a question of fact. Dr Davoren presented a theory on the supply of water from the Sowburn and the inherent limit on the area which could be irrigated but, critically, none of the witnesses of fact gave evidence which was consistent with this theory, he said. There was evidence from virtually all of those with permits to take water from the Sowburn - Mr Carr, Mr Beattie, Mr Herlihy and Mr McSkimming - and from all of those who had actually farmed BSF - Mr Yardley, Mr Le Fleming, Mr Baker, Mr Roberts and Mr Nelson - as well as others who would have known about the supply (such as Mr Frost and Mr Kirkwood). Yet none of these witnesses gave evidence supporting Dr Davoren's theory that the area of the milking platform was significantly reduced and production significantly constrained.

[182] The plaintiffs maintained that, had Dr Davoren analysed the situation properly, he would have found that there was absolutely no issue with availability of the Sowburn in 2006/2007, 2010/2011, and 2011/2012, and there were periods when less than the full take was available in February and March in the 2008 season, February in the 2009 season, and February to April in the 2010 season, but during these times there were also periods where the full take was available.

[183] In Mr Cooke's submission, throughout the operation of BSF - by the joint venture, the receiver and by Harvard - BSF had been described as having a platform of 1200 ha, so there was simply no evidential basis for the argument that the limits on water supply meant that it was not able to operate at that level.

[184] The plaintiffs accepted that there were occasions when water to BSF was restricted and, when that occurred, the productive assessment predictions set out in the AusFarm modelling would lead to potentially reduced production. Mr Cooke said that the AusFarm modelling demonstrated there was not a linear relationship between water and dry matter production, and accordingly milk solid production. It also demonstrated that limitations on the available water became part of the farm management decision making.

Defence submissions

[185] In Mr Ring's submission, any purchaser would be concerned about the legal certainty of the availability of water into the foreseeable future,⁸ particularly since demand for irrigation water by a downstream priority holder could suddenly increase.

[186] Mr Ring said it was difficult to reconcile different parts of Mr Carr's evidence with what Mr Carr had said previously, for example, telling the receiver in 2007 that *"there seems to be a major issue of water still being overlooked..."*. He accepted that, in the period 2007 to 2010, the Sowburn was *"constrained for the majority of the hot part of the summer"*. In his affidavit 26 September 2011, Mr Carr acknowledged that, *"in a dry season the Sowburn irrigation supply can be constrained"* – although he went on to say that this can be *"adequately managed."* Mr Ring said that the ability to adequately manage water could be correct, to the extent that it referred to utilising the McSkimming land, and its water rights to irrigate BSF.

[187] The defence position was that the only realistic conclusion was that, as a result of seasonal deficiencies in the Sowburn supply, and the 2007 uncertainty (or unavailability) of the Carr/Beattie right, there was insufficient irrigation water reliably available during the peak demand period to irrigate a milking platform of 1200 hectares.

[188] It was reasonable to infer, in Mr Ring's submission, that, taking all, or even only some, of the unreliable assumptions into account, the consistently available milking platform would be considerably less than 1200 hectares and at least approaching Dr Davoren's figures. This was not inconsistent with the actual production levels achieved, because of the contribution of land, water and silage from the McSkimming land, and of land, silage and crops from the Awataieri farm.

⁸ As demonstrated by Mr Kirkwood's offer during the 2007 tender process, considered below.

Analysis

[189] None of the experts suggested BSF was not a 1200 hectare enterprise. The real issue is its ability to produce milk solids. The availability of water is relevant to the extent it affects production.

[190] The experts agreed that the total available flow from the three water sources was between 508 and 512 l/s. The Maniototo East Irrigation Scheme was 100 per cent reliable, unusual in international terms, whereas the Sowburn and the Taieri were both less than 100 per cent available. While there was some question as to whether the Sowburn take was 167 l/s or 222 l/s, I am satisfied from Dr Heiler's evidence and the rerun of the AusFarm model at the lower rate, that the difference is inconsequential in terms of model estimates.

[191] The area of BSF which can be effectively irrigated from those water sources during periods of peak demand depended on whether all the flow was available and the strategy used to apply the water. At their conferral, Drs Davoren and Heiler agreed that, with a milking platform of 1200 ha, the peak water demand for water at BSF was 5mm a day but the available water take was capable of a demand of 3.7 mm a day.

[192] The experts also agreed that the AusFarm model was an appropriate tool for evaluating dry matter production from irrigated land, and that the modelling carried out did represent BSF's dry matter production for a soil PAW of 45 mm, with restricted irrigation of 3.7 mm, based on the full 508 l/s take being available.

[193] It is clear that, with a milking platform of 1200ha, there were likely to be periods in the peak of the dry season when the full water take was not available. The extent of those periods and the severity of them would vary each year. How those periods were dealt with was a management decision for the farmer. It is what happened when this water was not available that was really the issue. As the experts noted, there would be a reduced yield of dry matter and other management tools would be required. Predictably, the experts could not respond to the question about the average annual kg/dm production if the water resources were not fully reliable because that depended on the timing and quantum of unavailability.

[194] I am satisfied from the evidence of those actually working on BSF at the time that there was equipment available (K-Line and roto rainers) adequately to irrigate 1200 ha. It is inconceivable that in circumstances of a large land area and limited water resource, a farmer would not have had sufficient irrigation equipment.

[195] The major difference between Drs Davoren and Heiler was the return period each adopted, that is, the time taken to return to the start of the irrigation block from the date when irrigation started on that block. Again, the issue comes down to the likely practical decision made by farm management as to whether a return period longer than the optimum return period should be adopted, acknowledging there would be some penalty in reduced production from time to time.

[196] I accept the way in which Dr Heiler approached the issue was appropriate in the circumstances. He immediately addressed the issue that design of an irrigation system takes account of the water supply, observing that, where land was not limited, it was often the case that irrigation systems would be used to irrigate larger areas than would be the case if full water demand were met at all times. As was made clear from the evidence of the experts as well as the farmers, it was a matter of management choice.

[197] Dr Davoren conceded he did not check his conclusions with what had in fact occurred, to determine whether substantial amounts of dry matter had been required in order to meet the production levels achieved at BSF over the years. Dr Davoren had to make considerable concessions in cross-examination and his evidence was undermined by a consideration of actual farm production.

[198] What was clear from the experts' analyses is that it would make no sense for a farmer to model his irrigation on Dr Davoren's worst case scenario. Dr Davoren accepted that the AusFarm modelling, with which he agreed, showed the benefits, in terms of dry matter production, of irrigating a larger area less than "optimally" in comparison with full irrigation of a smaller area.

[199] I am persuaded by Dr Heiler's conclusions, given the AusFarm model results of average dry matter production between 11,000 and 13,000 kg/dm/ha, depending

upon PAW. I note the estimates lined up with the potential identified in the 1997 report on BSF of between 11,600 to 12,900 kg/dm/ha. As Dr Heiler said, “the SoilWorks report told it all”. The AusFarm modelling did not predict what production would be if water availability were less than the 3.7 mm a day over the full 1200 ha. The modelling exercise could not completely predict the implications for production of such restrictions.

[200] I accept Dr Heiler’s conclusion that the AusFarm model outputs in terms of annual water requirements and estimated dry matter production are realistic, particularly given his consideration of actual production data from BSF. That is, using a conversion factor, Dr Heiler concluded that the equivalent milk solids production would be in the range of 1,260,000 to 1,480,000 kg/ms from the 1200 ha. As he noted, of course there will be production variation from season to season and production will depend on other matters including the quality of the cows, use of supplements and general management issues.

[201] I recognise that the conversion figure used by Dr Heiler of 10.5 per cent might be low, but likewise I accept the evidence that utilisation rates in the Maniototo are higher than other areas given the particular conditions. For that reason, the suggested 25 per cent is likely too high. Therefore, the rate of 10.5 per cent needs to be increased, which will result in a consequential reduction in Dr Heiler’s estimates of milk solid production.

[202] As against that however, the result assumed a PAW of 45mm whereas Dr Eger, the soil expert who actually tested the soils on BSF, concluded that a PAW of 80mm would be realistic for BSF. This would result in higher dry matter production.

[203] I note Mr Hamilton supported Dr Heiler’s comment about the economics of supplying water at the rate needed to meet very high daily demands. Although he discussed a higher application rate than was used in the AusFarm model, he supported the premise that it became a management issue of balancing advantages of spreading water more thinly resulting in an overall higher production of dry matter.

[204] For these reasons, I accept Dr Heiler's conclusion that the 1200 ha milking platform on BSF was capable of, and close to, full and reasonable irrigation, albeit at levels less than optimum than if all inputs were unlimited.

[205] In conclusion, the available water, and the extent of milking platform it can sustain, depends very much upon farm management decisions. It is reasonable to treat BSF as having a milking platform of 1200 ha.

Part II Market value of BSF as at 31 May 2007

[206] I turn now to consider the market value of BSF as at May 2007. This involves a consideration of the evidence about the state of BSF between 2002 and 2008 and what BSF produced by way of milk solids throughout that period. I then consider the expert evidence on market value. The value of a dairy farm involves an assessment of average efficient production from that farm and I reach a conclusion on the appropriate figure to adopt for BSF in 2007. I consider the Fonterra forecast announcement of 23 May 2007 before addressing the evidence of the tenders for BSF in 2007 and 2008 as well as the evidence about the sale in 2007 of Stationview, a dairy farm in the Maniototo. I then reach a conclusion as to the appropriate figure to adopt for market value of BSF as at 31 May 2007.

What was the state of BSF in 2002 - 2008?

[207] There was a great deal of evidence about the state of BSF from 2002 to 2008, when it was under the management of the joint venture and then the receiver. This evidence was relevant to assessing the productive capability of BSF. The plaintiffs' case sought to demonstrate the relatively high production levels, despite poor management.

[208] David Yardley, a farm management consultant, was very familiar with BSF. He was engaged in April 2002 with a brief to split up the property into three stand alone dairy farms, establish two new dairy sheds and recruit sharemilkers for the individual farm units. He left BSF in April 2004.

[209] In Mr Yardley's opinion, the true potential of BSF had never been reached because of shareholder dissention, lack of strategic vision, poor capitalisation and poor management over the last five years of the joint venture's stewardship. He considered it was great testimony to the sharemilkers that they produced the output of milk solids they did under such a difficult operating environment.

[210] In 2002 there were three sharemilkers contracted to BSF: Geoff Baker, Greg Roberts, and Hugh Le Fleming. Each gave evidence about the impact of poor management by the joint venture on each farm's production.

[211] Mr Baker, from the end of 2001 or early 2002, was the sharemilker on the Tercio farm. He gave evidence about the internal problems between the shareholders/joint venture partners, saying it was a pretty stressful and difficult time for all the sharemilkers.

[212] According to Mr Baker, BSF routinely failed to operate as was required under the share milking agreements and management failed to pay for basic costs and necessary inputs. Mr Baker recalled fertiliser applications being withheld or delayed, or not being provided in the recommended volumes or at the right times (or in some cases not being provided at all). By the time the sharemilkers left the farms, the joint venture owed them, he thought, around \$750,000 or more. He did say that the soils on Tercio improved considerably in the three years from 2002 until late May 2005.

[213] Mr Baker believed that, if BSF had been properly managed and properly financially supported, at even an average level, it would have performed at a much higher level than was achieved in that three year period.

[214] Mr Baker's observations following 2005 were that BSF was poorly managed and underachieved, deteriorating dramatically up until the appointment of the receivers. The only property being farmed anywhere near properly was the Alnwick farm and that was only up until Mr Le Fleming left in mid-2006, he said.

[215] In 2002, Greg Roberts took up a sharemilking position on the Saran farm. The 2002/2003 season was difficult, as Saran was not ready for operation as a dairy farm,

he said, with no fences, or stock water system, and insufficient resources. Only the Alnwick farm had an operational milking shed so the cows from the other farms were walked twice daily to Alnwick, placing major stress on the stock. This impacted on the overall production of the three farms.

[216] In Mr Roberts' second season (2003/2004), there was no silage on the farm and it had to be trucked in from Awataieri. There were only enough funds for 1/3 of the normal fertiliser budget. Mr Roberts explained that not applying fertiliser and urea at the correct times in a season impacts on grass production, silage conversation, and retained pasture cover. Similar problems affected his third season, resulting in having to cut the season short.

[217] Mr and Mrs Le Fleming farmed the Alnwick property for four years, and confirmed the lack of support from the joint venture, particularly the lack of maintenance of fixed and irrigation plant, timely provision of fertilisers and urea, and general farm management issues.

[218] Others involved with BSF also testified to the impact of the joint venture's poor management. Russell Pope gave evidence that, after his son, Troy Pope, left BSF in 2004 and Mr Carr's involvement ceased, poor irrigation decisions were made and irrigation was left with unskilled management and staff. K-Line was left for days without being moved and the McSkimming land was basically abandoned.

[219] Troy Pope confirmed that when he returned to BSF in 2007, a great deal of maintenance work had not been done.

[220] By spring of 2005, Mr Carr was no longer involved in BSF and Mr McSkimming described it as a very difficult and trying period for everybody. In mid-2005, two of the sharemilkers ended their contracts. From then on, Mr McSkimming observed that the BSF irrigation systems were not being maintained or properly shifted. The Tercio and Saran properties deteriorated rapidly, as did the McSkimming land. The only property properly managed during the 2005 spring and summer of 2006 was Alnwick which was still being sharemilked by Mr and Mrs Le Fleming.

[221] By May 2006, things deteriorated markedly, in Mr McSkimming's opinion. Mr McSkimming said the McSkimming land had little or no irrigation or maintenance, leading to pasture dying. When Mr Frost took over things slowly began to improve but real progress was not made until he engaged Troy Pope to work on the irrigation systems.

[222] Mr Frost's evidence confirmed that, at the date of receivership, BSF was run-down. There had been a lack of funding and investment prior to the receivership, and maintenance costs for the first two years of receivership were well above normal levels. The 2007/2008 financial result showed significant cost increases for many expense items, including up to 20-30 per cent on fertiliser, grazing costs and feed costs, and 10-20 per cent increases on fuel, power, wages and contracting costs. There were significant costs to increase cow herd numbers to an efficient milking number of about 2900-3000.

[223] Mr Frost produced the reports from Farm Right for the period of the receivership. Farm Right's role was to review BSF, the cows, and the Awataieri and McSkimming properties once a month, and prepare a report with recommendations. Mr Frost recalled following all such recommendations. For example, he was taken to documents which identified the critical need to apply urea, and to service the Sowburn and roto rainers. He believed all those matters were attended to. He conceded he did not like spending money inefficiently or ineffectively but explained his aim was to get BSF back to a level where a buyer would not discount the sale price due to its condition.

[224] The Farm Right reports showed a steady reduction in cow numbers from 3,204 in September 2007 to 2,392 in May 2008. Mr Frost attributed that to culling, poor performance, and that 160 cows (which had been purchased by the plaintiffs from Progressive, discussed below) were taken off BSF in September. He accepted there was not enough food, pointing out that the McSkimming land had been run down to the point where it was not producing any food. The "empty" rate after mating was extremely high and there was a large reduction in the calving rate.

[225] The September 2007 report disclosed that production was behind, with cows being milked once a day, the farms tight for feed, and 150 cows on penicillin. Mr Frost agreed it was a rough start to his receivership because BSF was in poor condition over a whole range of issues.

[226] Mr Frost acknowledged that Mr Carr told him the Sowburn race was in disrepair, and Mr Carr did some work on it in June and July 2008. Mr Carr considered that the race needed resodding in major areas and Mr Frost accepted he was not prepared to undertake that as it was a very expensive task.

[227] Mr Nelson, the farm manager, arrived at BSF in June 2008 by which time the business had been in receivership for some 13 months. Mr Nelson described BSF as quite run down; his first priorities were to sort out drainage and cow lane maintenance.

Findings

[228] The evidence suggested that, had BSF been properly managed and funded, the production figures would have been better in the early years, although, even under those conditions, the farmers who testified provided good examples of the results skilled sharemilkers could produce. I accept Mr Yardley's evidence about the benefits of using three competing sharemilkers to optimise performance, which was clearly the case on BSF. The financial and interpersonal difficulties under which BSF operated impacted production but the very good sharemilkers optimised production levels as much as possible in the circumstances.

[229] The plaintiffs' witnesses were compelling in the evidence about the state of BSF when the receiver took over. I am satisfied however, that the receiver followed advice as to what needed to be done and, once those measures were implemented, production increased. He might not have implemented every measure Mr Carr or others considered necessary, but I accept the evidence that Mr Frost wanted to achieve a good sale price for BSF and was particularly careful about the state of BSF given the litigious environment which surrounded BSF's ownership.

Production levels 2002 onwards

[230] The shareholders on BSF collectively achieved approximately:

- 1,050,000 kg/ms in the 2002/2003 season;
- 1,150,000 kg/ms in the 2003/2004 season;
- just under 1,100,000 kg/ms in the 2004/2005 season;
- just over 1,100,000 kg/ms in the 2005/2006 season; and
- 927,505 kg/ms in the 2006/2007 season.

[231] Production in the 2007-2008 season was 953,000 kg/ms. The 2006/2007 and 2007/2008 figures were clearly influenced by limited resources, lack of maintenance and farm management, and shareholder disputes. In 2008/2009 BSF produced 1,101,000 kg/ms. This was achieved with approximately 3,300 milking cows on the property and access to the McSkimming land.

[232] The highest production at BSF prior to the sale to Harvard was the year ended 30 June 2010 at 1,175,000 kg/ms from around 3300 cows, which Mr Nelson attributed to access to the McSkimming land and water and the Awataieri property. As I have found above, BSF was to some extent dependent on the McSkimming land for water, additional grazing for cows and producing silage. Awataieri was used for similar additional support. The production figures therefore take into account the advantages of the neighbouring land, not solely BSF.

[233] Mr Nelson's evidence was that productivity of BSF on its own would depend on whether there were water restrictions in that particular year. On a fully self-contained basis, he assessed production of 845,856 kg/ms. With water restrictions there would be substantially lower production levels as there would be less feed and destocking would need to occur.

[234] Mr Nelson agreed that 1.2 million kg/ms could be produced in a good year on BSF if all stock were wintered off and supplemental feed were brought in, even without the McSkimming land. Otherwise, further infrastructure would be required, for example, storage ponds and the installation of centre pivots.

Mr Mills

[235] Paul Mills, a registered valuer, was an expert valuation witness for the plaintiffs.

[236] On 29 June 2007, Mr Mills valued BSF including the Fonterra shares, dairy and irrigation plant, at \$29,090,000, with \$20,684,000 attributed to land and improvements, (not including the part known as the Creek Block). This valuation was expressly subject to a number of assumptions and relied upon information provided by Mr Carr as to the irrigation water resources available.

[237] The 2007 valuation was provided for the plaintiffs' financier, Hanover. As the valuation was the only one carried out at the time, it is worth setting out aspects of it in full, as follows:

7. We have assessed the total average efficient production level for the aggregate property to be 1,283,000 Kg/ms. This equates to 1,136 Kg/ms over the total milking platform area (1,129 hectares).

...

9. The dairy and pastoral farm market has been very subdued in the Canterbury Region during the 2006/2007 season. This lower level of market activity is primarily a function of the difficult climatic conditions (spring/summer) and the effect of two years of lower dairy farm payouts. (2005/2006 and 2006/2007).

10. The key characteristics of the dairy farm market over the last three years included:

- The value of Fonterra's share capital has (on average) appreciated at a rate greater than the farm payout;
- The total sale price of dairy farm properties over the last four years has increased at a greater rate than the value of Fonterra's share capital;

- The volume of farm transactions decreased significantly in the 2006/2007 season compared to the previous season. Although, transaction prices appear to have remained firm, and
- The higher payout forecast will increase the demand for dairy farm properties next season and result in a higher level of liquidity in the farm market.

...

51. In summary, the Big Sky parent property has a good balance of soils that are capable of good levels of production provided sufficient fertiliser, irrigation water and management inputs are available.

...

62. The peak demand for irrigation water in the Maniototo Basin is normally during the period October to March inclusive. The seasonal variability in soil moisture deficits will (on average) require the withdrawal of irrigation water from some non-milking platform areas three out of ten years. A twenty per cent reduction in the area of milking platform land able to be irrigated is expected to occur once in every ten years.

63. I reiterate that for valuation purpose we have calculated the total irrigable area (refer Table 6) from utilizing the various water permits/entitlements based on an irrigation season length of 180 days and an average annual irrigation water requirement per hectare of 560 mm.

...

69. The following points are relevant when interpreting the production data for the 2006/2007 season ...

- The production achieved by the various farm units in the 2006/2007 season was negatively influenced by lower than normal cow numbers. The combined total cow numbers was 2,500. This compares to the 3,300 cows to be calved down for the 2007/2008 season,
- The cumulative effect of a lack of maintenance work on the Sowburn Creek irrigation water supply was reportedly a major contributing factor to the lower than normal level of irrigation system efficiency; and
- Significant areas of land were withdrawn from the irrigation round at peak water demand periods during the 2006/2007 season.

70. [1,270,500 kg/ms was forecast for the 2007/2008 season]

...

73. Whilst the [forecasted] feed inputs for the 2007/2008 season (580 KgDm/Cow) are above average, consideration must be made to the fact that the period where feed demand exceeds supply (shoulders of season) is relatively longer in the Maniototo Basin compared to most other regions.

...

80. **Average efficient Production Assessments – Milking platforms [as summarised] (Table 11)**

Effective Irrigated Area (milking platform)	1,129
Supplementary Feed Input (KgDM) '000	1,701
Milksolids Production (Kg/ms) (rounded)	1,283,000
Kg/ms/Ha	1,136

...

82. In summary, it is our opinion the Big Sky dairy farm units have the potential for a moderate increase in production provided an industry standard level of fertiliser, irrigation water and management inputs are available.

...

107. Early season farm transactions in the Canterbury region indicate at 15-25 per cent increase in farm values. However, this analysed increase in farm values is based on a limited volume of sales and is yet to be substantiated by a wider market analysis and subsequent land transactions.

...

109. In summary it is our opinion that the demand for well developed pastoral/dairy conversion farm properties with good physical characteristics and productive capacity is likely to remain strong in the short to medium term.

...

119. The key characteristics of an investment in a property such as “Big Sky” include:

- Historical data indicates a consistent trend of rural land price appreciation;
- Fonterra has a well established history of providing forward pricing signals for dairy farm payout; and
- The forecast dairy farm payout for the 2007/2008 season is \$5.55 per Kg/ms. This payout level will significantly increase the current returns on capital invested in dairy farm properties (including Fonterra Shares).

...

122. Due to the dearth of market evidence relating to dairy farm property sales/transactions in the Maniototo Basin we have considered value benchmarks from dairy farm sales from the Canterbury, Otago and Southland Regions.

...

125. The value ranges listed above have been analysed from farm transactions during the 2006/2007 season. It should be noted that the subsequent improvements of the forecast farm payout for the 2007/2008 season may result in these values setting the lower limit value in the current (2007/2008) season.

126. Due to the lack of directly comparable sales/market evidence for a dairy farm properties in the Maniototo Basin we have constructed a productive valuation assessment.

127. This valuation method is commonly referred to as the “income approach”. The application of this valuation technique is referenced in the International Valuation Standards as being relevant where value benchmarks from the “comparable sales” approach are not available.

128. The income approach essentially calculates a economic farm surplus that is capitalized at a market derived rate. The economic farm surplus relates to the returns available to reward the capital invested.

Productive Valuation Assessment (Table 18) [as summarised]

Milking platform area (ha's)	1,129.00
Effective farm area (Ha's)	1,476.00
Average efficient production (kg/ms)	1,283,000
Milk income (\$4.85/Kg/ms)	
Economic Farm Surplus	2,832,975
Capitalised Earnings (Total Farm Capital) – (8.5%)	\$33,329,118
Current Market Value (Incl Fonterra Shares)	\$28,630,000

...

131. Most prudent investors will tend to base investment decisions for dairy farm assets on a 3-5 year average payout. The majority of the major trading bank economists are currently predicting this to be \$4.50 - \$4.90/Kg/ms,

[238] Mr Mills’ original valuation was as at 29 June 2007. His adjusted figures to re-assess market value at 31 May 2007 were of \$20,767,000 for the land and buildings and \$/Ha: \$12,605; \$/eff/Ha \$13,910; \$/kg/ms (Avg Eff) \$16.19.⁹

[239] Mr Mills did not provide a value assessment under a restricted water scenario, which the defence experts did, saying relevant information was needed including: assessment of the duration, timing and extent of the water restrictions and the impact

⁹ This is somewhat confusing as this figure is higher than his June 2007 valuation. Mr Crighton referred to Mr Mills having made a 3 per cent reduction. It may well be that Mr Mills’ adjustment includes the Creek Block (valued at approximately \$300,000) which could explain the higher May 2007 assessment.

this would have on pasture production levels; dry matter and crop production analysis; irrigable land area/land utilisation analysis; animal feed demand analysis; evaluation of capital development/mitigation measures; and a scenario analysis to evaluate the various farm management system/land utilisation options that could be adopted to best mitigate the effects of a restricted water supply.

[240] Mr Mills' 2007 valuation was criticised because it contained errors and at times referred to a different property, something Mr Mills explained as having resulted from use of a template. He was also criticised for the references to the Canterbury region. He explained that Canterbury was the only South Island area where irrigated farms were available and therefore it was a correct comparator.

[241] Mr Mills acknowledged that he had received a detailed briefing from Mr Carr before undertaking the valuation. Furthermore, he kept Mr Carr and the accountant Mr O'Connell apprised as his report developed. This was shown by the fact he emailed some preliminary documents to Hanover, and then to Mr Carr and Mr O'Connell. The following morning he sent amended documents to all those parties having discussed them with Mr Carr and/or Mr O'Connell in the interim.

[242] Mr Mills had assumed that the CWA rights would be assigned to any purchaser of BSF. He was aware that the full water take entitlement would be unlikely to be available at certain times in the peak of the season and his pasture production figures reflected the fact that, at some times in the peak period, demand would exceed supply. His assessment was on the basis that, at that point, irrigation would be reduced from the non milking platform area. He had no knowledge of any problems regarding the status of the Carr/Beattie water right. His report included reference to BSF having centre pivots (which it did not). Mr Mills said that comment was an error.

[243] Mr Mills explained that he assumed the three water sources were legally available and then made an assessment using his own judgment. Mr Mills pointed out that the revised production figures in his supplementary brief were not inconsistent with what had in fact been irrigated on BSF and that historic farm production was relevant.

[244] Mr Mills said it was not correct to say “that all additional feed” required under a restricted water supply option would need to be sourced externally. A skilled (the average efficient) farmer would set up the farm management system to “cope as best it could” with a water restriction period. Possible measures included planting high feed value crops in the spring shoulder and making supplements on land outside the dairy platform. A skilled farmer would forecast cow feed demand relative to pasture production levels (factoring in a restricted water supply period) to calculate feed surplus/deficits each month throughout the milk production season. He would then attempt to optimise the dairy platform area.

[245] An advanced mitigation strategy could also be implemented to mitigate water supply restrictions by improving the capacity of the on-farm irrigation system, for example installing centre pivot irrigation and building water storage.

A Average Efficient Production

[246] Mr Mills’ average efficient production assessment materially exceeded the actual production achieved in the 2006/2007 season. Mr Mills said he understood that the actual production achieved in the 2006/2007 season was negatively impacted by a reduction in cow numbers (less than 800 cows). He referred to the improved production levels in the 2009/2010 season.

[247] Mr Mills’ table calculating average efficient production assumed a certain amount of dry matter was grown on BSF with supplementary feed brought in. He was aware of the use of the McSkimming and Awataieri properties, assuming that some dry matter was grown on BSF and some was imported. He said it was not unusual for that approach to be taken.

[248] Mr Mills calculated an annual efficient production from BSF of 1,283,000 kg/ms. He explained he arrived at that figure by considering the historic production, a variable climate and past ownership and management issues. He acknowledged that level of production had never at that time been achieved on BSF but did not consider history was representative because it had been influenced by those issues.

[249] When Mr Mills carried out his first valuation of BSF in November 2003, the 2002/2003 season was complete and he received the budgets for 2003/2004. Production in 2002/2003 was 1,065,000 kg/ms with 2,944 cows. Mr Mills then assessed an average efficient production level of 1,198,000 kg/ms based on a milking platform over three farms of 1,099 ha. His later assessment assumed 100 ha more. The budget for 2003/2004 was 1,225,000 kg/ms.

[250] By the time of Mr Mills' valuation of BSF in May 2005, the 2003/2004 season was complete with an actual production of 1,128,620 which was some 100,000 kg less than budget. Mr Mills explained that as being because the analysis assumed average efficient cow numbers of 3,333, whereas there were only 2,933 cows in fact.

[251] In the years 2004/2005 and 2005/2006, actual production was more than 10 per cent under budgeted production. Mr Mills was asked whether, given actual results, he had been over optimistic in his assessments. He explained he took some advice, and sought to understand the variances. He considered that BSF had under-performed as against its potential for a range of reasons: disharmony of owners, availability of feed, climate, and some water supply restrictions. Notably, there was no comment to that effect in the valuation.

[252] Mr Mills noted the 2006/2007 production of 925,505 kg/ms, observing that only 2000 cows were used and he was aware that supplemental feed was not consistently available.

[253] Mr Mills was then asked about actual production of 1,101,000 kg/ms in the 2008/2009 season involving 2,965 cows and when Mr Nelson, a competent manager, was involved. Mr Mills observed that there had been changes in manager throughout 2002 to 2014, and sharemilkers leaving. He discussed the impact of this and stated that farm management involves setting up for the next season so that a change of management will not necessarily produce immediate results. Mr Nelson was in charge in the 2009/2010 season which resulted in 1.178 million kg/ms and Mr Mills pointed out that production was increased in a particularly dry year.

[254] Mr Mills was asked about BSF's results under Harvard - 1,098,700 kg/ms in the 2010/2011 season and 1,156,000 kg/ms in the 2011/2012 season. Mr Mills observed that Harvard did not have the benefit of the CWA. Furthermore, the results could not be considered in isolation without information as to cow numbers, conserved feed, the milking platform size, and what farm development might have taken place, he said.

[255] The defence experts, Messrs Larmer and Armstrong, both calculated average efficient production levels of 1.1 kg/ms per annum assuming full irrigation, which Mr Mills accepted was within range of a reasonable production assessment.

[256] Mr Mills assumed 12,000 to 14,000 kg/dm per ha, a figure consistent with Mr Heiler at 11 - 13,000 kg.

B Productive valuation assessment

[257] Mr Mills used the productive valuation assessment as a cross check for his valuation.

[258] Mr Mills was challenged about his use of a capitalised earnings rate of 8.5 per cent, which he said he had used as a result of his subjective assessment for a farm like BSF. He was challenged to whether it was appropriate measure for a farm valuation. Mr Mills said a prudent purchaser would consider return on capital, and agreed that the figure was a highly sensitive one but said that it was not chosen as a result of overly optimistic inputs.

[259] Mr Mills adopted \$4.85 as the Fonterra milk payout for the purpose of his assessment. This was challenged on the basis that a prudent approach should be to take the average of the bank economists' forecasts. Mr Mills explained that the Fonterra opening forecast of \$5.53 was, on the basis of Fonterra's practice, considered to be about 70 per cent only of what the expected payout was and that the banks' analyses do not necessarily correspond with the market. Mr Mills said it was a time of a rapidly changing market and his was a forward looking analysis.

[260] Mr Mills used an average farm working expense of \$2.72 per kg/ms which was challenged as too low. There was evidence that average farm working expenses were \$2.74 in 2006/2007 but \$3.93 in 2007/2008. Mr Carr had forecast \$2.98 pre interest.

Mr Crighton's peer review of Mr Mills

[261] Tim Crighton is a registered valuer and chartered accountant, specialising in the application of accounting, valuation, and finance skills to the rural sector. He peer reviewed Mr Mills' June 2007 valuation, and commented on BSF's market value as at April 2008.

[262] In Mr Crighton's opinion, Mr Mills' assessment as at 30 June 2007 was appropriate, given his assumptions as to water availability for irrigation, and was supported by post valuation date market evidence. He was satisfied that generally: the data used and enquiries made by Mr Mills were adequate and relevant; the data analysis was sound; the valuation methods employed were appropriate; and Mr Mills' valuation opinion and conclusions were reasonable, within the limitations set out in his report. The 3 per cent adjustment to reflect the 31 May 2007 value was very much in range.

[263] Mr Crighton also assumed that the water rights were legally and practically available to BSF. He did not, himself, investigate the reliability of water and considered production levels were more important.

[264] Mr Crighton did not disagree with the defence experts that 1.1 million kg/ms per annum was within range of the average efficient production assessment for BSF assuming full water availability. However, he pointed out that BSF has achieved more than that in the past.

[265] Mr Crighton observed that May was not the typical time for farm sales and he would have advised a vendor to wait until late spring, particularly because it was clear the market was changing and there were, in his opinion, prospects for further gain.

[266] In cross-examination, Mr Crighton was asked about Mr Mills' table 18 where he had adopted the milk price of \$4.85, despite bank economists predicting a range of

\$4.50 to \$4.90. Mr Crighton explained that most prudent investors consider past, present and future trends and that, because the market was clearly changing in May 2007, there would have been more emphasis placed on the improving market.

[267] Mr Crighton defended the use of capitalised earnings as being essential to a productive value calculation. He disagreed with one of the defence experts that the method was discredited and considered it a sensible and robust way to cross check comparable sales.

Mr Larmer

[268] John Patrick Larmer is a registered valuer with rural specialisation and a registered primary industry consultant. He is a life fellow of the New Zealand Institute of Valuers and a past president and life fellow of the New Zealand Property Institute and fellow of the New Zealand Institute of Primary Industry Management. His professional experience extends over some 50 years. He was an expert called by the defence.

[269] Mr Larmer said dairy farms are valued by direct comparison with transactions with broadly similar characteristics. He described a paucity of comparable sales information available in the Maniototo. Although large dairy units attract investor interest and the long run overall return inclusive of any capital growth is considered, the market as a general rule does not capitalise net returns.

[270] Productivity was however a major "driver" and an important comparative indicator in the dairy farm market was price per kg/ms. Along with price per ha, this varied widely due to a number of factors including location, land characteristics, the extent and standard of improvements, and perceived risk factors.

[271] Mr Larmer's valuation, using the valuation date of 31 May 2007 and under a scenario of having sufficient water availability, was \$25,000,000 comprising: land and buildings at \$16,500,000 (amended after expert conferral to \$16,900,000); shares and plant "say" \$8,500,000. The overall market value was amended after expert conferral to \$25,400,000. This valuation assumed the whole milking platform area could be adequately irrigated, with no limit to the availability of water even in peak periods.

[272] Mr Larmer's valuation as at 31 May 2007 under the insufficient water availability scenario (assuming 50 per cent of the platform could be adequately irrigated) was \$16 million comprising: land and buildings \$11,400,000 (amended after expert conferral to \$13,250,000); shares and plant "say" \$4,600,000. After expert conferral, he readjusted the overall assessment from \$16,000,000 to \$19,450,000.

[273] After conferral, Mr Larmer increased his assessment of the milking platform from 600 ha, which he had adopted given Dr Davoren's evidence, to 700 ha.

[274] Mr Larmer valued the land as: 1200 ha at \$10,000 a hectare; 100 ha at \$3,500 a hectare (effectively the Creek Block); 460 ha at \$1,200 a hectare. He was challenged about his valuation of the 460 ha of land outside the milking platform. This included land by the river on the Tercio farm, which according to Mr Yardley, could have been developed for direct milking or support land. Mr Larmer accepted that, if that land were given a higher value, his valuation of BSF would increase by approximately \$1 million. However, he stood by his valuation, explaining the need to assess the appropriate overall land value for BSF.

[275] Mr Larmer said the \$10,000 per milked hectare was comparable with the Stationview sale, discussed in more detail below. He considered that farms in the Maniototo, even during the period of strong demand, were some 25 per cent – 30 per cent lower in productivity on a per kg basis than in the wider South Island dairy farm market.

[276] Mr Larmer considered the Harvard sale, and said that, following by the global financial crisis in mid 2008, land values were essentially back to May 2007 levels by mid 2010.

[277] Mr Larmer regarded the average efficient productivity as a key determinant of value for an investment dairy proposition such as BSF. He assessed the 1200 ha milking platform area as having a productive capability of 920 kg/ms per hectare, or overall average efficient production of 1,100,000 kg across the three milking facilities involved, on the assumption that there was sufficient irrigation water available for the total milking platform area. This included winter grazing off, supplemental feed

produced off the farm and the availability of irrigation over the late spring/summer/early autumn months.

[278] Mr Larmer said he adopted 1.1 million kg/ms pa as the average production efficiency using actual production figures as a cross check. It was put to him that, if water was constrained, then it would be expected to be reflected in actual production. Mr Larmer accepted that, but noted BSF's access to the McSkimming water. Mr Larmer did not accept that, if he assumed 1.2 million kg/ms pa was the average efficient production instead, his valuation would increase to approximately \$27 million, saying that it was not linear exercise.

[279] Mr Larmer said that he had carried out his own independent assessment and put little weight on actual production figures. He explained that he used as much information as available but finally undertook a best estimate himself, valuation being a subjective assessment. He gave some weight to the evidence from the three sharemilkers and Mr Yardley but confirmed he preferred his own independent assessment.

[280] Mr Larmer's assessment was on the basis of the average efficient farmer which he said was a farmer operating at a level about 60 per cent. He would, therefore exclude what very good farmers could produce. He would assume a normal season and normal, prudent management.

[281] Mr Larmer was referred to table 11 of Mr Mills' 2007 valuation. This set out farm size, pasture growth, cow numbers, dry matter produced from the farm, additional supplementary feed, and a utilisation factor of 75 per cent. Mr Larmer had not produced an equivalent table in his evidence. He maintained, however, that he had carried out the same exercise, although using less inputs, to arrive, he said, at a similar result. He observed that Mr Mills relied on a number of assumptions. Although Mr Larmer had assessed 1.1 m kg/ms as the average productive efficiency, this was not factored in his tables as such. He said the difference between him and Mr Mills was within the margin of error, although noted it made quite some difference in the value given the large land area.

[282] Mr Larmer explained his assessment was his best informed judgement. Mr Larmer conceded his analysis was arbitrary, a judgment call.

Mr Armstrong

[283] Mr Armstrong is a registered valuer, and a life member of the New Zealand Institute of Valuers, a life member of the New Zealand Property Institute, and a member of the New Zealand Institute of Primary Management. He is also qualified as a farm management consultant, having worked both as a valuer and farm management consultant for 45 years and having owned his own farm. He was an expert called by the defence.

[284] Mr Armstrong said that valuing rural property requires reviewing and inspecting the property, including reviewing soil types, climate, pastures, fertility levels, structural improvements, subdivision, and water supply. The valuer should then endeavour to review the current farming business operations with the farm manager and, if possible, review past financial performances on the property, to establish a stocking rate per hectare of milking cows and production per kg/ms produced over the milking platform. This allowed comparisons with sales of other farms, both in the location and in other locations with appropriate adjustments for differences.

[285] Mr Armstrong observed that sometimes production figures were inflated by significant inputs of feed coming from leased land, the purchase of winter grazing, and the purchase of supplements such as barley and palm oil kernel residue.

[286] There was only limited local sales evidence, the best being the Stationview sale, which Mr Armstrong considered had better quality soil than BSF. He then reviewed sales of dairy farms over 2007 to 2010 which confirmed his experience that the market discounts more poorly located properties. He then reviewed data from remote Canterbury properties and further adjusted downwards to allow for the more remote and less well established Maniototo dairy area to assist him in deriving a land value for BSF.

[287] In his view, a well-informed prudent purchaser would be concerned about the uncertainty of ongoing supply of irrigation water and the necessary contingencies to ensure adequate water to optimise production without having to rely on leasing extra land and/or buying in supplementary stock food. Although he acknowledged it was common practice in many parts of New Zealand to arrange for winter grazing of stock off the farm or to bring in supplementary feed, Mr Armstrong pointed out that this increases production levels beyond what the farm can internally sustain, and consequently increases costs. In his opinion, using production figures to assess the value of the underlying assets can be potentially misleading if there was no consideration as to whether these external factors were utilised, and to what extent. Mr Armstrong recognised that, as was standard practice for this type of property in this location, cows and young stock were wintered off the property.

[288] He considered that using water from the McSkimming land would have made a substantial contribution to the seasonal feed supply to BSF and, in Mr Armstrong's opinion, most probably camouflaged the potential supply issues with irrigation water from the Sowburn and Taieri River. He did not attribute any added value arising from McSkimming land, saying it added little value because of the lease's short tenure and absence of a right of renewal.

[289] Based upon Dr Davoren's evidence, Mr Armstrong concluded that optimum production levels would not have been achievable in 2007 due to inadequate and inefficient application equipment and seasonal restrictions on the supply of water. A summary of Mr Armstrong's assessments shows:

	Adequate Water Valuation as at 2007	Limited Water Valuation as at 2007
Land and buildings	\$17,839,500	\$13,249,500
<i>Total Land, Plant, Shares</i>	\$25,990,500	\$19,141,200
Estimated MS Production	1,100,000	800,000
Total \$/KG/MS	\$24.08	\$23.93
Total\$/ha(milking area)	\$21.658	\$27.345

[290] In Mr Armstrong's opinion, the market for large farming properties such as BSF had always been limited due to the total capital requirements to purchase land and buildings, dairy company shares, stock and plant and to provide working capital. He described market confidence as still low as at 31 May 2007, saying the market was just emerging from relatively low returns for dairy farming with some uncertainty being observed in the world financial markets and it was not until the 2007/2008 dairy season that confidence built and ran on into 2009 before declining in 2010.

[291] Mr Armstrong described the prevailing market conditions in May 2007 as relatively weak, with milk solids payments having fallen from the 2004/2005 peak of \$4.46 per kg down to \$4.10 for the 2006/2007 season. Fonterra's announcements in the first half of 2007 were positive, but with warnings to farmers not to expect a payout over \$5 per kg. The big lift in milk solids pricing did not occur until much later in 2007/2008 season and continued into late 2008, with the 2008/2009 season setting a record milk solid payout for the dairy industry.

[292] In Mr Armstrong's opinion, a prospective purchaser as at 31 May 2007 would therefore have been cautious when contemplating a market price for BSF based on the previous season's performance and the cautions being expressed by the dairy industry. His review of 2007 sales, particularly those in the first half of that year, showed there was little or no movement until later in the year when there was an expectation in increase in the milk solids payment.

[293] Mr Armstrong referred to the more remote region of Amuri/Hurunui and noted that the low end of that range was at \$17,256 per ha. He then applied a discount of 30 per cent to the low end of the Hurunui market to reach an adjusted per ha rate of \$12,000 which Mr Armstrong applied as a market reference for BSF. He then referred to the sale of Stationview, giving it an indicated land value for the irrigated area of \$11,000 per ha.

[294] Mr Armstrong had applied evidence of other sales to BSF and analysed the discounts he considered applied in two locations. That analysis resulted in a per ha value of \$12,390 but the value used by Mr Armstrong for the milking platform was \$10,000 per ha. Mr Armstrong's explanation was that the market analysis was

principally to determine the discount which should be applied to BSF because of its location. Mr Armstrong's approach appeared to rely on market evidence for the location aspect of valuation, but then apparently disregarded that evidence when it came to addressing the appropriate dollar per hectare value. Mr Armstrong conceded that he did not know the milking platform of the other properties used in his analysis, although said he had some idea. It was put to Mr Armstrong that, if \$12,390 per hectare were applied to 1,700 ha of BSF, the value would be \$21,806,400, and adding the Fonterra shares would give a price \$29,343,544, similar to Mr Mills' valuation. Mr Armstrong said that was not the way to carry out a valuation.

[295] Mr Armstrong said he had considered average production by an overall assessment which resulted in his conclusion of an average per hectare production of \$8,000 (\$10,000 for the milking platform and \$4,000 for mixed dry land and river frontage). Mr Armstrong then carried out an assessment assuming a limited supply of irrigation water, which he calculated would reduce production to 800,000 kg/ms. This was based principally on the supply from the Maniototo, which he considered would allow at least 570 hectares to be irrigated without risk. Mr Armstrong's valuation was on a self contained basis.

[296] Mr Armstrong conceded that his analysis of BSF was with the benefit of the Davoren report whereas, when carrying out his assessment of comparable sales, he did not have the benefit of any specialists' reports. The comparable sales were for dairy farms in Otago, Southland and Canterbury. He assumed that full irrigation was available in Canterbury but Otago would require irrigation.

[297] Mr Armstrong was confident he could be reasonably accurate about dry matter production and quality given his experience. He did not depend upon what the present or past farmers might have said, emphasising that he was valuing the farm not management. He would talk to the farmers but not conduct a rigorous analysis of their production levels.

[298] Mr Armstrong used 1.1 million kg/ms per annum as the average efficient production. There was, however, no analysis of how he had arrived at that figure in his brief of evidence. He had not considered the sharemilkers' evidence as to actual

production levels in 2007. He noted past higher production figures but was concerned they were not achieved solely from the milking platform involving the use of McSkimming water and supplementary feed produced off BSF. Mr Armstrong, therefore, relied on his own judgement.

[299] It was put to Mr Armstrong that actual BSF production and the evidence of sharemilkers and the receiver, including that BSF had not been properly fertilised and there was not sufficient supplemental feed, was important information. However, Mr Armstrong did not concede the point. He had investigated the management in 2010 and relied on his own judgment. He was not persuaded by reference to the receiver's evidence that, with prudent management, BSF could produce up to 1.2 million kg/ms per annum.

[300] Mr Armstrong did, however, agree that a prospective purchaser would assess historic production levels and how they were achieved and consider whether lack of water constrained production in a material way.

Average efficient production of BSF in 2007

[301] After conferral, the valuation experts reported as follows:

[1] What is the appropriate production potential to assume for valuation purposes?

The valuers have not been able to agree on the respective average efficient production assessments for a without water restriction assumption and a with water restriction assumption. The differences are:

	<i>Without water restriction assumption</i>	<i>With water restriction assumption</i>
<i>Mills</i>	<i>1,283,000 kg</i>	<i>1,000,000 kg</i>
<i>Armstrong</i>	<i>1,100,000 kg</i>	<i>800,000 kg</i>
<i>Larmer</i>	<i>1,100,000 kg</i>	<i>800,000 kg</i>

[2] When making assumptions regarding production, what allowances (if any) are made for feed supplies generated by:

Feed purchased in from third parties?

Under a dairy platform grazing management system it is standard practice to source supplementary feed externally for the milking herd and to winter the herd off the milking platform for a period of 8-12 weeks. This farm management model has been adopted by all valuers when assessing the average efficient production levels.

(a) Grazing rights off the property?

See above

(b) Leases of other property used to generate feed, graze stock and to provide irrigation water?

The leasing of other property can be used to generate the supplementary feed required.

[3] What value, if any, is added to the Big Sky property because of the lease of the McSkimming land?

All valuers agree that no value is added.

Submissions

[302] In Mr Ring's submission, BSF's use of the McSkimming and Awataieri properties went well beyond standard practice. He said the evidence was consistent that, in assessing the market value of BSF, the McSkimming land and water's contribution to the average efficient production could not be taken into account. Mr Ring stressed the need to assess what BSF could sustainably produce utilising only the land within its boundaries, without outside inputs, but allowing the use of other land off the farm for wintering stock and grazing young animals as accepted standard practice.

[303] In Mr Ring's submission, Mr Mills' inputs were overly optimistic. Mr Armstrong recalculated Mr Mills' table using 12,000 kg/dm, and this change alone reduced the average efficient production in the table by over 100,000 kg/ms, to 1,173,955 kg/ms. Similarly, his projected output of 1,283,000 kg/ms was greater than BSF had ever achieved before, even with the extensive inputs from McSkimming and Awataieri, including McSkimming water, and despite Mr Mills' reliance on missed similar production targets which should have led to a more cautious approach.

[304] Mr Cooke pointed out that both of the defendant's valuers assumed not even one day of less than full water availability which was plainly unrealistic, he said.

[305] Mr Cooke said that the use of the McSkimming land for grazing, crops or supplementary feed, was a routine aspect of dairy farming, and neutral in terms of BSF's valuation. There was no relevance in seeking to value/assess BSF as a self contained operation, in Mr Cooke's submission. That was not how BSF was configured, and not how it would be expected to be configured, given the availability of land in the Maniototo region. Accordingly, no discount should be attributed to the availability of additional land for supplementary grazing off farm, he said.

[306] Mr Cooke noted that Dr Davoren accepted, that, under the AusFarm model, if the PAW was 80 mm, the dry matter production using the 3.7 mm strategy increased to 15,729,000 kg/dm, which converts to 1,498,000 kg/ms. This was consistent with the evidence of the farmers, and suggested a much higher value for BSF than Mr Mills' approach. Significantly, he said, the productive assessment made by Mr Mills directly allowed for any potential conversion inefficiency.

[307] He submitted that the two years where production was seriously constrained were 2006/07 and 2007/08, being the years immediately before and immediately after receivership. In 2007/08 very low numbers of cows were milked. It was significant, in Mr Cooke's submission, that the receiver was able to increase production back up to a level over 1.1 million kg/ms in 2008/09 and then achieve 1.178 million kg/ms in 2009/10, even when there were difficulties with the Sowburn supply.

[308] In Mr Cooke's submission, it was clear that production in the period leading up to the receivership was adversely affected by the owners' disputes, internally and with the sharemilkers. Supplements were not supplied, and even fertiliser was hard to obtain. And yet the production levels were still at levels just below or just above 1.1 million kg/ms. Mr Cooke suggested that if BSF could produce at that level in dysfunctional circumstances, it was inevitable it could produce in excess of 1.2 million kg/ms with sound management.

Analysis

[309] It was common ground that the valuation of a dairy farm is derived in part from its productive capacity, being the amount of dry matter which can be generated from the farm in order to sustain production levels. Dry matter generates feed, the

availability of which affects fertility rates and milk production. The availability of dry matter can be supplemented in a number of ways. The experts agreed it was common in many parts of New Zealand to arrange for winter grazing of stock off the farm, or to bring in supplementary feed (for example hay/silage or palm kernel). All the expert valuers referred to the average efficient production as a consideration in assessing market value.

[310] Messrs Armstrong and Larmer took a slightly different approach to the issue of supplemental feed, with Mr Armstrong valuing on a purely self contained basis with off-site land being used for winter grazing only.

[311] Mr Mills' report was clear as to his assumptions. He assumed the CWA would benefit BSF and was not aware that water from the McSkimming land was used from time to time on BSF. He assumed the withdrawal of irrigation water from some non-milking platform areas three out of ten years and a 20 per cent reduction in the milking platform able to be irrigated once every ten years. I accept, given the expert evidence and indeed that of Mr Carr, that the extent and frequency of the area of the milking platform which would have irrigation withdrawn was greater than suggested by Mr Mills. Mr Mills' assumptions regarding water availability were not, therefore, correct.

[312] Messrs Larmer and Armstrong assessed average efficient production on the basis of their knowledge and experience. This is different from Mr Mills' more transparent approach, although there were valid criticisms levelled at his assumptions also.

[313] The defence contended that Mr Mills' valuation was based on information provided by Mr Carr and he was in effect influenced by Mr Carr's optimism. There was some validity in that submission, given Mr Mills had information about past production levels in comparison to budget, yet still projected high production levels. This was despite the fact the assessment was of **average** efficient production.

[314] Mr Larmer said the opinion difference with Mr Mills largely came down to per ha production judgements. Mr Mills' figure exceeded the best production BSF had

ever done to that point, which was achieved with the assistance of leased land. Mr Larmer's production capability assessment was marginally above the average production achieved over the three seasons 2007/2008 to 2009/2010 with the influence of leased land and introduced feed.

[315] On the basis of a 1200 hectare milking platform, Mr Larmer assessed average efficient production as 1.1 million kg. Using Mr Mills' assessed milking area, his 1.283 million kg of production represented 1136 kg per hectare or well over 20 per cent above Mr Larmer's average efficient level. Importantly, Mr Mills' assessments were based on assumptions about water availability which, as I say, were plainly wrong.

[316] When the three strands of evidence are combined: the AusFarm model, what was said by those who had actually farmed BSF, and the actual production figures, it is difficult to avoid the conclusion that production over 1.1 million kg/ms was achievable. When the production levels achieved under management of the receiver are considered, that conclusion is reinforced.

[317] Given the requirement of assessing the **average** efficient product, I am satisfied the appropriate figure to adopt is at least 1.1 million kg/ms. Whether Mr Carr might have achieved better, is addressed below.

The Fonterra forecast announcement

[318] The expert valuers agreed that the market for dairy farms throughout New Zealand generally follows the price received for the milk supplied, the "milk payout". Farm businesses which sell to Fonterra are contracted to supply the processing factory (Fonterra) and purchase Fonterra shares. The value and price of the shares fluctuate due to changes in the milk payout price and Fonterra policy.

[319] In May of every year, Fonterra announces the likely payout for the next season, which runs 1 June to 31 May. The payout is comprised of two components: the milk price and the dividend from Fonterra's value added activities. As the milk price underpins the farm's income, it is a factor in valuation. Generally both historic and forecasting payouts are taken into account.

[320] On 23 May 2007, Fonterra announced an opening dairy payout forecast for the 2007/2008 season of \$5.53/kg/ms. This was an increase of \$1.18 (27 per cent) compared with the final payout for the 2006/2007 season.

[321] Mr Mills considered that market participants' expectations (particularly vendors) would have reflected the changed economic circumstances as at 31 May 2007. A well informed vendor and purchaser would have had full knowledge of the changed economic circumstances as at the valuation date, he said. He considered that the market appeared to change immediately after the Fonterra announcement. An analysis of farm transactions subsequent to the valuation date indicated to him that the market gained momentum (in terms of farm price increases) throughout the 2007/2008 season.

[322] Mr Larmer described the Fonterra announcement of 23 May 2007 as putting some confidence into a rather flagging market but values did not lift immediately. He said he could not disagree more strongly with the advice given by a valuer, Mr Orchiston, to the receivers on 28 May 2007 that the Fonterra announcement increased the value of BSF including shares from \$20,690,000 to \$25,065,000. In Mr Larmer's opinion, that type of increase of value would not have occurred until later in the year in the September/October period when most farm transactions take place.

[323] In Mr Armstrong's opinion, the indications in the first half of 2007 from Fonterra were positive and provided relief and comfort to the farming community, but required caution as to the implications. He was taken to the Fonterra media release at the time which discussed unprecedented market conditions, strong global demand and that its forecast on 23 May 2007 was its highest ever. In an article in the Herald at the time, some economists were reported as predicting a payout of \$6.60 or even higher.

[324] Mr Armstrong acknowledged that Mr Orchiston's forecast did eventuate but not until many months later than the valuation date. In Mr Armstrong's opinion, the most that could have been said in May 2007 was that the market might well improve in time.

Tenders 2007

[325] In early 2007, Raymond Kean of PGG Wrightson, was engaged by Mr Frost (as receiver) to market BSF. He remarketed it for Mr Frost in 2008, resulting in the ultimate sale to Harvard.

[326] Mr Kean had been involved with attempts to sell BSF over a number of years. In particular, he had been engaged by Mr Carr some years prior to his engagement by Mr Frost to sell BSF but they were unsuccessful in doing so. There was some reference to an offer of \$30,292,029 with a possession date of 31 January 2006. The offeror was not considered credible. That same party tendered in 2008 and the same reservations were noted.

[327] Mr Kean recalled that Mr Frost was very conscious about ensuring that BSF was properly marketed for sale, being concerned about potential claims if there were any suggestion that it had been sold at other than best price. Mr Kean's marketing proposal dated 10 April 2007 referred to previous offers of between \$14,000,000 and \$16,000,000 for land, buildings, dairy shares and irrigation plant, irrigation shares and dairy cows. Mr Kean noted an offer was made in September 2006 for \$24,500,000 plus GST, apportioned as to land, buildings and shares of \$20,632,250, stock totalling \$3,467,750 and farm plant of \$400,000. Mr Kean considered that BSF was extensively marketed, including through national advertising in newspapers, internet listings and industry publications, and that the price ultimately received from Harvard was at the upper end of possible expectations.

[328] Mr Kean was involved in showing purchasers around BSF in 2007 and described strong interest. He said a receivership sale could create more interest in a farm, with potential tenderers assuming they could get a bargain. However, once more parties became interested, the competition increased. He agreed that BSF was one of New Zealand's largest contiguous dairy farms, a major enterprise and that the target purchaser was a sophisticated investor aiming to maximise potential production.

[329] He also agreed that finding such an investor could take time and that, in 2007, the circumstances surrounding the joint venture breakup, and the disputes between the

joint venture and the sharemilkers were known in the market. His understanding was that the joint venture had gone into receivership because it could not pay its bills.

[330] Mr Frost considered BSF was hard to sell because it was so large, the water position was uncertain and it required significant investment to obtain an optimal return. Four offers were received as a result of the 2007 tender process, ranging from \$18,091,000 to \$22,070,000, inclusive of shares. Plant and cows were to be paid for at valuation. Comparing these offers to Mr Carr's offer under the ASA on a like for like basis, Mr Frost concluded that they ranged from \$1,511,000 under what Mr Carr had offered, to \$2,448,000 above.

[331] The first tender of \$22,070,000 was from an Auckland party with other business interests. The report noted that there were many conditions including "satisfaction with all the important things".¹⁰ The second tender was from someone known to Mr Kean as owning dairy farms throughout New Zealand and no conditions of note were included. The third tender was from Mr Kirkwood, and included a condition on water rights, in particular, that if the Carr/Beattie water right were unavailable, the price would reduce by \$1,500,000.

[332] Mr Kirkwood became aware of dairy farming opportunities in the Maniototo Basin in 2007 and began investigating options which included BSF and also the property known as Stationview. Ultimately, Mr Kirkwood and his partners purchased Stationview in August 2007 and settled the purchase in June 2008. Mr Kirkwood saw the Maniototo Basin as an area which was underperforming and he believed that, with better management of water, fertility, grass age and species, the area could produce at levels similar to other irrigated areas in North Otago, Canterbury and North Canterbury.

[333] He described BSF as generally well laid out and presented neatly, despite being operated in receivership, and his key observation was that the housing was run down and in urgent need of capital maintenance. BSF was certainly better presented than Stationview and the general standard of improvements including the dairy sheds,

¹⁰ The eventually successful Harvard bid involved input by a party also associated with the first tender, described as a business person involved in putting together that type of business enterprise.

fencing, lanes, pump sheds and other improvements were superior to Stationview, he said.

[334] Mr Kirkwood saw opportunities on BSF to improve the efficiency of irrigation and harvest more water. He tendered for BSF, treating the receivership as an opportunity for an upside. Although he recalled offering approximately \$29 million, including Fonterra shares, the documentation suggests that was incorrect and his total tender was \$20,500,000.

[335] When the expert valuers conferred, they were asked: are the offers in June 2007 relevant and if so, how? They responded:

None of the valuers were aware of the June 2007 offers when carrying out their valuations. Mr Mills states that the circumstances surrounding the receivership sale process would need to be taken into consideration when analysing offer prices and therefore he gives this information a relatively low level of weighting. Messrs Armstrong and Larmer see the information as requiring some consideration as part of the overall basket of evidence.

[336] It was put to Mr Mills that the tenders received in 2007 represented an actual reflection of the value of BSF at the time. In Mr Mills' opinion, the market would have been fully aware of the receivership sale process and his experience suggested purchasers tend to discount their offers as a consequence.

[337] Mr Mills estimated a discount factor for forced sale valuations of farm properties of anywhere between 15 to 25 per cent, depending upon the risk associated with the forced sale. In his opinion, this level of discount placed Mr Mills' valuation within reasonable range of the 2007 offers.

[338] Mr Larmer's valuation of \$25 million (assuming the milking platform could be fully irrigated without restriction) was about 13 per cent above the highest tender (shares inclusive) and about 23 per cent above the average of the four tenders. In Mr Larmer's opinion, this was due to the receivership, and the differing valuations if water limitations were factored in. When compared to his estimated "without adequate water" value the lowest tender was 8 per cent below it, the highest 12 per cent above, and the average was just over 3 per cent above his valuation. Mr Larmer was of the

view that the tenders gave more weight to the "restricted water" rather than the "fully watered" scenario.

[339] In Mr Larmer's experience, forced sales could range from having no impact at all to causing a 30 per cent reduction in value. He did not have sufficient knowledge to comment, for example, as to how well known the receivership was in the area and whether its impact was confused or masked by the water situation. He accepted that, in principle, it was a factor.

[340] Mr Armstrong calculated the value of the shares and deducted them from the offers to establish the net land sale pricing as set out below.

Offer	Total offer	Offer after deduction of shares	Land/ha
1	\$22,070,000	\$13,902,774	\$7,899
2	\$20,510,000	\$12,332,774	\$7,012
Kirkwood	\$20,500,000	\$12,082,774	\$7,007
4	\$18,091,000	\$9,923,774	\$5,638
Average	\$20,282,750	\$12,125,524	\$6,889
Mr Armstrong's assessment without water, adjusted for full number of shares actually offered	\$21,805,426	\$13,638,200	\$7,748
Mr Armstrong's assessment with water	\$25,990,500	\$18,521,500	\$10,523

[341] Mr Armstrong considered this showed the irrigation supply risk was recognised by the tenders, as it was in his assessment of the value with limited irrigation water, and therefore confirmed his market value assessment as at 31 May 2007.

[342] Mr Armstrong said there was a presumption that a receivership sale would have an impact on price but that did not always occur. Farms could be tainted for a number of reasons, for example, poor management or the process being undermined by a vendor farmer. In other words, the actual circumstances needed to be considered, he explained.

Findings

[343] Messrs Armstrong and Larmer concluded that the 2007 tenders were a reflection of tenderers' awareness of water problems on BSF. They did not satisfy me as to the foundation for that conclusion. The report on the tenders showed that only Mr Kirkwood's offer was conditional upon the Carr/Beattie right being available.

[344] The 2007 tenders closed on 26 June 2007. I accept that, if anything, the offers are higher than they would have been if based on a 31 May 2007 market value.

[345] The bids for BSF received by the receiver in 2007 must be considered in the context of the receivership. While there will not necessarily be any discount on account of a receivership sale, I conclude that it is reasonable to assess the tenders as having been subject to a discount to reflect the fact of a receivership sale given:

- (a) the expert valuers' evidence;
- (b) Mr Nelson's description of BSF as run down at the time of his arrival in June 2008;
- (c) dissatisfied sharemilkers were suing the joint venture;
- (d) rumours of poor management and the evidence that the joint venture's problems were widely known;
- (e) the price eventually paid by Harvard was higher than its tender price.
- (f) the evidence of Messrs Kirkwood and Le Fleming that they saw the receivership sale as an opportunity Mr Le Fleming said he had a "crack" at BSF in 2008 and was "fairly aggressive" because he saw it as "a pretty damn good opportunity for us to grow our business". He tendered \$19,742,500 and he said:

I was looking for a hot opportunity. It was pretty hot. People didn't want to touch Big Sky. She was like a hot coal so I was having a crack. ... I was hoping that Murray Frost instead of

giving me a hard time would actually say well here is \$19 mill, take it and go. That was the attitude.

Mr Kirkwood was asked about his tender and said he considered it “an opportunity for upside and, speculative as it was, ... we saw a good opportunity and priced accordingly”. When asked what he meant by upside he said:

I would have liked to have seen that in a space of five years, of around \$10 million ... we would have thought our equity would have been gained in that upside.

[346] Furthermore, the 2007 process was suspended. Mr Kean referred to the potential for negotiation with bidders following the close of tender date, so the offers made at the tendering stage might not reflect the eventual price.¹¹ Both Messrs Larmer and Kean confirmed that, given its size and scale, it would take time before BSF could be properly sold. The 2007 process was truncated and the sale process would have needed to run its full course before it could be fully relied on as evidence of the value of BSF. The tender process reached its ultimate fruition through the sale to Harvard.

Stationview

[347] Mr Kirkwood bought Stationview in September 2007, after offering \$20,500,000 for BSF. Mr Mills said that, at the time of his 2007 valuation of BSF, Stationview was on the market for \$12.5 million which the agent considered was an achievable price, and which was in fact achieved some three months later. In Mr Kirkwood’s opinion, Stationview and BSF were very similar in terms of typography, soil fertility and storage, although Stationview had the advantage of on-farm storage. It could also be farmed as three units but was sold as one overall. Mr Carr considered BSF was relatively worth quite a lot more than Stationview, as Stationview’s soils, improvements, irrigation supply and distribution systems were, at that time, inferior to BSF. Mr Yardley carried out roadside and lane inspections of the farms, and in his opinion, BSF had better quality land than Stationview and therefore a superior productive capability.

¹¹ Harvard’s 2008 tender was in a range of \$23 to \$28 million, but the price was ultimately just over \$30 million.

[348] In his evidence Mr Mills said he considered the Stationview sale supported his valuation, and provided the table set out below:

Table 2. Value Benchmark Comparison – Big Sky v Stationview

Description	Big Sky	Stationview
Assessment/Sale Date	June 2007	September 2007
Total Area (Hectares)	1,647.51	709.20
Effective Area (Hectares)	1,476.00	578.00
Avg Efficient Prdn (Kg/ms)	1,283,000	581,050
Market Value/ Total Sale Price	\$29,090,000	\$12,500,000
\$/Ha	\$17,657	\$17,625
S/Eff Ha	\$19,709	\$21,626
\$/Kg/ms (Avg Eff)	\$22.67	\$21.51

[349] In Mr Mills' opinion, the relative value difference on a per kg/ms basis was reflective of the relative difference between the two farms' core resource base, state of development and level of improvements. He calculated a value per hectare of \$17,657 for BSF compared to \$17,625 for Stationview and a dollar price per effective hectare of \$19,709 and \$21,626 respectively.

[350] Mr Larmer said Stationview was the best comparison to BSF, as the only dairy unit successfully marketed in the Maniototo over the period. He calculated Stationview's value as about \$10,000 per milked hectare, and believed that Mr Mills must have analysed the Stationview figures in a different way from him. Mr Larmer confirmed he would expect a smaller farm, Stationview, to have a higher price per hectare. He disagreed with Mr Crighton's conclusion that the Stationview sale price aligned very well with Mr Mills' valuation of BSF and saw it as supporting his own valuation.

[351] Mr Armstrong took issue with Mr Mills' comparison with Stationview. Mr Armstrong said comparison of the farms on a price per kg/ms basis was inaccurate, as it was based on Mr Mills' analysis of BSF which assumed a higher annual production than he did. He also criticised the per hectare price as calculated by Mr Mills, saying one figure could not be used over the whole property when there was a divergence of productivity and different land classes.

Findings

[352] Mr Cooke criticised Mr Larmer's evidence, saying his analysis aligned with the value of Stationview as ascribed by Mr Mills but that Mr Larmer then adjusted his assessment of BSF's open market value on the basis of his own judgment. However, I am not satisfied the situation was quite as simple as that.

[353] Mr Mills' comparison was based on the value of each property, including the Fonterra shares. I accept that, unless the value of the shares transferred with each property was in identical proportion to the land value, the reliability of the comparison is undermined. Furthermore, Mr Mills' comparative table was based on his assessment of average efficient production on BSF, which was challenged.

[354] Mr Ring submitted that the sale price of Stationview was not a reliable comparator in assessing BSF's market value as at 31 May 2007, since Mr Kirkwood contracted to purchase Stationview in August 2007, after the market had started to reflect the effect of May 2007 Fonterra forecast announcement. However, both Messrs Larmer and Armstrong described the impact of the Fonterra forecast occurring only later in 2007. Mr Larmer said the increase "didn't really start to appear in the market until October, November" and Mr Armstrong said the increase "happened... much later, much later, many months later than the valuation date". There was no further announcement until December.

[355] I am therefore left in some doubt as to how to assess the Stationview sale in the context of an analysis of the market value of BSF in May 2007.

Tenders 2008

[356] In 2008, a further sale process for BSF was conducted. This resulted in six tenders submitted in November 2008, plus a private proposal from Mr Carr which was submitted in October 2008. This second round of tenders resulted in tenders varying from \$14.75 to \$32.717 million. The highest was rejected on the basis that Mr Frost had very serious reservations about the tender.

[357] The highest realistic offer came from Harvard, whose indicative tender was between \$23 million to \$28 million, inclusive of shares. It appears that a negotiation process followed, because by all accounts the contract was not entered into until March 2010 at a price of around \$30 million. Following approval from the Overseas Investment Office, settlement took place on 30 September 2010. The sale included additional cows, crop and silage, barley, additional Fonterra shares (required as supply increased), and the operating expenses incurred from June, July and August.

[358] The land sale component, as set out in the invoices for the curtilage area, land and building and interests in water rights, totalled \$17,421,008. The plaintiffs put the overall figure at \$18.1 million or higher.

[359] If the figure of \$17,421,008 is used for the land component, it was \$1,100,492 less than Mr Armstrong's valuation of BSF with an adequate supply of water and \$5,367,226 more than his limited water supply valuation of \$13,709,200.

[360] Mr Larmer was asked whether there was a potential discount given the Harvard sale was as a result of the receivership, and given comments attributed to Harvard at the time of its purchase as reported by Scoop to the effect that the sale was as a result of a receivership "hence the resultant discount on acquisition". Mr Larmer accepted, on that basis, that it appeared Harvard considered they had purchased BSF at a discount.

[361] It was then put to Mr Larmer that the Harvard sale demonstrated the 2007 tenders were less than market value. Mr Larmer said that depended upon the market, although his impression was that by 2010 farm values were back to the same levels as in 2007. It also assumed BSF had not been improved since 2007. He accepted that the use of the Harvard sale as a guide to the 2007 market needed to take into account whether or not there had been a discount on the sale price as a result of the receivership. However, his opinion remained that any discount on the sale by reason of the receivership was minimal.

[362] Mr Larmer also stated that, if he were wrong in saying Harvard was unaware of water issues, he would have to accept the Harvard price was a good indicator of the value of BSF in May 2007.

[363] In Mr Ring's submission, the Harvard sale was not a reliable comparator as it was negotiated almost 18 months later, Fonterra milk prices had changed markedly, and the share price had declined. BSF had also had the benefit of extensive inputs including fertiliser, and was sold to an entity with other farming interests in the area, and with sufficient access to capital to invest in the water mitigation.

[364] In Mr Cooke's submission, the price was largely comparable with the \$20,767,000 value reached by Mr Mills following expert conferral, excluding livestock and Fonterra shares. That was particularly so, he said, given the evidence that a sale by a receiver can involve a discount on the true market price. Mr Kean said in his evidence that the price achieved was at the higher end of expectations, but accepted that was so bearing in mind it was a receivership sale. Furthermore, Harvard publicly stated that it had acquired the assets at a discount from the receiver. In those circumstances, said Mr Cooke, it can fairly be said that it was more likely than not that there was some price discount. Using the bottom level of the discount range adopted by Mr Mills, a 15 per cent reduction, would bring the price at, or above his valuation, he said.

Findings

[365] It is clear from the receiver's report of 19 March 2010 that, as at that date, he had not accepted an offer for BSF. This evidence was important in two ways. First, it supported the plaintiff's contention that a sale of BSF would take some time to negotiate. Secondly, it supported the evidence as to the market value of BSF on 31 May 2007 given the evidence that, in 2010, sales had returned to a 2007 level.

[366] Although both Mr Larmer and Mr Armstrong suggested that Harvard did not properly understand the problems with the water supply to BSF, there was no basis for that assumption given the disclosures about water availability in the tender documents.

[367] The Harvard sale is, therefore, important to a consideration of the market value of BSF as at 31 May 2007.

Conclusion as to market value as at 31 May 2007

Submissions

[368] In Mr Ring's submission, based on inadequate water supply, the appropriate range of market values to adopt in calculating damages was \$20,750,000 - \$22,320,000, inclusive of shares. Mr Ring said the average was \$21.5 million, including the Creek Block,¹² and this should be adopted as the true market value of BSF (inclusive of shares) as at 31 May 2007, with a \$300,000 deduction for the Creek Block. The difference between the true market value, on that calculation, and the ASA price of \$19.7 million was just \$1.5 million, which he submitted should be the plaintiffs' maximum award of damages under this head of loss.

[369] If the "no water restrictions" position were adopted, in Mr Ring's submission, the Court should take the average of Mr Larmer's valuation of \$25,300,000 (\$16,600,000, excluding shares), and Mr Armstrong's, of \$25,690,500 (\$17,539,500, excluding shares), both excluding the Creek Block. Deducting \$19.7 million from an average of \$25,395,250 allowed a maximum award for damages of \$5,695,250.

[370] In Mr Cooke's submission, when the analysis undertaken by both Messrs Larmer and Armstrong was considered, they in fact confirmed the valuation put forward by the plaintiffs. Those experts have then applied judgment, in a way which was not entirely clear from their evidence, he said, to reduce that figure.

Analysis and findings

[371] All of the expert valuers are registered valuers. Messrs Larmer and Armstrong, the defence experts, are fellows and life members of the New Zealand Institute of Valuers.

¹² Specifically, \$21,535,000 – excluding the calculated Mills' assessment based on 1,000,000 kg/ms.

[372] Mr Mills, the primary valuer relied on by the plaintiffs, had his experience and expertise, as well his relationship with Mr Carr, challenged, in an attempt to undermine his standing and objectivity as a valuer in contrast to Messrs Larmer and Armstrong. He had only been a registered valuer for six years when he carried out the 2007 valuation. As against that, Mr Mills had himself farmed for three years and his university studies included farm management as well as valuation, all these factors being of benefit in assessing the value of farms.

[373] Mr Mills' valuation was supported by Mr Crighton. A fifth registered valuer, Mr Orchiston, was also referred to although he was unavailable to give evidence. Mr Orchiston gave a report to the receiver in May 2007. In light of the 23 May 2007 Fonterra announcement, he increased his prior valuation of \$20,690,000 including shares to \$25,065,000 on the same basis (he did not provide a land and buildings figure). He assumed 1 million kg/ms as the average efficient production of BSF.

[374] Valuation standards define "market value" as:¹³

The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

[375] This definition of market value is extended by the need to consider the highest and best use of the asset, defined as:

The use of an asset that maximises its potential and that is possible, legally permissible and financially feasible.

[376] The experts agreed that the highest and best use for BSF at 31 May 2007 was for dairy farming. That use, however, could only be achieved through irrigation.

[377] Messrs Larmer and Armstrong were prepared to accept Mr Mills' assertion that he had valued BSF as one aggregate although considered three separate units. It appears the concession was rather reluctantly given. I am satisfied, from his evidence, that Mr Mills did use that approach.

¹³ International Valuation Standards Council "International Valuation Standards 2013 – Framework and Requirements" (2013).

[378] For the reasons given above and as conceded by Messrs Mills and Crighton, an average efficient production of 1.1 million kg/ms per annum is a reasonable assessment for BSF.

[379] Mr Mills took his higher assessment of the average production figure, and then made a productive valuation assessment. I accept Mr Mills' difficulty valuing BSF in 2007 with no comparable land sales, and consider this was a reasonable approach. However, the income approach requires numerous assumptions. An example of the challenge to those assumptions was the use of farm working expenses of \$2.72 kg/ms, which was more optimistic than the \$2.98 kg/ms the plaintiffs were predicting and well below Mr Frost's actual figure of \$3.75 kg/ms and the industry average for the 2007/08 season. Further, the assumption in Mr Mills', and therefore Mr Crighton's, valuation as to water availability and periods when there would be a restriction on water to the milking platform, was incorrect. The experts all agreed that the best approach was a comparative sales analysis.

[380] Mr Mills' valuations were reasonably consistent from the time of his first valuation in 2003. As against the various inaccuracies identified, Mr Mills' valuation was still the only one given at the time.

[381] I also conclude that Messrs Armstrong and Larmer mistakenly assumed that the 2007 and 2008 tenders were at the level they were because of assumed water problems. That does not correspond with the evidence. It is fair to infer that any identified issues with water would likely have resulted in offers less than the tendered price, as can be seen by Mr Kirkwood's 2007 offer where any unavailability of the Carr/Beattie right was noted in the conditions as decreasing the face offer. The water situation was made plain in the sales documents issued in connection with the 2008 tender.

[382] Although Mr Kirkwood's 2007 tender included a condition about the Carr/Beattie right and water generally, it was not clear what his position would have been had he been given the information provided by GCA, referred to above. Notably, Hanover was provided with this information and was still prepared to grant full funding to Mr Carr. I do not accept the proposition advanced by Mr Ring that, as a

short term funder, Hanover would be less concerned about potential water problems than a purchaser. There was no evidence to support that suggestion. Hanover was advancing the full purchase price with interest capitalised for a year. It would obviously have been concerned about the value of its security, as evidenced by the fact it identified water rights as an issue and requested advice about them from GCA.

[383] Mr Armstrong conceded that the letter from GCA to Hanover concerning the water rights and the letter from Water Resources Otago as water consultants, were the type of advice a prospective purchaser could have been expected to take about the water rights benefiting BSF. The letter from Mr Pope to Mr Kirkwood dated 30 June 2007, saying the Sowburn required proper maintenance to ensure its full flow potential, also falls into that category.

[384] As stated above, in my view a prudent purchaser would allocate some risk to the continued availability of the Carr/Beattie right, although at a relatively low level in the circumstances given the GCA advice at the time. Such a purchaser would also allocate some risk to the continued availability of the McSkimming land. It had a particular advantage as support land for grazing given its proximity to BSF and for its water rights. I accept the probability in the circumstances that the lease would continue to be renewed but there was certainly risk associated with that. The objective market value would take these factors into account.

[385] The Stationview sale should have been of some assistance, although all the valuers maintained it supported their varying assessments of market value. Mr Mills' table comparing Stationview and BSF on the face of it supported his analysis but the inputs into that table were from his assumptions, for example, as to average efficient production.

[386] I also accept the evidence of Messrs Armstrong and Larmer that, as at 31 May 2007, the shift as the result of the Fonterra May 2007 announcement would not have been to the significant degree suggested by Mr Orchiston, although it would be fair to reflect some increase of optimism as at that date.

[387] As a result of their conferral, the valuers reported as follows:

What is the valuation of the Big Sky as one farm?

	Without water restriction assumption	With water restriction assumption
Mills	\$20,767,000	Not Assessed
Armstrong	\$18,521,500	\$13,709,000
Larmer	\$17,920,000	\$14,000,000

For the purpose of assessing a restricted water scenario the three valuers referenced the Davoren evidence and adopted 700 ha as being able to be effectively irrigated.

[388] Messrs Larmer and Armstrong both carried out alternative “restricted water” valuations. Mr Mills declined to do so, on the basis of requiring certain information before he could undertake that task. I am satisfied that requiring that information was reasonable. I have put the second valuations provided by Messrs Larmer and Armstrong to one side in any event, as the calculations were based on Dr Davoren’s analysis. For the reasons set out, I do not accept that the water restrictions and their effect would be at the level of Dr Davoren’s assessment.

[389] On the ‘without water restriction’ basis, there was a difference of approximately 15 per cent between the three main valuations (four counting Mr Crichton’s peer review of the valuation carried out by Mr Mills), with Mr Mills at the top with the valuation of \$20,767,000 and Mr Larmer at the bottom of the range being \$17,920,000. However, the Creek Block at farming value (\$300,000) needed to be subtracted from the valuations of Messrs Armstrong and Larmer, reducing their valuations again. Furthermore, both Mr Armstrong and Mr Larmer approached the valuation on a “fully irrigated” basis whereas, as indicated, the reality was that the water available to BSF was somewhat less than what those experts meant by that term.

[390] There was some legitimate criticism levelled at all the valuers and some of the differences between them can likely be ascribed to their slightly different approaches and that, as they all observed, valuation is a matter of judgment. In any event, I must come to my own judgment as to BSF’s market value taking into account the experts’ views and the competing evidence.

[391] Not only was Mr Mills' valuation higher than that of two highly experienced and respected valuers but it was also higher than what any party was prepared to pay at the time as evidenced by the tenders. The evidence of the tenders is invaluable because it shows what willing purchasers were in fact prepared to offer as their opening gambit. The average was \$12,125,524, after deduction of shares. With a 15 per cent increase to recognise the fact of the receivership and adverse publicity at the time (\$1,818,828), the average tender would be in the region of \$13,944,353. If the discount for a receivership were set at 30 per cent, the figure would be increased by \$3,637,657, giving an average of \$15,763,181. Even on that basis, all of the offers made at the end of June 2007, were less than the experts' assessments.

[392] However, an average of \$15,763,181 sits relatively well with the price paid by Harvard for land and buildings, being about 90 per cent of Harvard's price, based on Mr Armstrong's calculation of \$17,421,008. This price is very close to Mr Larmer's who assessed market values in mid-2010 as being at similar levels to those at 31 May 2007. The Dairy NZ economics 2010-2011 survey indicated that land prices were at approximately the same level in 2007 and 2010. The average sale price per hectare (2010 dollars) was \$28,307 in 2007 and \$27,548 in 2010.

[393] I do not consider it necessary to apply the same level of discount for a receivership sale to the price paid by Harvard as I would apply to the 2007 tenders because I am satisfied from the evidence that, by the time of the 2008 process, BSF was being run in a reasonable and productive way, having been improved under the receiver, and there was a period of negotiation. The Carr/Beattie right had been renewed by the time of sale. It is difficult to determine precisely how much weight should be applied to the comments ascribed to Harvard in the Scoop article, but even if a 10 per cent increase were applied, the total value would be around \$19 million.

[394] It is very difficult to go beyond the evidence of actual offers for BSF. I am satisfied it is appropriate to assess market value of BSF as at 31 May 2007 at \$17,421,008 (excluding shares) being the price paid by Harvard on a comparative basis (accepting Mr Armstrong's analysis). Although the circumstances were somewhat different, this assessment recognises the factors set out above, as well as

deducting the value of the Creek Block and allowing a risk factor in connection with the Carr/Beattie right. Including shares of \$7,528,144, the value was \$24,949,152.

[395] Once the ASA price of \$19.7 million is deducted, damages of \$5,249,152 are warranted.

Value of BSF in late 2007/2008

[396] The plaintiffs say that their loss should be assessed “in light of” changes in the value of BSF occurring after 31 May 2007, the date of breach, which would more fairly represent their true loss. This question involves considering the Fonterra announcements after 31 May 2007, the law on the date at which damages should be assessed, and assessing whether the approach is appropriate in this case given the evidence.

Fonterra announcements post 31 May 2007

[397] Over the period from 2004 through to 2009 the following Fonterra payouts occurred:

Year	MS/Kg	% Change
03/04	\$4.25	17%
04/05	\$4.59	8%
05/06	\$4.10	-10.6%
06/07	\$4.46	8.8%
07/08	\$7.90	24%
08/09	\$5.14	-35%
09/10	\$6.10	18.7%

[398] Mr Mills provided an affidavit in High Court proceedings dated 3 April 2008 commenting on the value of BSF as at April 2008, considering increases in the dairy payout in the preceding season. He observed:

... there has been a significant increase in the value of dairy farm properties throughout the South Island. The substantial lift in farm values is largely attributable to the increase in farm returns. ...

Our research and analysis of recent farms transactions in the Canterbury and North Otago Regions indicates that dairy farm values have increased in these locations by approximately 45 per cent compared to the previous year.

... accepting, the relevant differences in the subject property's location and productive potential relative to the Canterbury & North Otago Regions I would estimate that the market value assessed in the valuation dated June 2007 is likely to have increased.

Subject to the limiting assumption set out in my valuation report and assuming a industry standard level of farm management (the season) I would estimate the Big Sky farm assets are likely to have increased by an average of 25 per cent during the 2007/2008 season. This value increase would estimate the market value of the farms to be in the region of \$36 m.

[399] At the time of Mr Mills' affidavit, the predicted final payout for the season was \$6.90. Mr Mills estimated an average 25 per cent increase to the value of BSF, resulting in a market value of approximately \$36 million. This figure suggests that the 25 per cent increase was applied to the Fonterra shares as well as land and buildings. This estimate was based on the general farm value trends observed from irrigated land sales throughout the South Island.

[400] In April 2008, Mr Orchiston prepared another valuation in light of the increased Fonterra payout on 12 April 2008 of \$7.30 per kg/ms. He increased his valuation of BSF to \$21,660,000 for land and buildings, and \$28,560,000 including shares, plus milking plant at \$500,000, not including stock. He took 1 million kg/ms as the annual production. As he had done previously, he applied a discount of 10 per cent in respect of water, reliance on off farm grazing/feed and older pasture. In November 2008, Mr Orchiston's further valuation put a value of \$22,860,000 on land and buildings, rising to \$28,460,000 with the Fonterra shares, although by that stage the Fonterra shareholding was reduced because of lower production. Again, he applied a 10 per cent discount.

[401] Mr Orchiston's valuations do not support the same level of increase as Mr Mills. Mr Orchiston's valuation as at the end of May 2007 gave a value of \$25,065,000 including shares, and did not provide a land and buildings figure. His April 2008 valuation of \$28,560,000 was an increase of approximately 13 per cent over his May 2007 figure.

[402] In Mr Larmer's opinion, it would be correct to say that, by September, there would have been more indication of changes to farm prices, saying evidence from October and November showed a sharp uplift in prices, increasing by about 25 per

cent. He agreed that BSF was one of the largest contiguous farms in New Zealand. He accepted that the sale of an enterprise such as BSF would take time and it would be reasonable to anticipate at least a year.

[403] Mr Armstrong said confidence and enthusiasm would have built up with later announcements. He confirmed transactions would have started in the “selling season”, with prices picking up in October/November 2007 and continuing as prices firmed.

[404] Mr Carr was confident that he could have sold BSF outright if he had wanted to after settling the ASA. Because most dairy farms settle at the end of the season, the sale would have occurred on 31 May 2008, he said, and by that stage he would have been on BSF for 12 months. He was confident that production would have been recovered to around 1050 to 1100 kg per ha. This would have meant a production level overall of over 1.3 million kg/ms.

Submissions

[405] In Mr Cooke’s submission, a series of factors demonstrated why the loss needed to encompass the increase in value of BSF in 2007 and 2008.

[406] All of the valuers, and the market data, confirmed that there was a very substantial increase in values in the 2007/2008 season arising from the increased Fonterra payout forecast. It would always take time to achieve true market value on a sale. If the plaintiffs had acquired BSF and immediately sought to realise its market value, they would have been doing so in the 2007/2008 year, in Mr Cooke’s submission.

[407] The 31 May 2007 transaction preceded the next season. Mr Cooke said it would be unrealistic not to take into account the loss by reference to the next production season, given that production drives value.

[408] Mr Cooke referred to the valuation provided by Mr Orchiston on 28 May 2007 as demonstrating that, at the time the ASA was cancelled, the increase in farm values from the higher Fonterra forecast was recognised as giving rise to a significant increase in value of BSF. He noted media predictions that the changed level of forecast “will

actually push that to \$6.60 or higher”. Fonterra itself stated in its 23 May announcement that it expected “these market conditions to continue this year”. That assessment proved accurate, said Mr Cooke, with the December increase to \$6.90 and the January 2008 increase to \$7.90. The increase in market value was, in Mr Cooke’s submission, more than just foreseeable at 31 May 2007. In Mr Cooke’s submission, to deny the plaintiffs the very benefit contemplated at the time of the breach, would be unfair. Even Mr Armstrong and Mr Larmer, who were critical of Mr Orchiston’s valuation, ultimately accepted that he was proved to be right, he said.

[409] Mr Cooke submitted that the fact of the Fonterra announcement, forecasting a substantially increased record payout, was one of the very reasons why GCA was negligent in its failure to be ready for settlement on 31 May. The risk that the Humphries’ interests would wish to cancel the ASA was well known, and the fact of the Fonterra announcement was probably a highly significant reason why the Humphries’ interests decided to cancel the ASA when the opportunity presented itself, he said. Consequently, he said, it was a very significant warning to GCA to be ready to settle, and accordingly part of the negligence involved in the case. It also represented the very benefit the plaintiff lost.

[410] Mr Cooke also pointed out that, although the date of GCA’s breach was 31 May 2007, the plaintiffs were unaware of the breach at that date. Mr Carr explained that he was not aware of GCA’s failings until the High Court judgment declining specific performance on 29 February 2008. It would only have been at this stage, said Mr Cooke, that the plaintiffs were aware of the loss they suffered at GCA’s hands.

[411] In the circumstances, the plaintiffs were unable to mitigate their loss by buying another farm of similar value, in Mr Cooke’s submission. He said that for nine years, the plaintiffs were held out of their capital and it was during this period that Mr Carr would have been building up BSF as a significant dairy enterprise. It would simply be unfair, in his submission, to ignore what transpired after 31 May 2007. Assessing the position by reference to the immediately following dairy season was not unfair to GCA, but was necessary to do justice to the plaintiffs.

[412] It was obvious, in Mr Cooke's submission, that once the increased Fonterra forecast was announced and the market commentators were suggesting further rises to come, Mr Carr would have waited to sell until at least October 2007 and probably more likely the following year. In those circumstances, it was more probable than not that Mr Carr would have achieved the \$36 million suggested by Mr Mills in April 2008, he said.

[413] The defence position was that assessing the claimed loss at a later date than the date of breach was not pleaded until mid-trial, on 3 June 2016, and GCA would be prejudiced if this alternative basis of loss were allowed. Mr Ring said that, before the trial, GCA did not brief any valuation evidence on any other effective date and it was not a live issue for the experts' conferral.

[414] Mr Ring noted the general rule that, in a breach of contract case, the relevant date to assess damages is the date of breach, namely, 31 May 2007, but the Courts may depart from this "to work out a fairer solution".¹⁴ In this case, in his submission, nothing of legal or practical significance occurred between the parties during the 2007/2008 season which would provide a principled basis to depart from the general rule.

The law

[415] Although damages are usually assessed at the date of the breach, this rule is not fixed. In *Stirling v Poulgrain*, Richardson J stated, "It is not a universal rule. It yields to the Court's power in the interests of justice to fix such other date as may be appropriate in all the circumstances."¹⁵ In *New Zealand Development Co Ltd v Porter*, Tipping J cited Richardson J's comments and said:¹⁶

There will be cases in which the application of the general rule, ie the breach/date rule, will not do justice because assessment at the date of breach will not achieve the objective of contractual damages, ie to compensate the innocent party for the loss of the value of the promised performance ...

¹⁴ *Dempsey v Howe* [2015] NZCA 9, (2015) 16 NZCPR 203 (CA) at [27]. In that case, the purchaser was in continuing breach until the vendors (wrongfully) resold the property. The Court of Appeal held that assessing damages as at the resale date was "the fairer result". See also *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 420.

¹⁵ *Stirling v Poulgrain*, above n 14, at 424.

¹⁶ *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) at 466.

[416] The principle described in *Stirling v Poulgrain* was adopted in *McElroy Milne v Commercial Electronics*, and in the case cited by the defendants, *Dempsey v Howe*.¹⁷

[417] The House of Lords has said that where this principle is departed from, it will be where that departure is necessary or just to give effect to the compensatory principle.¹⁸ The damages awarded should represent no more than the value of the contractual benefits of which the plaintiff had been deprived. For example, in *McElroy Milne* the Court of Appeal found that it would have been false to assess the loss at the date of the breach because:¹⁹

What it lost was not some notional diminution in the value of an investment which it had intended to retain, but the substitution for a saleable asset of one which, despite best endeavours, was not saleable for a considerable time, and then only at a substantially lower price. It would be totally artificial in a case such as the present to attempt to measure the true loss by reference to alternative valuations at the date of breach. That approach must be rejected.

[418] This approach appears to have been used primarily when there is dispute as to when a contract was repudiated, or where there is some other time lapse which requires the date of loss to be calculated differently. Often, given the requirement in contractual cases to mitigate loss, that will be at a point at which the plaintiff was able to mitigate its loss, which may have been delayed because of the defendant's breach.²⁰ *McGregor on Damages* notes that the question of the appropriate valuation date where the market value of a property changes between the time of the wrong and the time judgment is entered will often occur more frequently in tort, given there is no requirement for mitigation by seeking a replacement.²¹ In the tortious context, they noted that a higher market value may be taken into account, up until the earliest time the claim should have been brought to court.

¹⁷ *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA); *Dempsey v Howe*, above n 14.

¹⁸ *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353.

¹⁹ *McElroy Milne v Commercial Electronics Ltd*, above n 17, at 52 per McKay J.

²⁰ Examples along these lines are given in John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at [21.2.2(c)].

²¹ Harvey McGregor *McGregor on Damages* (19th edition, Thomson Reuters, London, 2014) at [19-003]

[419] The authors also commented on similar principles developing in the contractual context:²²

And with a buyer of land, it is now becoming recognised that he is not required, on the seller's default by failure to complete, to buy other land in replacement until such time as he has taken steps to obtain specific performance if such steps, though eventually unsuccessful, have been reasonably taken; or indeed until such time as he has received his damages if inflationary trends have made it too difficult for him to finance a repurchase. Here again there is justification for awarding damages based upon market value at a point in time after the date of breach and even up to the date of judgment.

[420] In *Heslop v Cousins*, a solicitor's breach of duties caused the plaintiffs to lose an option to purchase a kiwifruit orchard.²³ Chisholm J allowed a later date than the date of breach to be adopted, as long as it was the first reasonable date at which the proceedings should have been brought, looking at the facts.²⁴

[421] Even in circumstances where no specific reason delayed seeking damages, judges have adopted different dates for assessing the loss. In *Cohen v Thomson* for example, Master Venning (as he then was) referred to the general principle that damages be based on the market value of the land at the date of the contractual breach, but noted that damages can at times be assessed at the date of a hearing, "particularly where, as here, there has been a significant move in property prices".²⁵ In his view, an adjustment allowing for a 15 per cent increase in value between the valuations closest to the date of breach and to the date of hearing was appropriate and fair.

Analysis

[422] Determining the date at which the loss should be assessed is essentially a factual question, based on what date best reflects the value lost due to the contract not being performed or breach of a duty.

[423] The selection of the later date for valuing BSF was to some extent arbitrary, as there was no reference by the plaintiffs to any specific moment in time at which the

²² *McGregor on Damages*, above n 21, at [19-004].

²³ *Heslop v Cousins* [2007] 3 NZLR 679 (HC).

²⁴ At [325] – [326].

²⁵ *Cohen v Thomson* HC Christchurch CP45/95, 26 September 1996.

plaintiffs' claim better crystallised than the date of breach, as is the more common example in the case law.

[424] The plaintiffs maintained that the new date of loss should be in the "immediately following milking season", which was when a farm would typically be sold. This could be seen as taking the "high point" of BSF value. Typically, to avoid adopting arbitrary points of measurement, the date of trial (or first reasonable opportunity by which the claim should have been brought) have usually been used as a substitute date. The very unusual progression of this case meant that the date of trial was remote to the harm. There was no attempt to argue that the date of trial should be used as an assessment. In any event, the milk solids price increased again after the point in time proposed by the plaintiffs before falling again, so the date proposed was not necessarily the high point of farm prices over the intervening period.

[425] Although the actual date of the breach was 31 May 2007, on GCA's advice, the plaintiffs proceeded with specific performance proceedings. It could, therefore, be fair to say the plaintiffs were not truly aware of the implications of the breach and its nature until that later date. As noted in the cases and texts cited above, a delayed date of assessing loss based on seeking specific performance is an established circumstance in which taking a later date of loss can be appropriate. It was not clear why the plaintiffs did not use the date at which the specific performance claims failed as the date for assessing loss, on the basis of the "first reasonable period" at which they should have pursued the breach.

[426] The significant change in the claimed value of BSF in the subsequent milking season was based on projected increases signalled prior to 31 May 2007. In *McElroy Milne* the question of foreseeability of subsequent changes in value arose in circumstances where one party was left holding an unsaleable asset. However, foreseeability may still have some relevance in determining whether assessing damages at a different point in time would fairly represent the loss. There was some force in the plaintiffs' submission that the fact of the Fonterra announcement made it even more important that the defendant was in a position to settle the transaction on 31 May 2007. That is, with the Fonterra announcement and general market optimism as evidenced by some of the market commentary, the Humphries' interests might well

have been more reluctant to sell particularly given the ASA price was not market value. There was, therefore, a reasonable basis, pre-settlement, to recognise that the value of BSF was increasing.

[427] Although the amended statement of claim was filed part way through the hearing, the defendant did not object per se although Mr Ring criticised the new position as to the date of loss in his closing submissions.

[428] The amended statement of claim dated 21 October 2014 claimed that the value of BSF as at 31 May 2007 was more than the ASA price, based on the increased Fonterra payout announced on 23 May 2007. There was no claim that the actual date of loss should be assessed at a later date. In his opening, Mr Cooke relied on the increased Fonterra payout as raising the value of BSF generally, but not as changing the date at which loss should be assessed. He did, however, refer specifically to an increase in value generally based on the Fonterra payout forecasts which occurred after 31 May 2007, and the need to adjust for this.

[429] The amended statement of claim dated 3 June 2016 was therefore the first time it was made clear that the assessment of the value of BSF included a specific claim that loss should be assessed on a later date than the date of breach.

[430] The experts did not confer on the issue of value in the following season and there was little or no cross examination of Mr Mills on this evidence.

[431] The experts did agree that an enterprise the size of BSF would take some time to sell. I note that Stationview, a much smaller proposition, was on the market as at 31 May 2007 but a contract was not entered into until approximately August 2007.

[432] Furthermore, the evidence confirmed that sales of dairy farms do not generally take place at the end of a season. Mr Crighton's evidence was that a vendor would not sell in May, which is an atypical month for farm sales. He said a vendor would wait until the typical selling season in the late spring, September, October. This was particularly so in this case, he said, because it was clear the market was changing and so there was a stronger possibility of some growth in value at the period of time.

[433] There was therefore some force in the proposition that, in order to do justice to the plaintiffs, it was appropriate to consider a sale date somewhat later than 31 May 2007. This would allow some increase to reflect the impact on the market of the May 2007 Fonterra announcement.

[434] However, even if the assessment of value takes account of the time needed to sell a property like BSF and the need for fairness to the plaintiff of allowing time for the impact of the Fonterra payout to be reflected in the market, it is not necessary to defer the date to April 2008, the date of Mr Mills' valuation relied on by the plaintiffs.

[435] In any event, Mr Mills' affidavit as to market value in April 2008 said he was giving only an "estimate" that there had been an increase "in the region of \$36 million". I accept the defence submission that this would not be a reliable basis on which to award damages. As noted above, his 25 per cent increase in value was calculated based on the Fonterra shares as well as the land value. Mr Orchiston's alternative valuations do not support such a level of increase.

[436] Mr Crighton also addressed Mr Mills' 2008 affidavit, saying:

...it is my view that this "value" must be treated with considerable caution. On the face of it, an increase in value over the June 2007 formal valuation could be substantiated; this is no more than an educated comment. It does not represent a valuation in my opinion."

[437] I take note of the acknowledgements by Messrs Larmer and Armstrong that there was evidence of an uplift in price towards the end of 2007 by as much as 25 per cent. However, I have some hesitation about the evidence, given, as it was, in cross examination and without being properly briefed or subject to expert conferral. Mr Orchiston's valuation was the only valuation carried out at the time, although that was in April 2008.

[438] Given the evidence, but noting its limited nature, in my assessment, it would be appropriate to attribute to BSF a value in the region of \$20 million exclusive of shares, by the end of 2007.

[439] However, not only was this approach not pleaded until virtually the end of the trial and I accept therefore the prejudice to the defendant of assessing damages on this basis, but also the plaintiffs' case was presented by focussing on the value of BSF to Mr Carr because of his particular skill set and the production levels he could have achieved. There was no real evidence that he would have sold BSF in the following season. The plaintiffs cannot be entitled to both market value at the end of the 2007/08 season and an uplift to the May 2007 value to reflect what Mr Carr could have achieved on BSF. That would be double counting.

Value of BSF to Mr Carr

[440] I turn now to consider the claim that the damages to the plaintiffs should be increased because of the value of BSF to Mr Carr personally, given his specialist knowledge and expertise. This involves a consideration of whether Mr Carr had a preferential position in relation to water, his knowledge of BSF, his plans for the future and his forecasted budget. It also involves an analysis of the evidence relied on by the plaintiffs as to investment value of BSF, whether that is an appropriate measure for damages and a consideration of the relevant law. I then reach a conclusion as to whether damages should be increased to reflect the particular value of BSF to Mr Carr.

Did Mr Carr have a preferential position in relation to water?

[441] Because of Mr Carr's knowledge of BSF, and what he described as his preferential position in relation to water rights, he considered he was able to optimise the value and potential of BSF. Mr Carr said it was always his ambition to be relieved of the day to day operation of BSF but remain active in the value added areas of increased harvesting and storage of water, energy production and conservation, and other engineering development opportunities.

[442] There was extensive questioning about Mr Carr's specialist knowledge and ability to maintain the Sowburn race, as compared to other competent workers. The legal efficacy and real value of the CWA was also challenged. Much of the evidence on water and Mr Carr's knowledge of and involvement in irrigation matters is set out above. I now record the more pertinent general observations.

[443] Had there ever been a non-party challenge to the CWA, Mr Carr believed he would have prevailed, given the 104 years of his family's control of water rights and his previous engagement and agreement with all existing and potential users of the Sowburn water. Mr Herlihy said he had no reason to believe that, had Mr Carr acquired BSF in May 2007, the spirit and obligations of the CWA would have changed.

[444] Russell Pope described Mr Carr as certainly knowing the value of water and irrigation. He was aware through their discussions, that Mr Carr was looking at storage of the Sowburn water right with a dam in the Creek Block. Mr Pope knew that Mr Carr was also in the process of designing a large harvesting dam, where runoff water and other supplies could be stored.

[445] Mr Baker described Mr Carr as more focused on water supplies and the security of water than perhaps anybody else he knew. As a director of MDFHL, Mr Baker was party to authorising expenditure on the Sowburn race. He said that Mr Carr was constantly working on this right to improve the flows, and reduce maintenance.

[446] Troy Pope said Mr Carr knew the Sowburn race like the back of his hand. Maintenance of the race and upgrading leaking areas were almost an obsession with Mr Carr, he said, describing him checking for any problems by walking the race throughout the irrigation season.

Findings

[447] Mr Carr was ardently interested in the irrigation of BSF, and in particular, the Sowburn race. His knowledge stemmed from when he worked on the race as a boy and his interest did not diminish over time. Mr Carr was convincing in his passion and indeed self-confessed obsession for the Sowburn race. I accept that he would have brought a level of management and maintenance to the Sowburn race unparalleled by anybody else.

[448] Mr Carr had widespread support in the farming community as evidenced by the number of local witnesses called to give evidence in support of his case. He was able to conclude the CWA in a manner favourable to him, despite others having rights

arguably more advantageous. There may well be flaws in the documentation about the CWA, but I have no doubt that, in practice, it operated as Mr Carr said. Furthermore, had there been any problems, he had the necessary relationships and goodwill to work those through.

[449] The water experts did not appear convinced that the CWA was of any real benefit. This perhaps underscored Mr Carr's advantage in having practical knowledge and experience of BSF and its water supplies, as contrasted with an academic analysis. The evidence from those actually involved with BSF and irrigation issues in the Maniototo generally supported the view that the Sowburn water and CWA was a benefit.

[450] I accept Mr Carr's specialist knowledge and experience about: the Sowburn water supply; the topography of BSF and therefore where to maximise water storage potential; the soils, noting Mr Carr's evidence that he had dug the main line supply over the whole property and therefore knew where to focus on the most productive land; the best use of land around the river margins; and the Maniototo climate.

[451] All these factors would have contributed to Mr Carr's management of and ability to achieve production from BSF.

Willowview

[452] In August 2007, the Willowview block, including 180 shares in the MEICL, was on the market. Mr Carr said that the failure of the ASA deprived him of the opportunity to purchase the block and upgrade it, to what he estimated as a market value of well over \$7 million. Mr Carr said it was a logical property for him to purchase. He discussed buying it for \$3.5 million with the owner, Mr Beattie. He intended to spend approximately \$1 - \$1.1 million converting it to spray irrigation and new pastures and potentially to another dairy unit. In his opinion, owning Willowview would have led to costs' savings in excess of \$400,000 in relation to BSF, from internalising off-farm grazing of young stock and milking cows in the winter, and feed production.

[453] Willowview has since been sold to Harvard who utilises it to support BSF in a similar way as Mr Carr would have done.

[454] This evidence was relevant because it confirmed how Mr Carr intended to manage BSF and maximise its potential.

Equity investors

[455] Mr Carr claimed he lost the opportunity to make a significant sum from the potential involvement of equity partners in BSF. By taking in equity of \$12 million, Mr Carr maintained he would have made a very good profit on the equity he would have had on settlement of the ASA in 31 May 2007. He said that GCA had a very detailed knowledge of all of his plans, and was involved in some way in virtually all his discussions/correspondence with potential equity partners. In fact, the rising dairy pay-out and the predictions for further strength in the international market eased the pressure to pursue equity partners from Mr Carr's perspective.

[456] Mr Carr said he had always planned to bring in a joint venture partner for between one third and one half of the equity in BSF. Mr Carr proposed that he and his interests would hold 50 per cent of the venture and \$12 million of equity, and that his partners would put in up to \$12.5 million of equity.

[457] Mr Carr said he would have: refinanced by obtaining a first mortgage and reducing the interest rate to about 9 per cent to generate cash surpluses (as set out in his contemporaneous business plans); fixed broken plant and equipment, painted and carried out other general maintenance on BSF over winter; spent the winter fully feeding the cows and improving the cows' condition by the introduction of special feeds; and increased cow numbers to 3300. He said he would have then shown interested parties around BSF in December 2007 when it was likely to be looking its best. Mr Carr said a reasonable estimate for those works was a budget of \$500,000.

[458] In Mr Carr's various business plans and loan applications, he included the Le Flemings as potential equity partners. They had indicated they had about \$5.5 million to invest. Mr Le Fleming said he and Mrs Le Fleming would almost certainly have bought into BSF.

[459] John Darby, a director of Darby Partners Limited and Equity Partners Limited (Equity Partners), is involved in large scale land development and investment in New Zealand. In 2007, Equity Partners was actively looking for investment opportunities in the rural sector, largely focused on large scale dairy operations. Mr Darby made contact with Mr Carr in mid-September 2007 to enquire about the opportunity to acquire BSF. In September 2007, Mr Carr told him the settlement sum was approximately \$27 million for assets with an assessed value of around \$46 million.

[460] Equity Partners later considered funding Mr Carr's litigation costs in return for an option to acquire a 50 per cent interest in the assets for \$19.5 million against their assessed value range of between \$45-50 million.

[461] Although I have some reservations, discussed below, as to the evidence of the assessed value of BSF, nevertheless Mr Darby's evidence confirmed his company's potential interest in investment in BSF.

Observations

[462] It was a condition of the plaintiffs' loan facility from Hanover that the debt was reduced by not less than \$5 million by 1 December 2007 through the introduction of an equity partner. Another condition subsequent required the plaintiffs to reduce the debt to Hanover by not less than \$15 million within three months of the advance by obtaining finance from a new lender. Equity investment was therefore a condition of Hanover's financing. It is self-evident that any equity partner would require either shares in Brookside, therefore diluting Mr Carr's shareholding, or a joint venture agreement whereby the plaintiffs' share in BSF would likewise be reduced.

[463] It is difficult to assess how this evidence should be treated when it comes to considering the plaintiffs' loss. I am satisfied on the balance of probabilities that Mr Carr would have been able to attract equity investors into BSF. He would however, have had to relinquish a substantial part of his shareholding in Brookside or Brookside itself would have had to relinquish a substantial part of its interest in BSF, 50 per cent on Mr Carr's evidence. As well as assisting in refinancing, the introduction of equity

would potentially have allowed some of the planned developments to proceed, for example, a new dam and the purchase of Willowview.

[464] I give this evidence weight in terms of assessing the value of BSF to the plaintiffs and in considering whether Mr Carr's production targets for BSF would have been achieved.

Would Mr Carr have performed at least as well as his budget?

[465] Mr Carr's loan application to Hanover referred to an estimated production of 1,200 [sic – presumably 1,200,000] kg/ms per annum, with an overall forecast of 1.27 million kg/ms discounted on a prudent level to 1.15 million kg/ms. Mr Carr's approach was that, on the basis of his knowledge of BSF, he would have been able to improve it rapidly and with improvement would come significantly increased production. He aimed to produce at least 1.4 – 1.5 million kg/ms from BSF within two to three years, and considered that such levels have now been shown to be very achievable.

[466] The three sharemilkers previously on BSF supported Mr Carr's views of its capacity. Mr Carr's forecast, said Mr Baker, was not "a big ask", referring to what had been achieved when three sharemilkers were on BSF. He said it was simply a matter of doing things differently: irrigation, fattening the cows for calving, and repairing and maintaining the irrigation system.

[467] Mr Robert's evidence was that if the Saran farm had been ready when he arrived and properly supported, it would have achieved far more production than it did. He believed that by the third season, Saran's production would have improved to about 420,000 kg/ms, its optimum production level.

[468] In Mr Le Fleming's opinion, had BSF been properly managed and resourced, it could have produced 1.2 million kg/ms in the 2007/2008 season. This was despite low production in the 2006/2007 season of 927,000 kg/ms, a performance he attributed to poor management. Mr Le Fleming rejected the notion that significant improvements could not be made in the space of one year, referring to lifting the production on his own farm by seven per cent from the previous year even when it had

performed well in that previous year. His view was that BSF could produce 1.7 – 1.8 million kg/ms per annum. This would require storage ponds and improved irrigation management and development; better herd management; an aggressive regrassing and fertiliser programme; better staff management and training programmes; and an improved financial structure.

[469] Others who had been involved with BSF also gave evidence on this topic. Mr Yardley, the farm consultant, estimated that, after 2004, BSF could have been producing around 1.4 million kg/ms per annum with appropriate inputs. He attributed the relatively poor production figures in 2007 to the receiver making the wrong decision in not continuing with three competing sharemilkers. Mr Yardley described the combination of sharemilkers, who have “real skin in the game” and the landowner, who has a vested interest in the business succeeding, as the perfect formula.

[470] Mr Yardley also emphasised the opportunities at BSF from water harvesting, and the land development opportunity on the Taireri River frontage. Mr Yardley acknowledged the use of McSkimming and Awataieri land and confirmed his predictions assumed the availability of them both.

[471] Mr Frost disagreed with Mr Carr’s assessment that it was “very achievable” that BSF could produce 1.4 – 1.5 million kg/ms. In Mr Frost’s opinion, Mr Carr underestimated expenses and overestimated production. That level of production would require very substantial investment, as well as more cows, he said. He doubted Mr Carr’s projected surplus for the year to 31 May 2008 of \$3,452,119 before interest and tax, since the professional farm manager in that year actually produced 953,000 kg/ms from approximately 2750 milked cows, producing a surplus of \$2,228,172 before interest and tax. Mr Frost pointed out that Mr Carr was planning to run the same herd which had actually been on BSF, yet BSF achieved a much smaller surplus than Mr Carr’s forecast.

[472] Mr Frost confirmed his opinion, as stated in the receiver’s tender document, as to BSF’s “tremendous potential production increase” capacity. Mr Frost’s view was that, with prudent management, BSF could achieve 1.2 million kg/ms. However, any more than that would require significant expenditure to provide storage dams to ensure

water was available, as well as the purchase of either large amounts of supplementary feed or the acquisition of additional land to enable cows to be wintered off the property.

[473] Mr Nelson considered Mr Carr's forecast of producing at least about 1.27 million kg/ms in the 2007/2008 season, from 3300 cows, using the McSkimming land but not Awataieri, as unlikely, noting water restrictions that year. In his opinion, the budget of 1.36 million kg/ms in the 2008/2009 season from 3420 cows would require large amounts of supplementary feed. He accepted that infrastructure improvements and measures such as soil monitoring would make a difference.

[474] Mr Kirkwood took over Stationview on 1 June 2008. The farm is made up of three units, all adjoining (similar to BSF). In the first season, 2008/2009, he achieved 721,895 kg/ms from 660 effective, irrigatable hectares; in 2009/2010, 755,067 kg/ms from 700 eff.ha; in 2010/2011, 782,444 kg/ms from 720 eff.ha; in 2011/2012, 885,893 kg/ms from 740 eff.ha; in 2012/2013, 923,858 kg/ms from 740 eff.ha; in 2013/2014, 941,267 kg/ms from 740 eff.ha.

[475] Mr Kirkwood considered that 1050 to 1100 kg/ms per ha was a sound sustainable base level of production in the area. This required about 500-800 kg of dry matter supplements in a good year and up to 800 kg/dm in a more challenging season. The cost of this supplement, if provided in the form of grass silage, is typically between 26 cents and 30 cents per kg. In his opinion, BSF should have been producing between 1.26 and 1.32 million kg/ms as a base level of production and levels of 1200 kg/ms per ha plus were achievable and sustainable in the Maniototo, over time, with the correct infrastructure.

[476] Mr Carr was extensively challenged on his ability to increase production in just one year. The actual production achieved under the receiver in the 2007/2008, 2008/2009 and the 2009/2010 seasons, meant there was effectively 300,000 kg/ms difference between that and Mr Carr's forecasts.

[477] Mr Carr discussed his recovery plan for his first year of ownership being to repair irrigation equipment, apply fertilizer and ensure the cows were fully fed. On top of that, he said he would undertake proper management of BSF. He said he

envisaged a role for himself in maintenance of irrigation and deferred maintenance of the Sowburn. He had planned to use Geoff Baker as interim farm manager. Mr Carr said that the sharemilkers on Alnwick and Saran had achieved in excess of 1200 kg/ms per hectare and, if all three farms did that on average, the total production levels would be 1.44 million kg/ms, well over Mr Mills' assessment of average efficient production at 1.283 million kg/ms.

[478] Mr Carr's attributed his projected increased production to his level of skill, the personnel he would have involved management and sourcing of stock feed, and not having the constraints in terms of capital and experience under which the receiver was, in Mr Carr's opinion, operating.

[479] In Mr Carr's opinion, the receiver, new to the job, did not have the requisite skills and resources immediately to improve the overall state of BSF from the previous disastrous management. The challenges were all known to him, he said, and he would have done what was necessary to restore the properties to what was a relatively low level of production compared to the actual potential. This was clearly demonstrated by the significant improvement from 2007/2008 to the 2008/2009 year, after the receiver replaced ineffective management, he said. This increase was approximately 150,000, with a further 75,000 kg/ms produced under very dry conditions the following year. This was largely without the Sowburn water but evidently with some water transferred from the McSkimming land.

[480] The 2008/2009 season produced 1.1 million kg/ms, a result Mr Carr attributed to cow numbers, observing that he would have milked more cows than were milked under the receiver. He accepted that, by this stage, BSF was being managed in a competent way, but still maintained that, even with Troy Pope as irrigation manager, the Sowburn flows would not have been maximised fully. For example, he referred to the fact that vegetation on the races was sprayed whereas Mr Carr would always clear by hand in order not to destroy root systems because such destruction allowed for a great deal more water slippage. Mr Carr's evidence was compelling in this regard.

[481] Mr Carr explained that he would have produced greater returns than the receiver or Harvard because they did not enjoy the same water flows from the

Sowburn, receiving, he said, less than half the available Sowburn water. Harvard no longer uses the Sowburn race. Mr Carr stated that the receiver and Harvard effectively “abandoned” the Sowburn, meaning they stopped maintaining it and did not know how to manage it. He pointed out that in 2011/2012, Harvard’s production was 1.156 million kg/ms from 3,300 cows with what, in Mr Carr’s opinion, was a less than satisfactory farm manager and no Sowburn water, using K-Line and roto rainer irrigation systems, with a marked improvement in 2012/2013.

[482] A Harvard report from 2014 showed total production for the 2012/2013 season of 1,469,220 kg/ms, with an average of 1412 kg/ms per hectare. This was consistent, said Mr Carr, with earlier production on a per hectare basis achieved by the sharemilkers, in trying conditions.

[483] The report noted "the dramatic increase in production in the 2012/2013 season is due to a change in on-farm management and the incorporation of the Willowview property into the Dairy Farms Partnership ownership. The subsequent increase in production for the 2013/2014 year is attributed to an increase in the milking platform area." Willowview provided an additional 120 ha. The 2013/2014 season produced a total of 1,636,000 kg/ms, an average of 1363 kg/ms per hectare. Mr Carr said that Harvard was only now implementing the improvements on BSF which he would have undertaken.

Costs of production

[484] Mr Carr’s first year budget was for what he described as a recovery year, with the two main issues being irrigation and fertilizing BSF. The budget included just under \$500,000 for cow grazing for three months to replace the use of Awataieri. He explained that his budget did not include buying silage because there was no need, given his planned management of BSF and use of the McSkimming land. Mr Carr did not accept that he would have been disadvantaged by not having Awataieri available for a full year. He discussed how he would have grown silage on BSF and used extra grazing around the edges around BSF, as well as properly using the McSkimming land.

[485] The defence criticised Mr Carr's budgeted working expenses of approximately \$2.98 per kg/ms, against what was said to be an industry average in 2007/2008. As noted above, evidence of the industry average was not, in fact, called by the defence. There was some confusion between farm working expenses and operating expenses, the latter, apparently, incorporating interest costs. What evidence was eventually put before the Court came from the Dairy NZ Economic Survey 2010-2011. That included a table summarising, inter alia, farm working expenses 2001-2011. It showed farm working expenses for owner operators, on a dollar per milk solids sold basis, as \$2.74 in 2006/2007, \$3.93 in 2007/2008, and \$3.86 in 2008/2009.

[486] Other evidence was brought on this point. Mr Baker referred to \$2.30 per kg, but this was the sharemilker cost, with another \$1 or so needed to reflect farm owner's cost. Mr Frost calculated his cost in the 2007/2008 season as around \$3.70. Mr Kirkwood, running the similar farm Stationview which he managed from Dunedin, considered the figure of \$3.70 sounded about right. Stationview's costs of production were \$3.05 per kg/ms produced in 2008/2009; \$3.20 per kg/ms produced in 2009/2010 (a drier than normal season and including capital development costs at approximately 10 per cent); between \$4.00 - \$4.30 (excluding depreciation, interest and the management wage) in 2011-2010, and \$5.11 in 2014.

Conclusion as to Mr Carr's abilities

Submissions

[487] In Mr Ring's submission, the plaintiffs' witnesses' opinions: were not based on the "60% guy"; did not take into account the use of Awataieri and the McSkimming land; were from witnesses who did not know the correct extent of water entitlements legally and physically available; assumed improvements had been carried out; and were given both hypothetically and in hindsight.

[488] He pointed out that the witnesses did not qualify themselves as experts. I confirm that, in my assessment, the evidence was given by farmers and consultants with specialised knowledge, based on their experience, and their evidence was

substantially helpful in ascertaining the facts at issue.²⁶ The evidence was therefore admissible.²⁷

[489] The plaintiffs' reliance on Mr Carr's alleged unique knowledge of BSF did not withstand objective scrutiny, Mr Ring said, given Mr Carr's prior involvement at BSF. The original Business Plan submitted to Hanover on 10 May 2007 anticipated that, at least until 31 May 2008, Farm Right would be contracted to manage and operate BSF. Maintenance of plant and machinery would not generally require unique skills and there was no specific evidence of features concerning the Sowburn which meant its maintenance would be beyond the knowledge and expertise of a contracted engineer, if the farmer were not personally up to the task, said Mr Ring. The defence did not therefore accept there was any evidence that Mr Carr would have managed BSF any better than the average farmer.

[490] Mr Ring said that the plaintiffs' claim relied on factors personal to Mr Carr and could better be considered as a loss of profit claim but it was not put on that basis. The only witness who gave any evidence in this regard was Mr Crighton and his evidence was, in the defence submission, flawed. He carried out a loss of profits calculation for the period 2007 – 2012, based on Mr Carr's projections, with the net present value calculated as \$21 million using Mr Carr's budget for 2008 - 2012.

[491] Mr Cooke emphasised Mr Carr's knowledge of BSF and how to maximise resources and production, saying he was uniquely positioned to get the best from the Sowburn race supply. He referred to Mr Carr's access to potential equity investors whose capital could be used to improve BSF. Additional development, such as the use of centre pivots, water storage and the purchase of Willowview were all reasonable prospects for the plaintiffs, he said.

Findings

[492] Mr Carr was clearly not the average farmer. He was innovative and entrepreneurial, and a very clever engineer. His innovation and foresight was

²⁶ Evidence Act 2006, s 4.

²⁷ Evidence Act, s 25.

evidenced by the work he undertook on the Maniototo water scheme. He was also able to work with other farmers and negotiate the CWA, form the companies, obtain financing, and complete the original Scheme but with a revised design and at substantially less cost.

[493] Mr Carr's abilities enabled him to identify other business opportunities, for example, the potential of Danseys Pass Hotel, and his formation of the Earthbuilding Company and Straw Bale Construction Limited.

[494] There was defence evidence from a veterinary consultant, Susanne Macky, who visited BSF in 2001 and 2002 and reported concerns about management, including Mr Carr. I put to one side these criticisms of Mr Carr, which were based on his involvement in a proposed mixed fashion feeding project, which was abandoned after adverse publicity. Mr Carr conceded that the joint venture's involvement in the mixed ration system proved disastrous. I do not accept the defence proposition that this undermined the evidence of Mr Carr's farming and general business acumen.

[495] Mr Beattie's evidence was that Mr Carr had consistently attempted to purchase more land and irrigation entitlements. Mr Beattie had direct knowledge of this through Mr Carr's purchase of his water rights in 1989, and from when he had been involved with Mr Carr as a director of the MEICL. It was no surprise to Mr Beattie that he was approached by Mr Carr in September 2007 expressing his wish to purchase Willowview.

[496] Production in 2007-2008 year was 953,000 kg/ms. In 2009, BSF produced 1,101,000 kg/ms. In 2010, a record level of 1,178,000 kg/ms was produced. This was achieved with approximately 3,300 milking cows and access to the McSkimming land.

[497] I am satisfied, given all the information, that Mr Carr could meet or at least come close to his production forecasts for the reasons explained in extensive detail by him. He intended to use very good farmers such as the former BSF sharemilkers who were clearly better than average efficient dairy farmers. There was no dispute that this would have required the McSkimming land, but given his relationship with

Mr McSkimming, there is no reason to think it would not have been available to Mr Carr.

[498] Whether Mr Carr would have met his budget is a different matter. There was some justification for criticism of his budgeted farm working expenses, considering the evidence set out above. The best evidence of farm working expenses for 2007/2008 was the actual expenses incurred by the receiver. Mr Carr on the one hand criticised the receiver for not implementing necessary measures on BSF, but his own budget showed he would have incurred less costs than the receiver, despite his desire to maximise BSF's potential. For these reasons, I conclude that Mr Carr's expenses would have been markedly higher than budgeted.

[499] The other issue with the budget is the financing costs. Hanover was providing the entire purchase price at 13.25 per cent interest and the plaintiffs proposed to refinance once settlement had occurred. Hanover's conditions required the debt to be reduced by not less than \$15 million within three months.

[500] The Business Plan produced for Hanover dated 30 May 2007 showed the first mortgage at 9 per cent interest, with interest on the second mortgage at 14 per cent. In oral evidence, Mr O'Connell confirmed that he expected a 9 per cent interest rate on the first mortgage, with a second mortgage interest rate of around 15.5 per cent. The defendant did not offer any evidence to contradict the plaintiffs' view as to likely interest rates but I note the evidence from Mr O'Connell at trial was slightly different from that included in the budget. It is reasonable to assess that there was at least an issue concerning the interest rates the plaintiffs would have had to pay.

[501] I therefore have some doubt as to Mr Carr's budget, in terms of his anticipated costs.

Mr Crighton on investment value

[502] Mr Crighton was asked to consider an estimated value for loss in net operating profit for the years ending 31 May 2008 to 2012 inclusive, as at 1 June 2007, based on budgeted net operating profit prepared by Mr Carr for BSF. He adopted an earnings value approach, more specifically the net present value of future earnings.

[503] Mr Crighton explained that valuations can be based on one of three principal categories:

- (a) the most probable price which would be achieved in a hypothetical exchange in a free and open market, that is market value.
- (b) an indication of the benefits a person or an entity enjoys from ownership of an asset. The value is specific to that person or entity, and may have no relevance to market participants in general. Investment value falls into this category.
- (c) the price which would be reasonably agreed between two specific parties for the exchange of an asset.

[504] Mr Crighton use the following definition of “investment value”:

The value of an asset to the owner for individual investment or operational objectives.

[505] He explained that investment value is an entity-specific basis of value, saying:

Although the value of an asset to the owner may be the same as the amount that could be realised from its sale to another party, this basis of value reflects the benefits received by an entity from holding the asset and, therefore, does not necessarily involve a hypothetical exchange. Investment value reflects the circumstances and financial objectives of the entity for which the valuation is being produced. It is often used for measuring investment performance. Differences between the investment value and the market value provide the motivation for buyers or sellers to enter the market place.

[506] Mr Crighton’s assessment of value was in part based on Mr Carr’s budgeted financial performance, which Mr Crighton acknowledged might not represent the probable market view. The other value component was what he described as a market determined capitalisation rate and hence discount rate. On balance, in his opinion, his assessment of the net present value of net operating profits 2008-2012 represented an investment value. Key variables in the analysis were the capitalisation rate and net operating surplus.

[507] Mr Carr's 2008 budget, which was prepared in support of his business plan for Hanover, and the May 2007 Fonterra payout were used in the analysis. Mr Crighton then produced the following table which summarised the key revenue and expense line items down to the net operating surplus, which he then capitalised to determine investment value as at 31 May 2007.

Budget for business plan	31 May 2008
Kg milk solids produced	1,270,500
Budgeted payout \$/kg/ms	5.53
Milk revenue	7,025,865
Total other sales	357,450
Total cash revenue	3,383,315
Less: cost of stock sold	548,700
Net revenue	6,834,615
Plus: stock natural increase/decrease	423,500
Total revenue	7,258,115
Less: expenses	3,805,996
Net Operating Surplus (EBITDA)	3,452,119
Capitalisation rate	8.50%
Implied Investment Enterprise Value for ATS Properties as at 31 May 2007	40,613,000 (rounded)

[508] The report then commented:

23. We note that budgeted payout of \$5.53 per kg/MS was significantly exceeded by the actual payout of \$7.66 for the year, which would have added circa \$2.7m to EBITDA, all other things equal.

24. With reference to the earlier definition of investment value we opine that an investment value of \$40.6m will fairly reflect the investment value to Mr Carr at 31 May 2007. Operating surplus is based on his expectations.

[509] Mr Crighton described his analysis as representing in theory what Mr Carr should have been prepared to pay for BSF, that is, it represented the value to Mr Carr but on the assumption that Mr Carr's budget was correct. The analysis was not a reflection of land value but was focused on net operating surplus, ignoring interest. It was not intended to represent market value.

[510] It was put to Mr Crighton that the method would not be used to calculate what a purchaser would be prepared to pay for BSF. In Mr Crighton's opinion, even in May 2007, investors were using that approach to assess the position in competitive markets, noting that both his and Mr Mills' firms used that metric. He acknowledged that

financers would want a market valuation but considered they would also look at forecasted cash flows.

[511] The sensitivity of the analysis was demonstrated by applying the approach to a review of Harvard's financial statement for the year ended 30 June 2015, which showed a loss of approximately \$14 million, then to Harvard's 2014 statement which showed a profit of \$15 million. Mr Crighton agreed that, using the same approach as he had taken to Mr Carr's forecasts, there would have been a dramatic difference in investment value between those two years. However, he said he could not really comment without knowing the reasons for the high variation between the two years.

Is investment value appropriate?

Defence submissions

[512] In Mr Ring's submission, the investment value assessment was subjective and arbitrary, and, because it was based on only one parameter of the intended dairy business, gave rise to inherently implausible and/or unreliable results. For example, he said, a farmer could have an operating deficit. This would necessarily result in no investment value, yet the farmer might also have no liabilities. It ignored interest, the existence or amount of borrowings, the existence or value of any assets, and their location. So it did not reflect, in Mr Ring's submission, market value or per hectare land value, and, if an investor were looking to invest with borrowed funds, a financier would almost certainly only lend on the basis of market value, because only market value was relevant to assessing the worth of the security.

[513] In Mr Ring's submission, because the plaintiffs were borrowing 100 per cent of the purchase price, the relevant value of BSF to the plaintiffs as at 31 May 2007 was its value as security, which was necessarily the market value.

[514] Mr Crighton described investment value as what the plaintiffs should have been prepared to pay to acquire the assets. Mr Ring pointed out that in April 2007, the plaintiffs refused to pay \$25.09 million to acquire not only BSF, but also the Danseys and the Styx Hotel. At the mediation on 1 May 2007, the plaintiffs were only prepared to offer \$23.79 million for all the assets encompassed by the ASA, including the

Danseys. As at May 2007, the plaintiffs were only prepared to pay \$19.7 million. Shortly after May 2007, the plaintiffs offered an additional half million to acquire all the BSF assets. Even in August 2007, the plaintiffs were only prepared to offer an additional \$1.5 million; and a similar price in November 2008, which included just the BSF assets and the cows.

[515] GCA's position was that, in any event, it was not appropriate to assess the value of the BSF to the plaintiffs by relying on the plaintiffs' forecasted net operating surplus for 2007/2008, based on their own budget. The reliance on Mr Carr's budget was criticised for a number of reasons, as set out in the following paragraphs.

[516] The budgeted production of 1,270,500 kg/ms was overstated, said the defence. The plaintiffs forecasted a record production year following a season in which the production was the lowest ever (927,000 kg/ms). The plaintiffs' recovery plan was substantially put in place under Mr Frost without resulting in the massive increase in production on which the plaintiffs had budgeted, said Mr Ring.

[517] The plaintiffs chose the budgeted payout figure of \$5.53, which was entirely arbitrary, and so in itself invalidated the value calculation, in the defence submission. Mr Ring said the last forecast payout announcement was not a reliable basis on which to assess sustainable value, which should be viewed in the medium or long-term. Mr Ring observed that the budgeted production expenses represented about \$3 per kg/ms, when the receiver only achieved \$3.75 in 2007/2008. Nor did it allow for 2007/2008 as a recovery season for the plaintiffs.

[518] The 8.5 per cent cap rate applied by Mr Crighton was unrealistic, having regard to the risks inherent in the dairying investment. It was also unsupported, in Mr Ring's submission, particularly because Mr Crighton based it on 2014-2016 sales not sales in 2007.

[519] Mr Ring then discussed the issue of interest saying that Mr Crighton's investment value did not take account of interest, even though this was an actual expense which would necessarily diminish or eliminate the net operating surplus. The plaintiffs' interest expense for the budgeted year was \$2,913,715, although it was to

be capitalised the first year. However, without this concession, the budgeted net operating surplus would have been \$538,404, instead of the \$3,452,119 used by Mr Crighton, said Mr Ring. If Mr Crighton had capitalised the \$538,404 at 8.5 per cent, his resulting implied investment value as at 31 May 2007, exclusive of shares, would have been \$6.3 million instead of \$40,613,000.

[520] In Mr Ring's submission, the evidence as to potential BSF equity investors and Mr Carr's stated intention regarding Willowview was all irrelevant, as it occurred post 31 May 2007. As far as Willowview was concerned, there was insufficient information, for example, how the purchase would be funded.

Plaintiffs' submissions

[521] In Mr Cooke's submission, an award of damages based on the price had the plaintiffs immediately sold BSF would not reflect the true nature of the plaintiffs' loss.²⁸ He said that Mr Carr was re-acquiring the family farms, not for resale, but to engage in the business investment. The award of damages needed to reflect the fact that Mr Carr lost the opportunity to develop BSF, and enjoy that investment value.

[522] Mr Cooke noted that, although the value assessed by Mr Crighton was based on the payout of \$5.53, the eventual price was much higher than this. The true value of BSF to Mr Carr was \$27,453,946,²⁹ he said, noting that further support for this approach was provided by the evidence of Mr Darby, the potential BSF investor, who had assessed the value of BSF at \$45-50 million.

[523] Mr Cooke submitted that investment value is associated with production. The valuation for third party purchasers is based on the concept of the "average efficient farmer". But, as this was one of New Zealand's largest contiguous dairy farms, it was unrealistic, he said, to think about the average New Zealand dairy farmer in that context, saying that very good farmers and farm management would have been required and that was exactly who Mr Carr would have used.

²⁸ Citing *Attorney-General v Geothermal Produce New Zealand Ltd*, above n 4.

²⁹ Once the ASA price was deducted.

[524] The plaintiffs claim that, accordingly, the award of damages should be based on, or at least incorporate, an uplift based on Mr Crighton's investment value approach.

[525] In Mr Cooke's submission, the cost of borrowing was properly taken into account in the investment value. He said that, taking into account the cost of capital, or more specifically the weighted average cost of capital, the calculation remained the same whether the borrower would actually borrow money to fund the acquisition or not. He maintained that actual interest costs were not deducted because the cost of capital was already taken into account in the discount rate applied. Otherwise, in his submission, the cost of capital would be double counted, noting that Mr Crighton's figures use an 8.5 per cent capitalisation rate and Mr Carr's budgets assumed an interest rate at 9 per cent, and then dropping to 6 per cent.

[526] In Mr Cooke's submission, what both the investment value and the market value seek to do is value the assets the plaintiff would have acquired under the ASA on 31 May 2007. To acquire those assets for the ASA price, the plaintiffs had to borrow money. Such interest costs were in Mr Carr's budgets. But the interest cost involved in borrowing in order to pay that price should not be deducted from the plaintiffs' damages claim, he said. The plaintiffs' claim was for the "premium" they would have received over the full ASA price: it was therefore appropriate to calculate damages by deducting the full ASA price and not just the interest cost involved in the borrowing. The cost of servicing the borrowing for the ASA price does not reduce the value of the premium, in his submission.

Law

[527] The investment value of BSF was chosen by the plaintiffs as a method of assessing the value of BSF, taking into account its particular value to Mr Carr. Typically in buying and selling property, there will be no investment value in the sense used here. The measure of the value lost is market value. In this case, the claimed investment value is analogous to the lost value from failing to purchase a business.

[528] Counsel did not refer to any cases which explicitly refer to the use of "enterprise" or "investment" value as a basis for determining damages in claims based

on the lost value of an asset. However, in other contexts, either the investment value or essentially the same approach, using EBITDA (earnings before interest, tax, depreciation and amortisation) has been used by the courts to value businesses for the purposes of financial claims.

[529] In *Clayton v Clayton*, the Court of Appeal and High Court were tasked with evaluating, on appeal, the Family Court’s approach to valuing Mr Clayton’s business interests for the purposes of a relationship property claim.³⁰ The Court of Appeal summarised the approach taken as follows:³¹

It was common ground between the experts that the market value of shares in the Claymark group should be based on a capitalisation of earnings. That required ascertaining future maintainable earnings and applying a multiple to achieve an enterprise value from which debt is deducted. The figure for future maintainable earnings was expressed as EBITDA.

[530] In similar circumstances, the Court of Appeal in *Dallison v Van Dyk* refused leave to appeal from a decision of the High Court as to the valuation of business entities comprising relationship property.³² The Family Court had adopted a capitalised earnings approach, which was also followed in the High Court. The appeal was brought on the basis that a net assets valuation should have been taken instead. The High Court described the capitalisation of earnings approach as being a valuation based on “[assessing] the maintainable earnings of the company and the selection of a rate of return appropriate to that particular company for the purpose of capitalising the earnings figure.”³³ This was contrasted to the net assets approach, which “requires an assessment of the realisable value of the company’s assets and liabilities to determine the net assets value of the company”.³⁴

[531] The Court of Appeal held that the questions were questions of fact not law, as “the assessment of witnesses advanced as experts and the High Court’s approach to the valuation of Laser Vision in the circumstances of this case were matters for factual

³⁰ *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236; *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293. The Supreme Court did not accept the valuation of the business interests as a ground of appeal: *Clayton v Clayton* [2015] NZSC 84.

³¹ *Clayton v Clayton*, above n 30, at [242].

³² *Dallison v Van Dyk* [2015] NZCA 580, (2015) 30 FRNZ 427.

³³ *Dallison v Van Dyk* [2014] NZHC 2851 at [59].

³⁴ At [60].

determination.”³⁵ The capitalisation of earnings approach was consequently accepted as appropriate in that circumstance.

[532] Although these cases, as examples, indicate that investment/enterprise style valuations approaches are used to determine the value of companies in certain contexts, this does not necessarily assist in determining whether it is an appropriate method to adopt in considering the value of the bargain which Mr Carr lost. It is clear from these cases that the question is a factual one.

[533] The loss involved in the failed ASA settlement is to some extent analogous to loss of chance damages, which are available where a plaintiff has not lost a specific guaranteed outcome, but has lost a chance at an outcome occurring. The fact that the chance of that occurring is not guaranteed does not prevent recovery, because the compensation is being given for the lost chance of the outcome.³⁶

[534] Burrows’ *Law of Contract in New Zealand* describes loss of chance cases as follows:³⁷

The cases show that damages for a lost chance have frequently been awarded in the context of claims for lost financial opportunities. There are many examples of successful claims for financial loss, whether for breach of contract or for tort or for breach of fiduciary obligation, where what is lost is a chance or an opportunity.

[535] Once a plaintiff has established that there has been a lost opportunity, the quantum of damages for the lost chance is assessed by measuring the value of the chance on the basis of the probability of the particular outcome occurring, which may be more or less than 50 per cent. The question of evaluating the loss of a chance has been described as a “matter of informed estimation”.³⁸

³⁵ *Dallison v van Dyk*, above n 32, at [19].

³⁶ Laws of New Zealand *Damages* (online ed) at [100], citing *Apatu v Peach Prescott & Jamieson* [1985] 1 NZLR 50 (HC) at 69, *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (CA) at 64 and 71.

³⁷ John Burrows, Jeremy Finn and Stephen Todd (ed) *Law of Contract in New Zealand*, above n 20, at 806.

³⁸ *Martelli McKegg Wells & Cormack v Commbank International NV* CA75/96, 7 November 1996, citing from *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (HCA) at [19].

[536] In *Chirnside v Fay*, the Supreme Court held that the Court of Appeal had been wrong to use loss of chance damages to calculate the loss of a joint venturer who was excluded from the joint venture and missed out on being involved in a development project.³⁹ Tipping J for the majority, said:

[95] The key difference between the way in which the High Court approached the question of monetary relief and the method adopted by the Court of Appeal can be stated quite simply. It is the difference between damages based on a notional disgorgement of profits made, but not realised, on the one hand, and compensation for being deprived of the chance of participating in a profitable venture, on the other. The key problem with the loss of a chance approach in the present case is that it is inconsistent with the essence of the liability finding that the parties were joint venturers: see [69] above. *Mr Fay did not lose the chance of entering into a profitable joint venture. He was already a party to that venture. ...*

[537] Like Mr Fay, Mr Carr had more than a prospective interest in BSF, since he had an absolute ability to pursue the opportunity except for the negligence of GCA. The difficulty is in assessing BSF's profitability had Mr Carr taken charge of it, rather than assessing the chance that he would have acquired it.

[538] In *Sanders v Laing*, applying the *Chirnside* reasoning, French J used the language of loss of chance where the profit that the plaintiff would have made in the joint venture was uncertain.⁴⁰ French J said "there is ... very much an element of chance and contingency in relation to profitability. Placing a value on that chance is notoriously difficult and of necessity must be very broad brush"⁴¹

[539] Rather than a loss of chance analysis based on the percentage chance of a likely outcome, loss of profits claims simply involve some adjustment of the anticipated profit claimed by the plaintiff where there is conflicting expert evidence.⁴² The classic election in contract damages is between pursuing the lost profit from a contract, as an expectation loss, and the wasted expenditure, being a reliance loss.⁴³ The loss of profits

³⁹ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.

⁴⁰ *Sanders v Laing* HC Christchurch CIV-2006-409-2041, 20 October 2008.

⁴¹ *Sanders v Laing*, above n 40, at [98] and [99].

⁴² *Singh v Rutherford* [2013] NZHC 1276 at [54]; *Newbrook v Marshall* [2002] 2 NZLR 606 (CA) at [30] – [31].

⁴³ *Anglia Television Ltd v Reed* [1971] 3 All ER 690 (CA) at 692.

measure is “the most obvious expectation loss”.⁴⁴ Similarly in negligence, damages claims may be made for loss of profit.⁴⁵

[540] In *Herbison v Papakura Video Ltd (No 2)*, Henry J compared the nature of the loss of the capital value and a loss of expected profits:⁴⁶

[with] loss of capital value ... a plaintiff is put in the same position as though he had never made the contract at all by recovering his capital costs less what he can obtain by disposing of the asset transferred to him. By contrast the second head of claim is based on the loss of bargain for which the plaintiff is put, so far as money can achieve that object in the same situation as if the contract had been performed. They are therefore differently based, although both within the general principles as enunciated in *Hadley v Baxendale* (1854) 9 Exch 341.

[541] As has been noted, estimating lost profits is always a complex task.⁴⁷ In *Ware v Johnson*, Prichard J said:⁴⁸

... a considerable degree of caution must be exercised in basing an award of damages on estimations of loss of future profits.

[542] The plaintiffs referred to *Attorney-General v Geothermal Produce New Zealand Ltd* as authority for the proposition that an award of damages based purely on what BSF was worth if sold to a third party purchaser would not be fair compensation.⁴⁹ In that case, the plaintiff’s crop of export roses was killed by negligent spraying of broom on an adjoining property. The financial blow meant no new plants could be purchased to mitigate losses, and plans to build additional greenhouses were shelved. Geothermal formed a new company and began to export orchids. They claimed for the loss of roses, and the estimated loss of profits from both the existing greenhouses and the new greenhouses which would have been built. The Court of Appeal judges’ statements as to the appropriateness of damages, however, do no more than recognise that the assessment of damages is essentially discretionary and a

⁴⁴ *Law of Contract in New Zealand*, above n 20, at [21.2.2(a)]; Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd edition, Thomson Reuters, Wellington, 2011) at [1.6.3].

⁴⁵ See *Attorney-General v Geothermal Produce NZ Ltd*, above n 4. This likely also applies to cases of “pure economic loss”: see the dicta of Tipping J in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 at [30].

⁴⁶ *Herbison v Papakura Video Ltd (No 2)* [1987] 2 NZLR 720 (HC) at 732.

⁴⁷ *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 542, cited with approval in *Watson v Whitehead* [2014] NZHC 2992 at [267] and *Singh v Rutherford*, above n 42, at [54].

⁴⁸ *Ware v Johnson*, above n 47, at 545.

⁴⁹ *Attorney-General v Geothermal Produce NZ Ltd*, above n 4.

question of fact.⁵⁰ The assessment was around how to assess the lost profits that the company might have made had it been able to continue growing roses.

[543] The claim in this case is not for lost profits but for the investment value, attempting to create a subjective value for BSF based on its worth to Mr Carr. This reflects the value which he personally lost, rather than looking at the value of BSF in an objective way. There is no theoretical objection to utilising investment value as a means of assessing damages in this case.

[544] However, the market value of products is typically used for the objective measure of value which it provides. Arriving at an investment value involves subjective considerations which are difficult to verify. There is also clearly an element of speculation in assessments made from projected possible profits. In lost profit claims, the sum sought is often modified or reduced by judges to reflect the inherent uncertainty around the level of profits which could be achieved. As stated in *Attorney-General v Geothermal Produce NZ Ltd*.⁵¹

Any award of damages depended on whether the loss for which they were claimed was of a foreseeable kind and, if so, what sum of money would compensate the respondent for it. These questions involved an assessment of the various witnesses and the making of proper allowances by way of discount for the chances which may or may not have occurred. It is commonplace that businesses damaged by wrongdoers, like chattels, are apt to be seen after the event in a glowing light. At that point a plaintiff's lost prospects may become his best prospects. Hence the need to approach claims with care and to make appropriate discounts where necessary.

[545] Analysing expected profit can be highly speculative.⁵² The process of evaluating a lost profit claim necessarily requires projecting into the future about possibilities that might occur. While this claim is not formed in loss of profit terms, these same principles apply. This was to some extent recognised in the plaintiff's submission that either the investment value should be taken, or there should be some uplift in the market value adopted to reflect the investment value.

⁵⁰ *Attorney-General v Geothermal Produce NZ Ltd*, above n 4, at 354, 365, 371.

⁵¹ *Attorney-General v Geothermal Produce NZ Ltd*, above n 4 at 359 per McMullin J.

⁵² *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992 at 49; *Newbrook v Marshall*, above n 42, at [30] – [31].

Calculations

[546] Bearing in mind those principles, I now turn to analyse this aspect of the claim.

[547] I begin by considering the structure of the plaintiffs' claim on this basis. In his valuation report dated 14 April 2016, Mr Crighton estimated the implied investment value of BSF to be \$40.6 million. The plaintiffs added the value of the Fonterra shares (\$7,528,144) to that sum to derive an "investment value" of \$48,128,144. They then subtracted the cost of the Fonterra shares and the land and buildings from the investment value. This resulted in what was described in the table annexed to the plaintiffs' submissions as a "total value land buildings claim" of \$27,941,090.

[548] Following the hearing, I issued a Minute, seeking further submissions on whether the investment value represented a valuation of the land and buildings only, as the plaintiffs contended, or whether the investment value, as suggested by the use of the term "investment value", represented a valuation of the farming business, including all of the various assets used to generate income. The methodology which Mr Crighton employed appeared, on its face, to support the latter view. The investment value was calculated by reference to the net income generated from BSF, which could only be generated if the plaintiffs owned all of the relevant assets, including the cows and Fonterra shares. If the values of the Fonterra shares and the cows were subtracted from the investment value, the claim would be substantially reduced.

[549] The defendant agreed with the suggestion set out in the Minute, also suggesting that the cost of the other cows purchased by the plaintiffs should be deducted from the investment value. However, the plaintiffs maintained that the investment value calculated by Mr Crighton was for the land and buildings and irrigation and milking plant only, and did not include the Fonterra shares or cows. They said that the investment value was calculated by reference to a capitalisation rate of 8.5 per cent, which was in turn estimated by reference to market data and actual net sale prices which were exclusive of Fonterra shares and livestock.

[550] Since, according to the plaintiffs, the investment value represented the value of the land and buildings only, the plaintiffs had added the value of the Fonterra shares

to the investment value so that the resulting investment value could be compared directly with other valuations of BSF. It followed that the plaintiffs also rejected the suggestion that the cost of the cows should be deducted from the investment value.

[551] The plaintiffs' contention that the capitalization rate utilised by Mr Crighton was derived by comparison to farm sales which excluded the value of Fonterra shares and livestock was not supported by any evidence. Mr Crighton's report was silent on the matter, and the issue was not addressed when Mr Crighton gave oral evidence. Furthermore, all of the other expert valuation witnesses, for both the plaintiffs and the defendant, adopted valuations which incorporated the value of the Fonterra shares. Messrs Larmer and Armstrong derived a valuation for BSF which incorporated the land and buildings plus the shares and plant. There was nothing in the evidence to suggest that Mr Crighton adopted a different approach which excluded the Fonterra shares from his valuation.

[552] Mr Mills valued the farms in 2007 and derived an investment value of \$38,441,000 using the same milk payout and capitalization rate of 8.5 per cent. His report explicitly stated that the valuation **included** the Fonterra shares. Mr Carr's own evidence, relying on that same report from Mr Mills, claimed an investment value of \$44,192,000 using a capitalisation rate of 7.5 per cent for land **and shares**.

[553] On that basis, I do not consider that the approach advocated by the plaintiffs, namely that the value of the Fonterra shares should be added to Mr Crighton's investment value, is sustainable. There was simply no evidence to support the contention that the investment value represented the value of the land and buildings, plant and equipment only. However, I accept that the valuation provided by Mr Crighton did not incorporate the value of the cows.

[554] The result is that the cost of the Fonterra shares should not be added to the investment value (before the cost of land, buildings and shares are deducted), with the result that the claim should be considered as reduced from \$27,941,090 to \$20,412,946 (representing the implied investment value of \$40,600,000 less land and buildings (\$12,658,910) and less shares (\$7,528,144)).

Conclusion as to the investment value approach

[555] There are difficulties with a damages claim centred on implied investment value. As Mr Crighton acknowledged, the analysis was on the basis of Mr Carr's budget and assumption it was achievable. Mr Carr estimated that BSF would produce, for the year to 31 May 2008, a surplus before interest and tax of \$3,452,119. Capitalising that surplus resulted in the claimed investment value.

[556] The obvious challenge to the budget is the sum included for farm working expenses which, even on the basis of other evidence called on behalf of the plaintiffs, was too low. The second issue is that the analysis focused on net operating surplus and ignored interest. The difficulty then is how that analysis is used in an assessment of damages because the cost to the Mr Carr of achieving the projected revenues would need to be taken into account.

[557] In the plaintiffs' closing submissions, they stated that the cost of borrowing "is properly taken into account in the investment value (as Mr Crighton said at NOE 1018/12 – 1019/8)." However, Mr Crighton's comments in cross examination do not support that proposition.

[558] Mr Crighton was asked whether the calculation ignored interest, in the context of being asked about investment value as a financial tool, and responded "At that level it does, yes ... so that's effectively at an EBITDA level." He repeated " ... I treat interest as separate from this [the assessment] which is why EBITDA is such a important multiple". The evidence was that valuing a business or a farm does not take into account subjective matters such as the particular owner's cash flow, as that was a separate question. The investment value was a tool, focused on the forecasted net operating surplus, which was provided by Mr Carr, based on his expectations around BSF's performance.

[559] Objective measures of value will necessarily not take into account the personal attributes of the owner, such as their level of borrowing. Mr Crighton conceded that the investment value was "not an asset valuation per se" although it could be reflective of the value of the asset. He described the valuation as showing the benefit received by an entity from holding the asset.

[560] In closing, the plaintiffs seemed to suggest that, as the capitalisation rate takes account of the cost of the capital, interest costs did not need to be deducted.

[561] The online *Oxford Reference Dictionary* provides a very general definition of a capitalisation rate as follows:⁵³

The consensus-expected return on a security. It is normally calculated as the reciprocal of the price–earnings ratio.

[562] A more specific definition is provided in the *Dictionary of Economics*:⁵⁴

Also called *cap rate or income yield*; a widely used method of determining the rate of return on an investment such as real estate. It is found by dividing the *net operating income (NOI)* for the first year by the total investment.

Example: Assume that net operating income = \$18,618 and purchase price = \$219,000. Then, the cap rate is $\$18,618/\$219,000 = 8.5\%$.

If the market rate is 10%, the *fair market value* of similar property is $\$18,618/10\% = \$186,180$. The property may be overpriced.

[563] The question of whether interest is taken into account will therefore depend on the definition of “net operating income”. Net operating income has been defined in accounting dictionaries as: ⁵⁵

the amount by which income exceeds expenses, before considering taxes and interest

[564] This clearly shows that the taxes or interest payments which an individual investor might have to make are not taken into account in calculating the capitalisation rate. The capitalisation rate is therefore concerned with the *return* on capital, not the cost to an investor of *obtaining* that capital.

[565] Mr Crighton’s calculation of investment value used the net operating surplus in Mr Carr’s budget of \$3,452,119, not the figure of \$538,404 which was the balance after deduction of interest costs. As Mr Crighton acknowledged, “if you included interest then clearly that value’s going to be lower.”

⁵³ *Oxford Reference Dictionary* (online edition, Oxford University Press).

⁵⁴ Jae K Shim and Joel G Siegel "Capitalization Rate." *Dictionary of Economics* (online edition, Wiley, Credo Publishing).

⁵⁵ *Business: The ultimate resource* (2nd edition, A&C Black, London, 2006) at 1594; *CIMA Dictionary of Finance and Accounting* (Bloomsbury, London, 2003) at 190.

[566] In this case, the plaintiffs could not have made the net operating surplus on which the calculation of investment value was based *without* making those interest payments. The claim centres on the opportunity the plaintiffs lost to own a valuable investment or enterprise. The *cost* to them in creating that investment value must be taken into account.

[567] I have some reservations about the evidence of Mr Darby from Equity Partners, particularly because his assessed value range for BSF, \$45 to \$50 million, was calculated by his chief financial officer. The chief financial officer did not give evidence and it is therefore difficult to place much weight on his or her assessment without knowing the basis of it. Mr Darby concluded that BSF “may well fall into that range”. He understood that there was considerable land yet to be fully developed into what could have been carrying capacity for dairy. This assessment was not referred to by any of the valuers who had inspected the property although Mr Yardley described there being opportunities for further development.

[568] For those reasons, I am not satisfied that it is appropriate to use investment value for an assessment of damages in this case.

Should damages be increased to reflect the value to Mr Carr of BSF?

[569] Having found that investment value is not the correct measure of damages in this case, I still need to address whether damages based on the market value of BSF on 31 May 2007 reflects the extent of the loss actually and reasonably suffered by Mr Carr and his interests. Mr Cooke sought an uplift based on the investment value approach, if the investment value was not considered appropriate.

[570] The plaintiffs’ claim is in negligence and contract. The relevant principles for assessing damages are essentially the same. *The Law of Torts in New Zealand* states:⁵⁶

... In the end, assessment of damages is essentially a question of fact: “Any rules or principles constitute guidance only. The object is to be fair to both sides. The prima facie approaches that the courts have developed provide “a measure of predictability”, but “[t]he key purpose when assessing damages is

⁵⁶ Bill Atkin “Remedies” in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 1305 at 1308 (footnotes omitted).

to reflect the extent of the loss actually and reasonably suffered by the plaintiff”.

[571] In *Stirling v Poulgrain*, Cooke J said:⁵⁷

The essence of Lord du Parc's observations and of the observations quoted by him in his speech is that in the end the assessment of damages is a question of fact. Rules capable of meeting all cases are unlikely to be devised and, as Wilde B said, ". . . it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable to all cases".

[572] The question for me is what amount of damages will do justice in the particular circumstances of the case? This is, what is best calculated fairly and appropriately to compensate the plaintiffs for the harm done, while at the same time being reasonable between the plaintiffs on the one hand and GCA on the other.⁵⁸ I must adopt the value which is the most appropriate, fair and reasonable in this particular context to compensate the plaintiffs for not acquiring the assets.

The defendant's knowledge

[573] A defendant's knowledge of the innocent party's circumstances is relevant both in terms of the foreseeability of loss, and particularly any special circumstances affecting the loss.⁵⁹

[574] Mr Cooke referred to the fact that, at the relevant time, all parties, including the defendant and Hanover, were proceeding on the basis that BSF had the value reflected in Mr Mills' valuation, and were relying on that to be so. GCA acted for BSDF from June 2000 and for Mr Carr throughout the dispute with Mr Humphries leading to the ASA. Mr Carr had worked closely with partners of GCA who knew his intentions and who advised him in respect of the transaction. Mr Carr's evidence about the knowledge of the partners of GCA was not challenged or contradicted by GCA.

[575] I accept that GCA was aware of: Mr Carr's association with BSF; the reasons why he believed it was worth considerably more than the ASA purchase price; Mr Carr's budgets/plans and the advantages Mr Carr enjoyed by virtue of his

⁵⁷ *Stirling v Poulgrain*, above n 14, at 419.

⁵⁸ *Dynes v Warren & Mahoney* HC Christchurch A252/84, 18 December 1987 at 57.

⁵⁹ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA).

involvement with BSF and the water rights; the arguments Mr Carr would have advanced had there been any challenge to the water rights; Mr Carr's plans for development, including the potential introduction of an equity partner or partners; and Mr Mills' valuation of BSF as provided to Hanover.

Value assessment

[576] The plaintiffs' claim has always referred to the additional value of BSF given Mr Carr's position in relation to water and his ability to operate BSF to its optimum potential.

[577] When assessing average efficient production Messrs Larmer and Armstrong discussed the concept of the "60 per cent efficient" farmer. I accept that, given the size of BSF and the scale of investment, a 60 per cent average efficient farmer would be unlikely to undertake the enterprise. Mr Armstrong conceded that point. In any event, I have no doubt that Mr Carr would have been substantially better than the 60 per cent average efficient farmer on BSF, for the reasons explained earlier. Clearly, however, as Mr Larmer said, the figure of 60 per cent is not to be applied in a linear way to the 1.1 million kg/ms pa assessment of average efficient production. Such a linear approach would mean the excellent farmer, in the ninetieth percentile, would be producing more than 1.9 million kg/ms from BSF and no one suggested production at that level.

[578] I have already decided that Mr Carr would have achieved at or close to his budgeted production when he first acquired BSF. His evidence of potential equity investors adds considerable weight to his future plans for BSF including the acquisition of further land and construction of water storage. As noted, equity investors would have necessarily reduced Mr Carr's equity in BSF.

[579] It is, therefore, necessary to address whether there should be any uplift in the damages determined on the basis of market value on 31 May 2007 to recognise these factors.

[580] At this point, I return to Mr Mills' 2007 valuation. His valuation of \$20,767,000 was based on information provided to him by Mr Carr – water

availability, the benefit of the CWA, and Mr Carr's projected production levels. Because of those assumptions, I am satisfied that Mr Mills' valuation represents the best measure of the value of BSF to Mr Carr, as at the date of breach, taking Mr Carr's knowledge, personal benefits and expertise into account. Mr Mills' valuation was obviously not squarely based on the same factors as identified by me as relevant to Mr Carr's loss. For example, Mr Mills' valuation over-estimated water availability while my assessment of value of BSF to Mr Carr takes account of potential improvements given his prospects of equity investment. On balance, however, I conclude it is fair.

[581] For these reasons, in my assessment, the correct measure of value of BSF to use in an assessment of the plaintiffs' damages is \$20,767,000, \$28,295,144 inclusive of shares. From that I deduct \$19,700,000 (the other liabilities which the plaintiffs would have incurred on settlement being taken into account later). That leaves \$8,595,144 as damages in respect of the loss of BSF.

Part III: Lost value of other ASA assets

[582] I turn now to consider the other assets included in the ASA in respect of which the plaintiffs claimed loss.

Patearoa House

[583] The ASA included the house property at Patearoa but did not ascribe a price to it.

[584] Mr Carr intended to transfer the Patearoa House to Mr O'Connell as part of settling the amounts he owed to him. The defence accepted that, regardless of any such intention, the plaintiffs have lost the value of the house.

[585] The Patearoa house had QV of \$135,999 as at 19 May 2007 and GCA accepted that value should be used for the purpose of damages.

Creek Block

[586] The plaintiffs claim \$660,000 in respect of the loss of the market value of the Creek Block, taking into account its development potential. Mr Carr confirmed that

as at 31 May 2007, he intended to subdivide the Creek Block into 14 lifestyle blocks. He explained he had done rural subdivisions in the past and he understood the process and costs involved. At his expected surplus of approximately \$120,000 per section, the overall pre-tax surplus from developing the Creek Block was at least \$1,500,000, Mr Carr said.

[587] Mr Carr was asked about various documents which suggested that in May 2007, Mr Carr and Mr O'Connell attributed \$100,000 only to the value of the Creek Block. I accept Mr Carr's explanation that, even as farmland, he considered the Creek Block worth more than \$100,000 and that the attributed value of \$100,000 was as a result of Mr O'Connell's workings at a time when little focus or consideration was given to the issue. Mr O'Connell gave evidence to like effect.

[588] Mr Passmore has been a registered valuer since 1973, primarily spending those 42 years valuing a wide range of properties in Central Otago. He was instructed to provide a "standalone" valuation of the Creek Block. Mr Passmore's valuation approach was assessed on differing bases as follows:

- (a) First, by assessing the value of the land as farmland but "as a single holding and in relation to block land", he concluded that the market value was \$307,250; (at conferral the experts saw the value, if assessed as farm land, as between \$3 to \$4,000 per hectare);
- (b) Secondly, by assessing the value on the basis that "the advantages of the property would result in a premium price", he concluded that the market value was \$647,150.
- (c) Thirdly, by means of a notional subdivision of up to 14 rural lots, he concluded the value of the land was \$645,000. He then assessed market value (including the value of improvements) at \$660,000.

[589] Mr Passmore valued the Creek Block on the premise that resource consent would be granted for subdivision, that water would be available via existing water rights from the Sowburn, and that electricity and telephone services would be available

from existing lines. There was criticism of the valuation in the context of likely demand, holding costs and the profit and risk calculation.

[590] Mr Passmore's \$660,000 valuation was for a subdivision into 14 lots of eight hectares each. A subdivision into one lifestyle block would, in Mr Passmore's opinion, result in a value of some \$13,000 less; that is, \$647,150. The plaintiffs said the highest and best use (and value) of the Creek Block would be as a single lifestyle block, at \$647,150.

[591] GCA accepted that the plaintiffs had lost the value of the Creek Block. In Mr Ring's submission, it would not be appropriate to assess damages based on its value as at 31 May 2007 as a lifestyle block, or as a sub-divisible block, when the plaintiffs did not intend to dispose of the Creek Block on this basis. He said that the Creek Block was also going to be given to Mr O'Connell, for his services.

[592] I am satisfied that the plaintiffs intended to develop and dispose of the Creek Block. I put to one side any suggestion Mr Carr intended to transfer it to Mr O'Connell for services rendered, which, in my assessment of the evidence, was a comment made in error. It is a logical conclusion that, given the likely advice and costs on subdivision, the plaintiffs would decide to dispose of the Creek Block as a single lifestyle block and damages should be assessed at that level, \$647,150.

Farm plant and equipment

[593] Two alleged losses arise under this heading. Mr Carr claimed there was additional plant and equipment on BSF with a value of not less than \$250,000, which he would have acquired under the ASA but was not accounted for in the price, and for which he should be compensated. Secondly, and separately, he said that under the ASA the plaintiffs would have acquired certain plant and equipment which was on BSF and owned by Brookside Contracting, also with a value of not less than \$250,000. This was being used as security for debts owed by that company to UDC Finance. Under the ASA, Mr Carr was to pay the UDC debt and receive the plant and equipment.

[594] GCA said that the plaintiffs initially claimed there was \$500,000 worth of plant and equipment included in the ASA price, with no distinction made between these two

separate claims and that the nature of the claims only became clear in the amended statement of claim filed at the end of the trial.

[595] The evidence presented on these two heads of loss was extremely confused, and most of the evidence related to the equipment covered by the UDC security. For that reason, I will address that aspect of the evidence and claim first.

Brookside Contracting/UDC plant and equipment

[596] Under the ASA, the plaintiffs were acquiring all the shares in Brookside Contracting. Some of the plant owned by Brookside Contracting was security for a loan from UDC, which was that company's only liability. Mr Carr said the UDC loan would have been paid out of the Hanover funds in the sum of \$187,000 which was a compromise on the total debt of \$250,000. The plaintiffs would have benefited by \$63,000, given they would then receive Brookside's \$250,000 worth of assets. Instead, the plaintiffs pleaded, as a result of the cancellation of the ASA, Mr Carr was obliged to repay the full debt of \$250,000 to UDC Finance Ltd.⁶⁰ The statement of claim recorded that Mr Carr recovered \$105,000 from the Humphries' interests in respect of the UDC liability which left a net loss of \$145,000, as well as the loss of not acquiring the Brookside assets.

[597] However, the plaintiffs then revised their claim to treat the recovered \$105,000 as an additional liability of the plaintiffs on settlement, to be added to the ASA price for the land and buildings. They said that the UDC liability did not need to be taken into account in determining the loss under this head of the claim. The plaintiffs therefore claimed the lost value of the assets, and set that amount at \$250,000.

[598] The defence said that the plaintiffs would only ever have acquired the assets by paying UDC \$195,000 (in contrast to the \$187,000 figure used by the plaintiffs). \$170,000 was to release the security and \$25,000 was to release the guarantees given by Mr Carr, Brookside, Mr Humphries and the Patterson interests.

⁶⁰ Further Amended Statement of Claim dated 3 June 2016 at [57] and [58].

[599] GCA said that the sum needed to pay the UDC debt would have come from the Hanover advance, and that, if the ASA had settled, the plaintiffs would have therefore acquired all the assets and the discharge of their liabilities for \$195,000, all of which was borrowed. The maximum value of the assets, including the guarantees, was \$195,000 and the plaintiffs cannot have lost anything by not expending that money and not gaining any asset, in Mr Ring's submission.

[600] Mr Carr's evidence was that the assets of Brookside Contracting included a 20 tonne Kobelco Digger, a 8 tonne Hanix Digger, a 526 JCB Loadall, an Isuzu 370 8 wheel dump truck, another Isuzu tractor unit and transport for carting the diggers, a 3.2 m Nobile Mulching Mower, an 8 m Rotary Krone Rake, a Gehl 5.6 mower conditioner, an International Hydro Tractor trencher unit and various other smaller plant items such as post drivers. He had completed a "rationalisation list" as at 31 January 2005 which listed his estimated sale value of various items of plant owned by Brookside Contracting as approximately \$337,000. While some of this plant and equipment would have decreased in value between 2005 and 2007, Mr Carr believed it was worth approximately \$250,000, as claimed. He said he had placed an arbitrary value of \$250,000 on it for the purposes of the loan application.

Findings

[601] The pleadings, evidence and submissions were somewhat confusing in respect of this claim. The statement of claim pleaded that Mr Carr paid \$250,000 to UDC but said the UDC debt would be repaid for \$187,000. The evidence suggested Mr Carr reached a compromise with UDC for \$195,500.

[602] The claim is now framed for \$250,000 on the basis that, despite having paid off the UDC liability, the plaintiffs did not acquire the shares in Brookside Contracting (the value of which was the equipment) which was worth, the plaintiffs said, not less than \$250,000.

[603] The assertion that there was no further consideration under the ASA for the acquisition of the shares in Brookside Contracting was not correct given the evidence that Mr Carr's liability was to take responsibility for the UDC debt. It was not, therefore, a matter of acquiring the shares for no consideration.

[604] Adding to this confusion, it was clear from the evidence that the defendant, or its insurers, has paid \$250,000 to settle the UDC liability. No evidence was presented as to how this related to the \$195,000, or how it should be taken into account in respect of the claim generally. In any event, it seems the UDC liability has been paid.

[605] The plaintiffs' treatment of the \$105,000 recovered from Mr Humphries as an additional liability of the plaintiffs to be added to the ASA price, is somewhat illogical. However, by doing so, they do effectively deal with the fact that Mr Humphries paid \$105,000 to Mr Carr.

[606] The result is that the UDC debt has been repaid in the full amount but Mr Carr did not receive the benefit, being the value of the equipment covered by the security. Mr Ring submitted that the assets must have been valued by UDC at less than \$195,500 because the compromise reached between Mr Carr and UDC required payment of that amount for the release of the security as well as the release of guarantees, and \$170,000 was attributed to the plant and equipment. However, the fact that UDC reached a settlement is not necessarily reflective of the value of the assets. There may well have been many reasons for UDC to agree to that compromise and, without evidence from UDC, I cannot take this any further.

[607] I also note the evidence that the UDC security was in respect of *some* of the plant owned by Brookside Contracting. Overall, I am satisfied from Mr Carr's evidence that the equipment owned by Brookside Contracting had a value of \$250,000 and the plaintiffs should be compensated for that loss.

[608] For these reasons, I am satisfied that the plaintiffs are entitled to the sum of \$250,000 in respect of the plant and equipment owned by Brookside Contracting.⁶¹

Additional equipment on BSF

[609] This aspect of the claim relied on Brookside's opening balance sheet from 2007 and 2008, showing \$250,000 for plant and equipment and an insurance schedule dated 20 April 2007. The plaintiffs estimated a value of \$250,000 for the plant and

⁶¹ In saying that, I assume the plaintiffs' arrangement with the defendant means the amount paid by the defendant to repay the UDC debt will be repaid/off set.

equipment in their finance application to Hanover, and contemporaneously arranged insurance with Farmers Mutual Insurance Association (FMG) for the larger items. The insurance value of those items was \$231,721. This, Mr Carr said, excluded other smaller tools and general equipment that formed part of the farm assets.

[610] Mr Carr was taken to the document from FMG dated April 2007. As he acknowledged, however, many of the items listed in that document were items of plant which were included in the valuation of BSF.⁶² He confirmed that, with the exception of two items of minimal value, the UDC document listed the plant and equipment the subject of the claim. He referred to the settlement invoices on the Harvard sale which included \$350,000 for plant and \$3,300 for wet weather gear in support of the claim.

Findings

[611] There was clearly plant and equipment actually on BSF (or the McSkimming land but not owned by Mr McSkimming) which was not itemised in ASA. However, the schedule which appeared to support this claim was the same schedule referred to by Mr Carr in his evidence in respect of the UDC plant and equipment. I agree with the defence position that the evidence was too unclear to allow a claim under this head. Mr Carr did not mention an insurance schedule in either his first or second brief of evidence and, when questioned, had difficulty recollecting the insurance schedule at all. There was no definitive list of the items being claimed and the valuers were not asked to confirm whether any of the items claimed under this head was included in their valuations of plant and equipment.

[612] The plaintiffs have not established this aspect of the claim to the required standard. They are therefore entitled to a total of \$250,000 for plant and equipment.

ASA cows

[613] The cows on BSF (ASA cows) were included in the ASA at a price of \$2 million but Mr Carr claimed they were worth about \$1,350 each at the time of settlement, so that he was paying \$2,000,000 for \$3,375,000 worth of cows.

⁶² The assessed values discussed at the experts' conferral gave values for land and buildings including irrigation/dairy shed plant and equipment.

[614] Progressive provided a valuation of the ASA cows to Hanover dated 30 May 2007 describing 2,500 in calf and mixed aged cows at \$1,100 each (\$2,750,000). The valuation noted the high demand at that time for cows and that the valuation was therefore conservative. Mr Collins, who produced the valuation, had not inspected the cows that day but had been involved with them for some three years prior. He described them as a good commercial herd of cows, an average herd.

[615] In oral evidence, Mr Collins stood by the valuation, noting it was conservative and the market was moving. He was referred to the Dairy NZ Economics Survey 2010-2011 which showed the price, in his interpretation, for cows in 2007 being worth approximately \$1,400 per head, with the 2010 price higher by approximately \$1,000 per cow.

[616] John Paterson has worked as a dairy livestock specialist with South Dairy Farms since February 2002 and, in September 2010, began working for Rural Livestock Limited. The principal component of his job was the buying and selling of dairy herds which required an assessment of the market value of stock. He did not view the cows in 2007 and said the records were minimal, meaning breeding worth would be considered low, and the age structure was not good. He valued the ASA cows based on the market conditions at the time and his experience.

[617] Mr Paterson considered that reports from Farm Right showed that average production at the time and in the previous two seasons was relatively low. Somatic cell count levels were high, which has an adverse effect on the cows' value. I accept Mr Paterson's analysis.

[618] The Agrifax report dated 21 September 2010 set out average prices of cows throughout the regions in New Zealand. As at May 2007, the price ranged between \$1,300 and \$1,400 depending upon whether the cows were considered to have high or low breeding worth. Mr Patterson observed those figures were comparable to the average from his sales of \$1,350. Mr Patterson accepted that the trend in May 2007 was for rising cow prices, peaking in March 2008.

[619] Mr Paterson assessed his 2007 records and, after taking out any problem cows, averaged the sale price at \$1,350 per cow. Mr Paterson noted that TB was discovered on the Saran farm on 29 May 2007 which affected all three farms, and consequently the value of the cows. In all the circumstances, Mr Paterson's opinion was that the ASA price reflected the market price for the cows, which he valued at \$800 per cow as at 31 May 2007.

[620] Mr Collins and Mr Paterson agreed that it would be very difficult to source 2,500 similar quality cows in late May 2007 as most sales took place at the start of the season. By May, it would not be possible to buy a herd and a purchaser would have to buy smaller numbers likely of lesser quality and the price could have gone as high as \$1,700 by the spring.

[621] On 29 April 2007, a routine inspection of cows from BSF killed at the freezing works confirmed that bovine TB was present amongst the herd. As a result, on 29 May 2007, TB movement control restrictions were put in place. The effect was that cows could be moved only to another TB infected property, or sent for slaughter. While not restricting the use of the cows for milk production, sales opportunities would have been limited.

[622] Harvard purchased the BSF cows in 2010 for \$1,500 each, notwithstanding TB status, because the cows were to remain on BSF. Mr Collins accepted there would have been some change in the herd but fundamentally they were of the same quality as those valued by him in 2007.

Submissions

[623] In the plaintiffs' submission, the fact that BSF came under TB control, devaluing the cows, had no substance because the TB status did not affect the cows' productive value: they only had a lesser value if sold in the open market. In Mr Cooke's submission, the reality was reflected in the price Harvard ultimately paid for the cows. It would make no sense to sell these cows separately from BSF, he said. The evidence about the difficulty in acquiring the size of herd required for BSF demonstrated that, logically, any purchaser of BSF would also acquire the cows. They

would therefore remain on BSF with their value unaffected by stock movement control.

[624] Therefore, the value of the cows to the plaintiffs was that they only needed to pay \$800 per cow for a perfectly adequate average herd in situ, rather than going to the market and buying a replacement herd at an average of more than \$1,350 per cow.

[625] In Mr Ring's submission, the relevant context for assessing the ASA cows' value was that the plaintiffs were also seeking full compensation for the loss of BSF. That compensation would be assessed by reference to a value partially based on milk solid production, so it would involve double-counting to award the plaintiffs damages for not acquiring the cows which have been counted toward that milk production level, he said.

[626] In any event, in his submission, there was no justifiable basis for assuming that a notional willing buyer of the ASA cows for market value purposes must also be a notional willing buyer of BSF at the same time. It followed, he said, that the plaintiffs' intention to milk the cows on BSF was not relevant to their market value, primarily because the plaintiffs could not implement this intention and were already being separately compensated for it. The appropriate value of the cows should be assessed independently of the value of BSF. The price that the plaintiffs would have paid for equivalent cows on the open market is not relevant, because the plaintiffs did not buy, and did not need, replacement cows. In any event, this price would be the market value of cows of the same age and in the same condition, including being subject to stock movement control.

[627] The defence also referred to the plaintiffs having pleaded market value relying on Agrifax survey information, which showed that the plaintiffs' claim was based on assessing value on the open market.

[628] The defendant contended that, in fact, the plaintiffs saved up to \$500,000 by not having to purchase the cows at over value and that the defendant should therefore receive a credit in respect of this amount. After discussion, Mr Ring, although still contending it was a logical conclusion, decided not to pursue the point. I am not

convinced that this line of argument is logical. Had the ASA settled, then the value of the cows to the plaintiffs was for milk production and they would have been retained for that purpose.

Analysis and findings

[629] The plaintiffs are entitled to the difference in price for the cows between the ASA price and the market value in the same way as this applies to the land value. The cows were not assessed by the valuers as part of the value of BSF.

[630] Mr Carr's claim for the ASA cows was on the basis of retaining them on BSF and therefore, that the fact of stock movement control was not relevant to their value. However, the open market price for the ASA cows was slaughter value only. It is not correct to say that the highest and best use of the cows was for them to be on BSF. The highest and best use of the cows was for milk production but that could only take place on BSF or another affected farm. The correct position is that the cows had a very limited market and their open market value was at the ASA level because of their TB status.

[631] The reduction in value of the ASA cows cannot be laid at the feet of GCA. The stock movement control was in place before 31 May 2007. At best, had settlement proceeded, the plaintiffs might have had a claim for breach of warranty under the ASA depending upon its terms. However, as the cows were to remain on BSF and continue producing, there would have been difficulties in proving loss.

[632] The plaintiffs' claim can succeed for the price difference in respect of approximately one third of the cows. This is on the basis of Mr Carr's evidence, which was not challenged, that two of the three herds were affected by stock movement control as at May 2007 which is why he issued instructions that the other cows he purchased (the Progressive cows) were not to be mixed with the affected herds.

[633] I am satisfied that the market price for one third of the cows as at 31 May 2007 was \$1,350 per cow. 833 cows at \$1,350 per cow totals \$1,124,500. Deducting from that sum the purchase price at \$800 each (\$666,400) results in a loss to the plaintiffs of \$458,100.

Part IV: Costs incurred as a result of the failed ASA

[634] I turn now to consider the plaintiffs' claim in respect of costs incurred as a result of the failed ASA.

Progressive cows

[635] The plaintiffs claimed under this head a loss of \$1,285,681, plus 12.5 per cent interest from 1 June 2014. This included advances totalling \$969,817, loan fees, accrued interest, and transportation and grazing costs, allowing for credits in respect grazing and sales revenue.

[636] On 23 May 2005, Mr Collins of Progressive Livestock Limited was engaged by Mr Carr to purchase 800 cows for milking on BSF (the Progressive cows). He indicated a budget of \$1,300 per cow delivered. Once the ASA was cancelled, the cows were no longer needed, but Mr Carr said he had no option but to complete the purchase under the contract. However, Hanover would no longer provide him with the necessary funds to enable him to do so.

[637] Mr O'Connell approached Mr Murray Valentine for a loan to fund the purchase of the Progressive cows pending resolution of the litigation. At that time, the plaintiffs believed Brookside would be able to obtain specific performance of the ASA, enabling Mr Valentine to be paid in due course. Because Mr O'Connell was aware that Brookside would be party to the litigation, he thought it prudent for a separate entity to own the Progressive cows and Kye Ventures Limited (Kye) was used for that purpose. Mr Valentine, through his company Zinfandel Holdings Limited, advanced Kye \$839,930 on 18 June 2007. Kye was entirely reliant on Zinfandel for funding the costs in relation to the Progressive cows, with Zinfandel also funding the costs of transporting the cows and winter grazing.

[638] Mr Carr said that at all times Kye was holding the Progressive cows for him (or whichever entity he chose). Mr Carr provided a guarantee and executed an acknowledgement of debt indemnifying Kye for its costs in purchasing the cows and providing other financial assistance, including a loan from South Canterbury Finance (SCF).

[639] There were two elements to the funding secured against the Progressive cows. The direct advances for their purchase by Zinfandel, and SCF advances to Kye and Garrison Limited which has a remaining liability of \$250,000.

[640] 642 cows were purchased. 585 cows were leased to the receiver, because everyone (GCA included, said Mr O'Connell) was confident settlement would be achieved. The cows were intended to be farmed on BSF so it made sense to have them there when settlement occurred. Five cows died and the remainder sold.

[641] The lease of the cows expired in May 2009 and as the receiver did not want to renew the lease or buy the Progressive cows, they were eventually sold for \$680 each less sales commission and auctioneer's costs of \$13,220 plus GST. The overall loss on sale before interest and fees, and legal fees, was \$360,996. With interest continuing to accrue at 12.5 per cent on the outstanding loan from Zinfandel, the amount owing to 31 May 2010 stood at \$885,351.

[642] The defence position was that any loss was suffered by Kye not the plaintiffs; the loss was for wasted costs and the plaintiffs could not recover wasted costs and expectation losses in respect of different aspects of the same transaction; causation; and mitigation.

Who suffered the loss?

[643] The Progressive cows were purchased by Kye. Mr Carr was sole director and shareholder of Kye until May 2006 when it changed to Mr O'Connell. Mr Carr accepted, however, that he effectively controlled Kye. In Mr Ring's submission, any loss was primarily suffered by Kye and Kye was not a party to the proceeding.

[644] The plaintiffs alleged that they incurred the equivalent liability, and/or suffered the equivalent loss, because Kye held the Progressive cows on trust for the plaintiffs, specifically Brookside, and at all times acted on the plaintiffs' behalf. Mr Carr was referred to the contemporaneous documentation which did not support a trust structure but rather an intention that Brookside would buy the cows once the ASA settled. I accept that, in Mr Carr's mind, there was really no difference. Mr O'Connell was also cross-examined in quite some detail about the claim that the Progressive cows were

held by Kye on trust for Brookside. He maintained that was the position, despite contemporaneous documents drafted by him referring to the agreement that Brookside would purchase the cows from Kye after settlement of Brookside's purchase of BSF.

[645] Understandably perhaps, Mr O'Connell did not have a lawyer's appreciation of the legal nature of a trust relationship. The references to Kye holding the cows on trust for Brookside did not correspond with the various records made at the time. This included the Kye shareholders' and director's resolutions showing the purchase as a major transaction, and Kye's statement of financial position as at 31 May 2008. These made no mention of the trust arrangement. I am satisfied that the true position was that it was agreed Brookside would purchase the Progressive cows from Kye rather than Kye holding them on trust for Brookside.

[646] Mr Carr said he provided a hand written guarantee of the loan from Zinfandel but that the hand written document was misplaced. In the 2007 funding proposal for the loan, the only guarantee referred to was from Mr O'Connell. I accept that, had there been any other guarantors, they would have been mentioned. Furthermore, the relevant resolutions did not include reference to any guarantee from either Brookside or Mr Carr. The notes to Kye's financial statements for the year ending 31 May 2008 recorded a personal guarantee from Mr Carr in respect of the loan from SCF. Given that was recorded, it is notable that there was no mention of any guarantees from Mr Carr or Brookside in respect of the Zinfandel loan.

[647] Mr Carr gave "an earlier undertaking", and then "formally acknowledged" in a deed of acknowledgement of debt dated 14 September 2009, that he was liable for all of Kye's liability to Zinfandel. The deed of acknowledgement debt recorded that Mr Carr agreed to indemnify Kye rather than guarantee the loan.

[648] I am, therefore, not satisfied to the required standard that there was a guarantee. I agree that it was not inappropriate for another entity controlled by the plaintiffs to assume the liability to purchase the Progressive cows rather than Brookside. Brookside/Mr Carr had the obligation to purchase the cows. When the ASA failed to settle, the plaintiffs did not have the funds to buy them, and, rather than Brookside borrowing the money in circumstances when it was involved in litigation about the

ASA, another entity controlled by the plaintiffs did so. In those circumstances, the plaintiffs approached the matter reasonably in using a separate entity to acquire the Progressive cows, borrow the money to do so, and hold them.

[649] I am satisfied that it was the plaintiffs who had the liability to purchase the Progressive cows. The fact a different vehicle was chosen as the ultimate purchaser does not alter the position. For that reason, I put the trust and guarantee issue to one side.

Causation and mitigation

[650] The evidence was that the cow market began to lift almost immediately after May 2007 due to the increased Fonterra payout.

[651] Although the Progressive cows had been ordered prior to 31 May 2007, not all had been purchased by that day. The claim related to 830 cows, whereas as at 31 May 2007 only some had actually been purchased. Mr Carr acknowledged that, ideally, he should have cancelled the order for the balance of the cows, but explained that, in the turmoil, shock and panic of the failed settlement, he did not do so. The purchases proceeded, and the cows were then put onto BSF knowing that Saran and Alnwick were under stock movement control. Notwithstanding this, the cows were leased to the receiver on terms which Mr O'Connell regarded as very unfavourable.

[652] By 28 June 2007, Mr Carr was given two options to deal with the Progressive cows: either resale, on the basis that there was a rising market with sales of around \$1,575 per cow, or to lease to a third party and sell them in 2008. Mr Carr explained that he did not sell the cows because he was still pursuing his claim for specific performance which, if successful, meant he would have had to buy back the cows in a rising market. He acknowledged that, had the specific performance proceedings succeeded, he potentially could have claimed that additional cost as damages but said, in the circumstances, he did not turn his mind to that possibility.

[653] Mr Carr had given instructions that the Progressive cows were to remain separate from the two herds on BSF that had become TB movement control herds by May 2007. While the first two truckloads of cows were kept separate, ultimately

between staff mix ups and management incompetence, Mr Carr said, the cows were mixed, rendering the Progressive cows subject to movement control. Once the cows were mixed with the TB movement control cows, the stock was probably worth between \$450 and \$650 each, and Mr Carr said selling them was therefore not an option.

[654] Mr Carr accepted that it was a realistic risk that, by putting the cows on BSF, they would become mixed with the stock movement control cows with the resulting impact on value. Mr Carr explained that his situation was dominated by his application for specific performance and desire to increase production on BSF, which was short of cows at that time, explaining his funding was dependent upon farm production.

[655] Mr O'Connell, who was very involved at this stage, explained that he had thought the risk of losing money on the Progressive cows was small. The focus was on preserving the position and attempting to complete the purchase of BSF. He accepted that in August 2007, the cows could have been sold at a profit if they had not been leased to BSF. The same position applied as at February 2008, when the High Court dismissed the application for specific performance and in September 2008 when the Court of Appeal upheld that decision.

[656] Mr Carr acknowledged that in February 2008, the market indicated a price per cow of around \$2,300, far higher than that prevailing in May 2007. It was put to Mr Carr that, after the High Court decision, he must have known there was a real prospect that he would not obtain BSF and therefore, it would have been prudent for him to have sold the Progressive cows then. Again, Mr Carr stressed the context and what he said was strong advice of the prospects of success in the Court of Appeal.

[657] In 2008, the receiver required removal of some cows and purchased some of them for \$1,069 at a time when market value was at least twice that amount. Mr Carr acknowledged that the alternative, given the stock movement control, was to sell for half of that.

Submissions

[658] The defence contrasted the position in July 2008 and September 2008, when respectively, 169 cows and 450 cows could have been sold at a profit, had the cows not been subject to stock movement control. This would have cleared the Zinfandel debt in full.

[659] In Mr Ring's submission, no damages should be awarded because the material and substantial cause of the plaintiffs' losses was their decision in August 2007 to lease the Progressive cows to the receiver when they knew that the cows would most probably become subject to stock movement controls. Alternatively, there had been a failure to mitigate. Mr Ring submitted this failure occurred by not selling the cows immediately for a profit; and/or not leasing the cows to a farm other than BSF, and then selling them after the High Court judgment, or the Court of Appeal judgment, was delivered, when they could have been sold for a profit.

[660] Mr Ring accepted that, in principle, GCA could be liable for losses suffered in respect of cows purchased in anticipation that the ASA would settle as scheduled on 31 May 2007. However, GCA could not be liable for losses in respect of cows that had not yet been purchased, which the plaintiffs took a deliberate risk in buying after the failure of the ASA. Mr Ring said that, by 31 May 2007, no more than 89 Progressive cows had been purchased, for which the plaintiffs had been invoiced and paid \$127,159. If GCA is liable at all in respect of the Progressive cows, it was only liable for losses sustained in respect of the 89 cows which had been purchased by 31 May 2007, in Mr Ring's submission.

[661] Mr Cooke said that the plaintiffs faced a dilemma. GCA did not advise the plaintiffs that their application for specific performance was doomed, or even unlikely to succeed. Mr Carr understood that the appeal had good prospects of success, and so he pursued that avenue. Mr Cooke said that the defendant's argument appeared to be that Mr Carr should have realised, without external advice, that GCA was wrong.

Analysis and findings

[662] The plaintiffs suffered a loss when the Progressive cows were sold, as Mr Ring conceded. I agree that the plaintiffs should not be entitled to recover the full costs of purchase and interest because the plaintiffs would have had to purchase the cows anyway.

[663] The principles in relation to mitigation are well established. They are summarised in *Laws of New Zealand*, as follows:⁶³

110. Principle of mitigation. Plaintiffs who are victims of a tort or breach of contract must respond reasonably to the defendant's wrong. They must act to keep the damages down as far as is reasonable in all the circumstances. ...

...

112. Test of reasonableness. ... The plaintiff's response to the defendant's wrong is judged, not in hindsight, but according to the circumstances as they appeared at the time. When there are various alternatives open to a plaintiff, a reasonable choice of one alternative over another will not be held against a plaintiff if it is subsequently found that one of the other alternatives might have involved some greater mitigation of damages. ...

...

115. Rule as to loss incurred in reasonable attempts to avoid loss. If the plaintiff, acting in reasonable response to the defendant's wrong, has incurred expenses or further losses in order to avoid or diminish the damage, the plaintiff is entitled to recover those expenses or losses from the defendant. The plaintiff can do this even if the resulting damage exceeds the damage that would have been suffered had no mitigating steps been taken. ...

[664] This summary reflects recent case law in relation to mitigation of losses.⁶⁴

[665] Once it became clear that Mr Humphries would not settle the ASA, the plaintiffs had three options: sell the Progressive cows immediately for a profit; lease the Progressive cows to another farm; and put the Progressive cows on BSF.

[666] I accept that the plaintiffs were faced with a very difficult situation. If they had not continued with the acquisition of the Progressive cows, they would have incurred a loss if they had purchased BSF because they would not have had the cows they

⁶³ *Laws of New Zealand Damages* (online ed) at [110], [112], and [115].

⁶⁴ *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215 at [134] – [143] and *Marlborough District Council v Altmarloch Joint Venture Limited*, above n 4, at [55].

needed and production would have been adversely affected by lower stock numbers. The decision to continue with the purchases, and to lease the cows to the receiver, subject to conditions, cannot be said to be so unreasonable that the plaintiffs failed to mitigate their loss.

[667] However, this aspect of the claim fails regardless by reason of causation and remoteness of loss. To claim damages, there must be factual causation and, legally, the damage must not be too remote.⁶⁵ Whether damage is sufficiently linked to the defendant's breach is a question of fact, which must be established in a commonsense, practical way.⁶⁶ On Mr Carr's evidence, the Progressive cows were leased to the receiver on condition they were not mixed with the two BSF herds which were subject to stock movement control. That did not happen, as a result of negligence, said Mr Carr. Any claim for reduction in value of the Progressive cows is therefore potentially a claim against the receiver, separate from the negligence claim against GCA. It was not the decision to put the cows onto BSF but rather the mixing of them with the two affected herds which broke the chain of causation from GCA's negligence so that its negligence was not a substantial and/or material cause of all or part of the ensuing losses.

Consequential litigation costs

[668] Mr Carr claims for costs he incurred in litigation, primarily with the Humphries interests, which would have been settled or prevented by the ASA. As a result of the ASA not settling, the litigation continued,⁶⁷ and new claims were filed, including claims by the plaintiffs for specific performance of the ASA. There was litigation related to the acquisition of the Styx Hotel and the discharge of the UDC debt which was to settle under the ASA. Mr Carr eventually obtained the Styx Hotel for a price ultimately lower than the ASA price, so no damages are sought in relation to that litigation. Mr Carr says the ASA would have stopped the claims which were on foot

⁶⁵ Peter Blanchard (ed) *Civil Remedies in New Zealand*, above n 44, at [1.8].

⁶⁶ Peter Blanchard (ed) *Civil Remedies in New Zealand*, above n 44, at [1.8.1], citing *Sew Hoy & Sons (in rec and liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA).

⁶⁷ Including the Big Sky liquidation; the application to remove Anesyds' receiver; appeals, enforcement and related litigation in respect of the default judgment concerning Styx Hotel.

between the parties, and there would have been no need for future litigation about any of the assets covered by the ASA.

[669] The litigation was funded partially by a loan from GCA and partially a loan from South Canterbury Finance (SCF). The SCF loan led to a liability of \$1,300,000, which following the collapse of SCF, was negotiated to \$35,000. However, as Mr Carr could not obtain a loan for that amount due to his personal circumstances following the collapse of the ASA, he took a loan from a personal associate. The loan was made on terms requiring repayment of \$250,000. Mr Carr therefore claimed this sum from GCA.

[670] GCA pleaded that it was not liable for these losses, saying the loss was too remote and not foreseeable. GCA said it could not be liable for the \$250,000, or any part of it in excess of \$35,000, unless it was reasonable for Mr Carr to agree unconditionally to repay the \$250,000, which it was not. Specifically, it claimed that the plaintiffs should have approached QBE, who had previously funded litigation and other legal expenses for Mr Carr. In February 2015, the date of the loan, the parties were engaged in other discussions over funding, and it was reasonable to think QBE would have funded the small sum of \$35,000.

[671] Secondly, GCA said that the effective cost of credit was unreasonably high. GCA said that the parties must have anticipated a final resolution date of no later than about September 2018, which would mean an interest rate was being imposed of around 175 per cent per annum.

[672] GCA therefore said its maximum liability was \$35,000.

[673] In Mr Cooke's submission, although the repayment of \$250,000 was expensive, Mr Carr had limited options. Mr Carr was worried about the consequences if another party bought the SCF debt from SCF, and wanted to settle quickly. Mr Carr's evidence was that, at that stage, he had little recent interaction with QBE and no reason to think it would assist. Furthermore, at that time, GCA was pursuing a claim against Mr Carr directly for failing correctly to apply other sums it had loaned him, so it was unrealistic to think he could approach them for more money.

Analysis and findings

[674] I accept the plaintiffs’ submissions in this regard. The reason for the SCF loan was directly related to the defendant’s negligence, as it stemmed from the need to pursue the objects of the ASA settlement through other litigation. Further, GCA conceded liability for the \$35,000 settlement. Presumably, therefore, had the whole debt not been settled, GCA would have been liable for the \$1.3 million, although in closing Mr Ring referred to the fact that the level of the debt would not have been so high if Mr Carr had applied other loans to pay off the SCF debt earlier. However, this was not the subject of any particular submissions or evidence. In *McElroy Milne*, the Court of Appeal held that where the type of damage was foreseeable, the extent of the damage did not change the defendant’s liability, following the “eggshell skull” principle.⁶⁸

[675] Flowing from the compensatory principle, the Courts will not allow an innocent party to recover losses which could reasonably have been avoided.⁶⁹ The question of whether the plaintiff has failed to take a reasonable opportunity to mitigate is a question of fact, the burden of proof lying on the defendant.⁷⁰ The plaintiff need only take reasonable steps, and *Civil Remedies in New Zealand* describes the standard of reasonableness as “not high”, since the defendant is the wrongdoer.⁷¹ Even where a party has acted badly, it is a difficult burden to discharge.⁷² I refer also to the principles on mitigation set out from *Laws of New Zealand*, above at [663]. Most importantly:⁷³

... The plaintiff’s response to the defendant’s wrong is judged, not in hindsight, but according to the circumstances as they appeared at the time.⁷⁴ When there are various alternatives open to a plaintiff, a reasonable choice of one alternative over another will not be held against a plaintiff if it is subsequently found that one of the other alternatives might have involved some greater mitigation of damages.⁷⁵

⁶⁸ *McElroy Milne v Commercial Electronics Ltd*, above n 17, at 44 per Cooke P.

⁶⁹ Peter Blanchard (ed) *Civil Remedies in New Zealand*, above n 44, at [1.11.2].

⁷⁰ *Payzu Ltd v Saunders* [1919] 2 KB 581 (CA).

⁷¹ Peter Blanchard (ed) *Civil Remedies in New Zealand*, above n 44, at [1.11.3(b)].

⁷² *Bank of New Zealand v Ford* (2001) 4 NZ ConvC 193,289 (HC) at [33], cited with approval in Peter Blanchard (ed) *Civil Remedies in New Zealand*, above n 44, at [1.11.6].

⁷³ *Laws of New Zealand Damages* (online ed) at [112].

⁷⁴ *Hooker v Stewart* [1989] 3 NZLR 543 (CA) at 547.

⁷⁵ *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd’s Rep 614 (CA).

[676] In *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd*, Lord Justice Browne-Wilkinson said:⁷⁶

If there are two methods of mitigating damage, both of which are practicable and reasonable in the circumstances known to the innocent party at the time the mitigating action is required, it is not possible to say that the innocent party acted unreasonably in selecting one of these methods just because, in the light of later events, it turns out that the loss would have been less had the other method been adopted.

[677] This is somewhat different from the position here, where it is argued that the mitigation attempted was not reasonable, and that Mr Carr ought to have considered approaching GCA as an alternative means of mitigation. However, it highlights the proposition that a party cannot be punished for the choice it makes in circumstances where it is choosing between reasonable means of mitigation.

[678] The repayment liability of \$250,000 was assumed to settle the debt which was in and of itself a mitigation of the \$1.3 million dollar loan, secured through negotiation with SCF. *McGregor on Damages* records that a plaintiff is entitled to claim for losses incurred in the course of efforts to mitigate damage which replaces the original loss, whether or not the resulting damage is more than it would have been had the mitigating steps not been taken, as long as the steps were reasonable.⁷⁷ In this case, the loss is not more than it would have been had mitigating steps not been taken, but is significantly more than the \$35,000 settlement sum.

[679] The central question therefore is whether the loan was reasonable. Although a repayment of \$250,000 in return for a loan \$35,000 represents a particularly high interest rate, Mr Carr had obviously exhausted mainstream funding options. The rate of return no doubt reflected the risk associated with the loan. Mr Carr was facing a number of debts and claims against him. The prospect of settling the SCF debt for the low sum of \$35,000 was obviously attractive, and he needed to do so before the debt was on-sold. The \$250,000 repayment liability Mr Carr assumed was in the context of a debt to SCF which had reached \$1.3 million. In those difficult circumstances, it was foreseeable and likely that Mr Carr might end up taking steps which were not the best

⁷⁶ *Gebruder Metelmann GmbH & Co KG v NBR (London) Ltd*, above n 75, at 634.

⁷⁷ Harvey McGregor *McGregor on Damages*, above n 21, at 303.

commercial options in order to fight entire financial collapse. As stated by Lord Collins in *Clippens Oil Co v Edinburgh and District Water Trustees*:⁷⁸

... in my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much worse for the wrongdoer who has got to be answerable for the consequences flowing from his tortious act.

[680] Furthermore, if Mr Carr had not found funding to settle the debt, GCA would be facing liability for the full \$1.3 million. This factor in particular, places a context around the reasonableness of the very high interest rate. The fact that SCF settled the debt for significantly less than its entitlement was a circumstance of great benefit to both Mr Carr and GCA.

[681] Whether or not the plaintiffs should have considered the possibility that GCA would have funded the \$35,000 settlement is also a question of fact. Although unusual, it is clear that GCA had funded Mr Carr's litigation needs previously for much higher sums. However, his reasons for not pursuing that option were reasonable, in the circumstances.

[682] Mr Carr is therefore entitled to \$250,000 in this regard.

Other liabilities

[683] Mr Carr had other liabilities which arose from the failure to settle the ASA. Aside from the SCF debt, in their opening submissions (although not pleaded in the Further Amended Statement of Claim) Mr Carr claimed for other borrowings he made from personal contacts to fund litigation. This consists of an \$85,000 debt owed to Mr Le Fleming and \$60,000 owed to Mr Stewart Herron, borrowed toward some early litigation costs in attempting to enforce the ASA.

Le Fleming debt

[684] Mr Le Fleming guaranteed a loan from SCF to Mr Carr of \$55,000 plus interest and costs. That guarantee was subsequently enforced, and on 12 August 2011, Mr Le Fleming paid \$75,000 to SCF to settle his liability under the guarantee. Mr Carr

⁷⁸ *Clippens Oil Co v Edinburgh & District Water Trustees* [1907] AC 291(HL) at 303.

therefore owes him that sum. There was no dispute about this element of the debt. GCA accepted liability for that \$75,000 on the basis of Mr Le Fleming's evidence, which I also accept.

[685] Mr Carr originally claimed an additional \$10,000 as interest also owed to Mr Le Fleming, but this did not appear to be pursued in light of the defence contention that there was no evidence that Mr Carr was contractually required to pay interest and it was therefore not special damages.

[686] \$75,000 is therefore awarded to the plaintiffs in this regard.

Herron debt

[687] No documentary evidence was provided in relation to the debt allegedly owed to Mr Herron, and the most recent statement of claim made no reference to it.

[688] There is no award to the plaintiffs in this regard.

Unpaid litigation costs

[689] The plaintiffs also claimed for costs incurred in the process of litigation over the ASA which Mr Carr remains obliged to pay or has already paid. Those costs were incurred in pursuing Mr Humphries, in the liquidation of Anesyds Limited, and in relation to proceedings with the Otago Regional Council and Main Farm. The following sums were claimed:

- (a) \$395,437 in costs to Mr O'Connell;
- (b) \$43,583 owed in fees to GCA Lawyers;
- (c) \$2,812 owed to Mr L Taylor, a barrister.

L Taylor and GCA lawyers

[690] In closing, the plaintiffs broke down the pleaded claims for money owed to Les Taylor and "GCA lawyers" as follows:

- (a) \$1,124 owed to Aspinall Joel (a Dunedin law firm) in relation to filing the plaintiffs' claims against Mr Humphries;
- (b) \$3,170, \$4,500, \$1,150, and \$17,437 (according to various invoices) to GCA Lawyers, for work relating to the plaintiffs' claims against Mr Humphries;
- (c) \$10,723 to GCA Lawyers for work relating to the Anesyds Limited liquidation (Anesyds was the company that owned the Danseys Pass Hotel, which was to be acquired by the plaintiffs under the ASA), and \$4,198 for proceedings issued by Main Farm Limited in relation to a water right;
- (d) \$2,812 to Mr Taylor, barrister, for work relating to Mr Humphries' claims.

[691] The plaintiffs claimed the full sum of \$46,395 although I calculate the total to be \$45,114. GCA accepted liability for \$35,760 in respect of these costs and said, in the absence of any reliable evidence justifying an increase in that sum, it was still prepared to pay only that amount.

[692] I am satisfied the invoices confirmed the sums pleaded, and that all post date the failure of the ASA to settle, and the costs were incurred as a result.

[693] The plaintiffs are awarded \$45,114 for this claim.

Mr O'Connell

[694] The costs for Mr O'Connell's work were more highly contested. The plaintiffs claimed that Mr O'Connell was owed a significant sum (pleaded as \$395,437 but referred to in closings as \$351,500; which is roughly consistent with the sum of the success fee, the attendances prior to 1 June 2007 and the attendances following the ASA failure until 2009, less GST), for his assistance to Mr Carr surrounding the ASA and its failure. The claim is divided into two elements:

- (a) first, for Mr O'Connell's success fee for arranging finance for the ASA, in the sum of \$171,925 and attendances assisting with settlement up until 1 June 2007 in the sum of \$18,000; and
- (b) secondly, fees for work completed following the failure of the ASA in relation to the Progressive cows, the plaintiffs' specific performance application and hearing, and subsequent appeal, and as a director of Brookside over the period up until October 2008.

[695] These were opposed by GCA. In relation to work undertaken prior to 1 June 2007, the defence said that this was not an expense incurred by the plaintiffs because the ASA did not settle. In relation to the success fee, it maintained that this was only payable if the loan was drawn down and the ASA settled, which evidently it did not. There was therefore, no basis for claiming the success fee.

[696] Mr Carr confirmed in cross-examination that he considered the plaintiffs were obliged to pay the success fee and he intended to do so. In Mr Cooke's submission, there was no objective legal reason to determine that the sum was not in fact owed to Mr O'Connell, since the interpretation of the agreement between the plaintiffs and Mr O'Connell was "not simply a matter of law but rather, is a matter of interpretation of the agreement". The parties did not intend that a negligent failure by Mr Carr's lawyers would disentitle Mr O'Connell from being paid, he said, and the arrangement on the success fee needed to be interpreted through a purposive lens. The loan application was approved, the loan was drawn down and indeed paid to the ASA vendor, albeit returned as settlement was not achieved by the required time. In Mr Cooke's submission, the defendant's own negligence should not prevent Mr O'Connell obtaining payment for his services.

[697] Contractual interpretation in New Zealand follows the "modern approach" to interpretation set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West*

Brunswick Building Society.⁷⁹ This approach was summarised by Tipping J in *Vector Gas Ltd v Bay of Plenty Energy*.⁸⁰

... The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds.

[698] However, the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* reminded:⁸¹

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[699] In this sense, the question of the correct interpretation of the agreement between Mr Carr and Mr O'Connell is a question of law. The subjective intention of the parties is irrelevant to the interpretation process.⁸²

[700] The arrangement between Mr O'Connell and Mr Carr was set out in a letter dated 4 May 2007. The success fee was payable on drawdown and "the contemporaneous settlement". I accept Mr O'Connell's position that he had done the work to earn the fee. However, on a strictly legal basis, it was never payable. The success fee required not only the drawdown of funds but also settlement. This did not occur and the condition for payment of the success fee was not satisfied. I fully understand Mr Carr's moral obligation. However, he is not entitled to damages in this regard, since Mr O'Connell is not entitled to payment.

⁷⁹ *Investors Compensation Scheme Ltd v West Brunswick Building Society* [1998] 1 WLR 896 (HL) at 912-913.

⁸⁰ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

⁸¹ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

⁸² *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131, [2016] 2 NZLR 829 at [35].

[701] Mr Carr was asked about \$18,000 claimed for attendances between 22 May and 1 June 2007. Some of the attendances recorded by Mr O’Connell were part and parcel of the work required in connection with his success fee that is, preparing the loan application, profit and loss accounts, balance sheets etc.

[702] To the extent that any of the work within the \$18,000 claim was work done as part of the success fee arrangement, Mr O’Connell cannot claim that he is owed it, as he is precluded by the terms of the fee agreement. The other part of this sum related to work done prior to the ASA failing.

[703] Mr Carr is entitled to be put in the position in which he would have been had settlement occurred. If settlement had occurred, he would have had to pay Mr O’Connell’s fees. These fees were not, therefore, incurred because of the defendant’s negligence. Although they could be seen as “wasted costs”, the claim has been put on the basis of expectation losses and a plaintiff cannot claim both expectation and reliance losses in cases where “it is necessary to expend money on a contract to earn the profits”.⁸³

[704] The \$18,000 fee claimed is therefore not recoverable.

[705] Mr O’Connell said he was owed \$161,625 plus GST for the work done by him following the cancellation of the ASA, up until June 2009. That work was itemised in the draft notice of fees prepared prior to trial.

[706] The work included arranging and dealing with all of the finance for Kye in having to purchase the Progressive cows, organising the winter grazing, negotiating the lease of the cows with Mr Frost, attending to the sale of some cows, loan documents with SCF, and numerous attendances regarding the Progressive cows. The fees also related to the significant number of attendances claimed in relation to the provision of evidence for the High Court, and Court of Appeal, and organisation and attendances with respect to obtaining finance to support Mr Carr’s litigation.

⁸³ John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand*, above n 20, at 792.

[707] Mr O'Connell's schedule of fees was extensively challenged. For example, in relation to the period June – November 2007, \$60,500 of attendances was claimed but less than (approximately) \$5,000 worth of work was itemised. There also appeared to be some overlap between the attendances, for example, work itemised on one page of the schedule covered the same period as the other page. Although it related to different aspects of services, when the claimed time is added together, it resulted in very high amounts of time spent per month over the relevant period. Mr O'Connell claimed he provided services worth \$28,125 to Mr Carr between the period May and August 2008, but Mr O'Connell had difficulty answering the detailed analysis conducted in cross examination.

[708] Mr O'Connell said, understandably, he could not recall what he had done about nine years ago and that he was involved in a whole new world of legal proceedings at the relevant time. I have no doubt he was an important source of support for Mr Carr during this period and he devoted a great deal of time to Mr Carr and his problems.

[709] The defence challenged another aspect of Mr O'Connell's documents relating to fees, apparently in connection with his services as a director of Brookside. Clearly, the plaintiffs cannot claim for any work done in October 2006 but I accept Mr Carr's explanation that in fact nothing was done by Brookside until about May 2007 because Brookside was formed specifically for the purpose of the purchase. In any event, this element was only a small component of the \$30,000 referred to in this part of the fee note.

[710] The defence sought to portray Mr O'Connell in a negative light by alleging that certain steps he took did not comply with proper accounting practice. I accept Mr O'Connell's explanations about all these matters and am satisfied there was never any intention by him not to comply with his obligations.

[711] In Mr Ring's submission, Mr O'Connell's assessment of his fees was contrived, both as to narrations and amounts, and produced against the background of a claim against the defendant. Specifically, Mr Ring pointed to the fact that from June to November 2007, for a fee of \$67,500, Mr O'Connell recorded preparing one affidavit and attending the High Court trial for three days. The affidavit was nine

pages of brief and eight exhibits which should have been readily available on file, Mr Ring said. The rest of the bill was claimed as “providing documents and associated material for trial” which Mr Ring said did not justify the amount charged. The defence said that the maximum recoverable amount for Mr O’Connell’s fees should be no more than \$50,000.

[712] In Mr Cooke’s submission, the limited narrations did not mean significant work was not done by Mr O’Connell. He said the sum had not been invoiced yet because Mr O’Connell was well aware of Mr Carr’s inability to pay. Mr Carr confirmed he also intended to pay these amounts regardless of whether they were awarded as damages.

[713] It is for the plaintiffs to prove the claim on the balance of probabilities. *McGregor on Damages* states that where it is clear that a substantial loss has occurred, the fact that assessment is difficult because of the nature of the loss is no reason for awarding no damages or nominal damages.⁸⁴ The standard of proof of loss is “seldom” certainty, and even adopting a reasonable certainty standard “the word reasonable is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount.”⁸⁵ The example given by the text is *Zabihi v Janzemini*, where the valuation of missing jewellery was questioned. The Court of Appeal said:⁸⁶

The court must do its best on such evidence as it feels able to accept to place some kind of value on the jewellery ... even if its precise identity cannot be established and therefore its value must be in doubt.

[714] I am satisfied that the period following the failed ASA settlement involved significant legal challenges, in which Mr O’Connell was an important figure. The defendant continued acting as Mr Carr’s lawyers in all the relevant litigation until early August 2007, at which point GCA informed Mr Carr it was unable to continue to act for him. Mr O’Connell had been heavily involved in the process leading up to the ASA, and the ASA settlement, and was the sole director of Brookside. I accept

⁸⁴ Harvey McGregor *McGregor on Damages*, above n 21, at 348 - 349.

⁸⁵ Harvey McGregor *McGregor on Damages*, above n 21, at [10—002].

⁸⁶ *Zabihi v Janzemini* [2009] EWCA Civ 851.

Mr Cooke's submission that it was unrealistic to suggest that Mr O'Connell's involvement in that major litigation was limited to three days in Court (with no preparation time beforehand), one day to prepare an affidavit, and half a day to consider and assist with preparation of a statement of claim.

[715] Mr O'Connell's level of involvement was clearly significantly more than that, as indicated by Mr Carr's answers as to his discussions with and reliance on Mr O'Connell. Although his calculations were not precise, Mr O'Connell's advice to Mr Carr and that his involvement was significant during six months of litigation.

[716] As referred to above, in my assessment there was some overlap between the different categories of work when it comes to the overall result as to the amount of time per month Mr Connell devoted to Mr Carr's matters. Mr O'Connell was obviously an important source of professional advice to Mr Carr, given he had lost the services of GCA, his long standing lawyers and advisers. Having weighed up all the evidence, I am satisfied it is a fair and reasonable result for Mr Connell's fees over the period to be reduced by one third. Accordingly, \$110,000 is awarded to the plaintiffs in this regard.

Arbitration costs

[717] Mr Carr also claimed the wasted costs of an arbitration undertaken between his interests and GCA, attempting to resolve the question of the defendant's liability for negligence. Mr Carr said these costs were not dealt with by a costs award following litigation over the arbitration, and were expenses arising from the defendant's breach and its long-term denial of liability. There were three sets of costs incurred in relation to the arbitration in the pleadings:

- (a) A fixed fee negotiated for solicitors and counsel from GCA Lawyers for the arbitration of \$700,000. (It was accepted that the pleaded fixed price fee of \$787,500 wrongly included GST);
- (b) Billed costs of \$66,952 incurred prior to this arrangement;
- (c) Experts costs of \$83,742 from the arbitration.

[718] The arbitration had a chequered history, the agreement being signed in September 2010 and May 2011. A partial award was made, ruling against the plaintiffs. The plaintiffs attempted to appeal, and it became clear that the arbitration agreement purported to give appeal rights which the Arbitration Act prohibited. The issue of the validity of the arbitration agreement subsequently went to the Supreme Court.⁸⁷ The High Court proceedings against GCA were issued in 2013 in order to avoid limitation problems and then actively pursued in 2014.

[719] GCA objected to the inclusion of these costs as, under the original statement of claim, only \$400,000 was claimed under this heading, with no references to it in either the briefs of evidence or discovery. GCA said at the last minute this claim was substantiated and was far more than the pleadings or discovery indicated.

[720] In Mr Ring's submission, as a matter of law, these costs were irrecoverable. This was, first, because litigation costs were not recoverable as damages. The arbitration dealt with the same point of law, with the same parties, and did not fall within any of the exceptions to the rules on recovering litigation costs (being where the costs were incurred with a third party, or where involving a separate cause of action).

[721] In Mr Cooke's submission, although public policy considerations typically meant parties' litigation costs could not be claimed as damages, that was not so where the costs were not covered by the High Court's costs jurisdiction or an equivalent costs regime. As the arbitration was a nullity, the costs were not regulated by any regime. Mr Ring submitted this exception only applied where the claimant was the successful party in the other proceeding. He argued that, since the plaintiffs did not succeed in the arbitration claim, they should not now be able to recover the costs as damages.

[722] Secondly, Mr Ring submitted there was an insufficient causative connection between these costs and the negligence. He submitted that negligence must be a material and substantial cause of the head of loss, and this loss was caused because of a defective arbitral agreement not the defendant's failures. Mr Cooke submitted that the costs were directly caused by the defendant's negligence, and its decision not to

⁸⁷ *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792.

admit liability until the very last moment. The expense of subsequent litigation as a result was, the plaintiffs said, a foreseeable and natural consequence of the defendant's failures.

[723] In the alternative, the defence position was that the fixed fee component was not recoverable because of the terms of the agreement. The agreement was conditional, meaning the lawyers' fee was only payable if the arbitral proceeding resulted in a settlement or a judgment sum from the arbitral award. Since neither of those resulted, the plaintiffs were not legally liable to pay the fixed fee and consequently the defendant was also not liable. In his closing submissions, Mr Cooke relied on the same "purposive interpretation" approach as set out above in relation to Mr O'Connell's fees. The parties to the agreement considered that the fee was payable and intended to pay it regardless, and there was no mutual intention that acts of negligence on behalf of Mr Carr's lawyers (and in this case, in the arbitral agreement itself) would disentitle Mr Carr's lawyers from being paid.

Analysis

[724] The arbitral agreement provided:

Fixed fee will be paid by you on receipt of payment of any settlement or judgment sum.

[725] There has been no settlement and no judgment sum arising out of the arbitration, as a result of the Supreme Court decision.

[726] Although Mr Ring addressed first the principled question of the ability to claim legal costs as damages, and questions of causation, the practical question of whether any loss or obligation has arisen in terms of the fixed fee agreement is the first step of analysis. If Mr Carr does not have an obligation to pay the fixed fee arrangement, then there is no "loss" for the \$700,000 which comprised the majority of this claim.

[727] I set out above the relevant principles of contractual interpretation, which also apply to this claim. In relation to this dispute, I also note the recent judgment of the Court of Appeal in *Air New Zealand Ltd v New Zealand Air Line Pilots' Association*

Inc, in which the Court adopted the following summary, from Lord Neuberger in the UK Supreme Court, as to the correct approach to contractual interpretation:⁸⁸

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be ascertained in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of [the contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions. ...

[728] In this case, the natural and ordinary meaning of the terms of payment appears straightforward. The agreement sets out an arrangement whereby the lawyers would be able to recover only if the plaintiffs succeeded in the arbitration. Although, the words “any settlement or judgment sum” are relatively broad, they clearly related to the arbitration. An evaluation of the overall agreement and its context makes it clear this was a conditional fee arrangement.

[729] The arbitration was not successful, both in the sense that the arbitration award was in favour of GCA (although it is not clear what the outcome would have been on appeal) and the arbitration agreement itself was fatally flawed. There can therefore be no claim for the fees arising from the fixed fee arrangement.

[730] However, recovery of the expert’s costs and the fees incurred prior to the fixed fee arrangement will not be barred by the terms of the agreement in this way, since they were not incorporated into the agreement. These expenses raise the question of the ability to claim costs for prior litigation costs, and causation.

[731] The question of litigation costs as damages has been considered in New Zealand before. The general policy rule that costs may not be claimed as damages,

⁸⁸ *Air New Zealand Ltd v New Zealand Air Line Pilots’ Association Inc*, above n 82, at [35], citing with approval Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15].

with a few set exceptions, is well established.⁸⁹ In *Chick v Blackwell*, Hansen J outlined the policy justification and exceptions.⁹⁰

... first, that the rules of assessment of costs encourage parties to exercise restraint and, secondly, it would undermine the costs rules and the policy behind those rules if the party claiming costs in an assessment could recover any unrecovered costs as damages.

There are two exceptions to the rule that costs cannot be recovered as damages. The first is where the costs were incurred in proceedings involving a third party. The second is where the claimant is relying on a separate and independent cause of action. ...

[732] In *Peters v Peters*, Heath J allowed recovery of litigation costs from previous proceedings, as coming within both exceptions.⁹¹ In *Peters*, there had been legal challenges between two Trusts about money lent from one Trust to another, in circumstances where it was unclear if it was intended to be paid back or not. One of the trusts then sued the law firm who had documented the loan, saying that if it had been properly documented the dispute would not have arisen. The firm was found negligent. Heath J found that the first claim was about the nature of the advance as opposed to being for breach of duty, and involved a third party (the other Trust). When considering the quantum, Heath J awarded the entire amount of costs sought, less some costs of a relationship property proceeding which would have occurred in any instance.

[733] Each of these New Zealand judgments, and both parties in this case, referred to an article entitled *Costs as Damages* by Louise Merrett which provides substantial analysis as to the policy reasons behind the rule.⁹² Both the plaintiff and defendant also referred to *Union Discount v Zoller* as supporting their position on costs recovery.⁹³

[734] In *Union Discount*, in breach of an exclusive jurisdiction clause, one party attempted to bring proceedings in New York which were struck out.⁹⁴ No costs were applied for, or awarded, on the basis that under the law of New York, no costs were available. In concurrent proceedings in the United Kingdom, the successful party

⁸⁹ See, for example, *Simpson v Walker* [2012] NZCA 191, (2012) 28 FRNZ 815 at [75].

⁹⁰ *Chick v Blackwell* [2013] NZHC 1525 at [152] and [153].

⁹¹ *Peters v Peters (No 2)* [2013] NZHC 1061.

⁹² Louise Merrett “Costs as Damages” (2009) 125 LQR 468.

⁹³ *Union Discount Company Limited v Zoller* [2001] EWCA Civ 1755, [2002] 1 All ER 693 (CA).

⁹⁴ *Union Discount Company Limited v Zoller*, above n 93.

sought to recover the costs as damages. The Court of Appeal considered that the previously expressed general rule that costs in foreign proceedings could not be claimed as damages in civil claims in England was too broad, and that, in the unique factual circumstances, the costs could be claimed. However, the Court noted that some cases were more doubtful, such as:⁹⁵

... suppose an arbitration clause which nominates arbitration in England. One of the parties sues in the High Court. The other obtains a stay and a court order for costs which does not fully recompense him for his costs reasonably incurred.

[735] The Court considered the policy reasons behind not awarding costs as damages, and highlighted the need to avoid going into the same question twice by looking behind a decision not to award costs in the lower or foreign court as a key rationale. The Court said the previous leading case disclosed that:⁹⁶

... where there was in the earlier action no prospect of obtaining costs although there had been no fault on behalf of the successful party, there was no policy inhibition on granting him the amount of those costs as damages in a later action if he had available to him an appropriate cause of action.

[736] However, the Court emphasised that, without a separate cause of action, costs cannot be recovered as damages even if they are irrecoverable under the rules of the foreign court.

[737] In *Costs as Damages*, the rationale for requiring a separate cause of action is justified as preventing parties bringing a freestanding claim for damages, only to recover costs of previous proceedings.⁹⁷ The author states that, based on *Union Discount*, as long as there is a separate cause of action and the previous court or tribunal had not been able to award damages, the claimant could recover costs in cases other than simply foreign cases. Similarly, if the subject matter of the dispute was the same but the earlier case was criminal not civil, a costs claim could be pursued.⁹⁸

[738] It follows that generally, the costs of an arbitration on the same issue being dealt with by the courts would not be recoverable as damages. If the arbitration

⁹⁵ At [37].

⁹⁶ At [11].

⁹⁷ Louise Merrett “Costs as Damages”, above n 92, at 480.

⁹⁸ Citing *Berry v British Transport Commission* [1962] 1 QB 306 (CA).

agreement between Mr Carr and GCA had not been flawed and Mr Carr challenged the decision in the High Court, it would not have been appropriate to award the costs of the arbitration as damages in that subsequent proceeding. The parties were the same in both proceedings, and both proceedings dealt with GCA's liability for the failure of the ASA. An arbitrator typically has the authority to award costs, so the public policy reasons which apply in terms of protecting the courts' costs regime would similarly apply.

[739] However, in this case, there was no valid arbitration, and no means of either obtaining a decided outcome or obtaining costs. There was therefore no means of obtaining costs for the arbitration in any way, because it was not possible to do so. The current proceeding was not a collateral attack on the arbitration. The Supreme Court's finding that the arbitral agreement was invalid gives this claim a unique background.

[740] There is no risk that, in awarding litigation damages in these circumstances, plaintiffs would be incentivised to spend excessive money on lawyers, knowing they would be reimbursed, because in this circumstance there was no reason for the parties to believe that the arbitration would not be successful. There is also no question of going into the same issues twice, because the arbitral award was defective and no costs decision was made.

[741] In relation to the objection that awarding costs would be awarding the losing party, the plaintiffs were initially unsuccessful. However, because of the defective agreement, there was no determination of any appeal. Had they been successful, they would likely have been awarded costs in their favour for the arbitration, as occurs with reversed court decisions. The fact that the defendant has now conceded liability also makes this point more difficult: GCA has now in essence accepted that the plaintiffs should have succeeded in the arbitration (although there was some suggestion that the plaintiffs bolstered the High Court claim to address identified deficiencies in the arbitration). Although *Union Discount* refers almost solely to awarding costs to a party who has been successful in other proceedings, the facts are materially very different from the present case. Comparably, in *Peters*, where both proceedings stemmed from

the fault of the defendant, due to their negligence there seems to be no reason costs should not be able to be recovered.

[742] I am satisfied that this is a rare circumstance in which allowing the cost of the arbitration to be recovered is appropriate. However, the question of whether the wasted costs were caused by the defendant's negligence must still be considered. As noted, whether the defendant's negligence caused a loss in a factual sense is a common-sense question of whether the breach was a sufficiently substantial cause of the plaintiff's loss.⁹⁹

[743] Intervening acts can break the chain of causation. *McGregor* notes that where the event would not have occurred had the defendant not acted as he did, the defendant will be liable for the damage (although the example given is one of a physical force set in motion).¹⁰⁰ The counterexample is where a subsequent event would have happened regardless of the defendant's actions, in which case there is no liability.¹⁰¹ Where a party makes an application which fails, and the application was not "caused" by the defendants but through the claimant's own decision to issue additional proceedings, for example in a foreign jurisdiction, *Union Discount* clearly states that costs are not appropriate.¹⁰²

[744] GCA claimed that the costs of the arbitration were incurred only because the arbitration was defective, which was not caused by their negligence in relation to the ASA. The fact that the arbitral agreement was defective was not related to the original negligence. However, the parties would not have been in a position where they needed to utilise the arbitration agreement were it not for GCA's negligence. This can be contrasted with the position in respect of the Progressive cows, discussed above, where, had Mr Carr's instructions been followed as to not mixing the cows, the loss could have been avoided. In this case, the ultimate loss of the arbitration costs would have been suffered even if the arbitral agreement had not been defective.

⁹⁹ A G Guest (general ed) *Chitty on Contracts* (27th ed, Sweet & Maxwell, London, 1994) at [26-015], cited with approval in Peter Blanchard (ed) *Civil Remedies in New Zealand*, above n 44, at [1.8.1(2)].

¹⁰⁰ Harvey McGregor *McGregor on Damages*, above n 21, at 163 – 164.

¹⁰¹ Harvey McGregor *McGregor on Damages*, above n 21, at 164.

¹⁰² *Union Discount Company Limited v Zoller*, above n 93, at [17] – [19].

[745] This is a very finely balanced decision. My conclusion is that there has been no break in the chain of causation, as it was GCA's acts solely which led to the need to utilise the arbitration agreement. Although it would not have been reasonably foreseeable that the arbitration agreement would be defective, the defendant could, however, reasonably expect that if found liable for negligence, it would likely have to pay the plaintiffs' costs. GCA's negligence remained the main contributing factor to the need to incur the costs.

[746] I am therefore satisfied that the plaintiffs are entitled to the experts' and the litigation costs. Based on *Peters v Peters*, full recovery has been seen as appropriate previously. This should certainly be the case for the experts' costs at least, as they would have been awarded in the arbitral proceedings had the plaintiffs been successful. In relation to the litigation costs, there is a policy argument for awarding scale costs only, in the sense that is what would have been recoverable had costs been awarded in the arbitration, or on appeal. However, the full costs are what the defendant has in fact lost and the aim of this damages assessment is not to recompense for the costs the party would have received, but to put the party in the position in which he would have been had the defendant not been negligent.

[747] The schedule of experts' fees incorporates two payments made to Mr Carr and these must be deducted from the experts' costs, leaving a total of \$81,105. The defence was concerned to ensure there was no double counting in respect of \$50,000 lodged in trust on account of expert costs. Mr Carr was somewhat confused about this when he gave evidence. Mr Cooke assured the Court in closing that there was no claim for the \$50,000 in trust. On that basis, the amount of experts' costs awarded to the plaintiffs is \$81,105.

Conclusion

[748] In summary, I award the plaintiffs in respect of this category of claimed damages:

- (a) \$250,000 for the SCF debt;
- (b) \$75,000 owed to Mr Le Fleming;

- (c) \$45,114 in respect of unpaid litigation costs;
- (d) \$110,000 in respect of fees owed to Mr O'Connell; and
- (e) \$66,952, and experts' costs of \$81,105 for the arbitration costs.

Part V: Counterclaim, liabilities not assumed or incurred, general damages and interest

GCA/QBE payments

[749] On behalf of GCA, QBE made payments to or on behalf of the plaintiffs totalling \$654,122, to be applied to litigation expenses and legal expenses incurred in attempting to recover assets which were the subject of the ASA. These advances were by way of loan, with the amount advanced and accrued interest to be effectively off-set against any damages award. This was in addition to the \$250,000 advanced to the plaintiffs, to enable Mr Carr to settle his liability under his guarantee to UDC.

[750] GCA counterclaimed for the portion of this loan they say Mr Carr misapplied, in the sum of \$215,471. This was also pleaded as an affirmative defence in the main claim, as a set-off.

Advances for litigation and legal expenses

[751] QBE accepted that, to the extent the loans were applied to litigation and legal expenses incurred in attempting to recover the assets the subject of the ASA, the advances should be treated as fully taken into account in the damages award. This leaves amounts which were not applied in accordance with the specific purpose for which they were advanced.

[752] GCA loaned Mr Carr \$400,000 for specific purposes, namely his legal costs from the date of the agreement and existing legal costs incurred seeking specific performance. It claimed that at least \$215,471 was instead applied to repay personal loans, a loan from SCF, accounting costs, receivers of unrelated companies, contract work at Mr Carr's residential property; was lodged in a bank account and used for unknown purposes; and that a remainder sum has not been accounted for. In Mr Ring's

submission, Mr Carr effectively admitted the allegations when, in response to the accusation of misapplication of the advances, he said, "Strictly not, no. They were necessary payments to keep me alive". The defence maintained that allowing Mr Carr to prepare for litigation was not a recoverable litigation expense.

[753] As an alternative, GCA relied on the payment of \$185,824 out of the \$400,000 advance made from Rhodes & Co's trust account to Brookside on 21 November 2008. Mr Ring referred to Mr Carr's evidence confirming that amount was not applied to authorised purposes. Mr O'Connell was unable to provide any assurance to the contrary.

[754] There was a loan of \$185,000 from SCF for legal expenses. It appears that some of this went to Mr Carr in drawings. \$60,000 was shown as being paid to Rhodes and Co, the lawyers acting, in legitimate litigation expenses. Mr O'Connell was unable to say to what the other drawings applied. He accepted that some portion of the SCF money was not used for litigation purposes.

[755] In Mr Cooke's submission, the fact that some of the funding was used to keep Mr Carr financially solvent instead of funding litigation, should not form the basis of a counter claim or set off. Mr Carr had to be able to fund his living expenses in order to pursue the litigation, which was a consequence of the defendant's negligence.

[756] While Mr Carr was certainly in a difficult position, the purpose of the advances was for litigation expenses. Mr Carr's living expenses cannot fall into this category.

[757] For these reasons, the defendant's claim that Mr Carr misapplied \$215,471 succeeds. This amount is to be deducted from the damages award.

Paid share of arbitrator's costs

[758] GCA paid 100 per cent of the costs of the arbitrator and is entitled to deduct from any award of damages the plaintiffs' 50 per cent liability for the arbitrator's costs, being a deduction of \$97,198.

Liabilities not assumed or incurred/amounts received

[759] Finally, the defence pointed to liabilities not assumed or incurred and amounts received due to the failure of the ASA to settle, claiming the plaintiffs were better off by \$919,054. As a result, GCA was entitled to a credit in this sum, offsetting the damages that it had to pay.

[760] The parties agreed that GCA is entitled to a credit of \$487,054, being liabilities not assumed or incurred, and amounts received, by the plaintiffs because the ASA did not settle. These amounts are:

- (a) Sum received from Mr Humphries as co-obligor of UDC debt - \$105,000;
- (b) Finance on farm equipment and plant - \$37,077;
- (c) Arrears of rent and rates for McSkimming land - \$30,000;
- (d) Liquidators fees - \$49,977;
- (e) GCA unpaid attendances - \$265,000.

[761] If the ASA had settled, the plaintiffs would also have been required to pay facility fees to Hanover totalling \$432,000. I cannot see how this is in a different category from the other costs. It was a payment the plaintiffs would have had to make in order to settle the ASA.

[762] The total of \$919,054 is to be offset from the damages.

General damages

[763] Mr Carr claimed that as a result of GCA's negligence, he suffered stress, anxiety and disruption as a consequence of the on-going litigation with the Humphries' interests, his serious financial challenges (including bankruptcy), the uncertainty as to when the litigation would end, and eviction from his home and holiday home, being the Danseys Pass Coach Inn and the Styx Hotel respectively.

[764] Mr Carr summarised the impact as including:

- (a) the impact of the resumed litigation with Mr Humphries;
- (b) the effect on his general health, including insomnia;
- (c) the enormous stress and anxiety of his inability to continue to support his family and his inability to settle with his ex wife;
- (d) the end of his relationship with his previous partner;
- (e) the strain on his relationship with his sisters because he still owed them from their share of the farms from the 1980s;
- (f) the view that his family holds that he has squandered generations worth of work;
- (g) his struggle to obtain funding from any of the normal sources, and only at punitive rates.
- (h) his loss of reputation and self esteem, as a result of community and media speculation, and at times ridicule. He described the scrutiny as intense, humiliating, and relentless; and
- (i) his inability to make a fresh start in life.

[765] Mr Cooke also pointed to Mr Carr's life being dominated by this litigation over the last 9 years, and the harm and destruction of his reputation as a businessman. This was evidenced by online articles, available through Google searches, which detailed that Mr Carr faced bankruptcy in the High Court, with references to articles in publications such as the National Business Review. In Mr Cooke's submission, this demonstrated the extent to which Mr Carr's reputation as a businessman had been detrimentally affected.

[766] On this basis, Mr Carr sought \$100,000 in general damages. The effect on Mr Carr was said to be comparable to the effect on the plaintiffs in *Heslop v Cousins* and *Arthur Andersen & Co v Gibson* in which the plaintiffs were awarded \$100,000 and \$70,000 in damages respectively.¹⁰³ Mr Cooke compared leaky building cases and said Mr Carr actually lost his family home and properties entirely as a result of the negligence.

[767] GCA accepted that Mr Carr should be entitled to general damages, but said the appropriate award was no more than \$40,000, given the traditional emphasis of the Courts on limiting this head of damages to a moderate level. General damages must be kept within reasonable limits.¹⁰⁴

[768] This case, in Mr Ring's submission, was less serious than other cases in which high end stress damages have been sought. He pointed out that Mr Carr was not bankrupted, partially due to QBE advancing payments to him on GCA's behalf, and that, although the effect was great and prolonged, he did regain some of his properties in 2012. Furthermore, while Mr Carr referred to the impacts on his health, there was no corroborative medical evidence, and, although there were also adverse effects on his family and domestic relationships, he had a new domestic relationship.

[769] Mr Ring also referred to the fact that Mr Carr was able to obtain payments from other sources for living and non-compensable expenses, which alleviated the factors relevant to the damages claim.

Law

[770] This claim is for general damages in tort, to compensate Mr Carr for the negligence of GCA and the effects of that loss which cannot be objectively quantified. In particular, a plaintiff may receive damages for general inconvenience, distress, and disruption where those consequences were reasonably foreseeable consequences of

¹⁰³ *Heslop v Cousins*, above n 23; *Arthur Andersen & Co v Gibson* HC Auckland CP1633/91, 10 July 2002.

¹⁰⁴ *O'Hagan v Body Corporate 189855 (Byron Ave)* [2010] NZCA 65, [2010]3 NZLR 445 (CA) at [111], citing *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 569.

the defendant's negligence.¹⁰⁵ In this case, there is no dispute that general damages are warranted. The only question is the appropriate level.

[771] In leaky building negligence cases, the Court of Appeal has given guidance that the usual award should be around \$25,000 per unit to occupiers.¹⁰⁶ However, in other negligence cases there is not such an established and clear scale.

[772] In *Mouat v Clark Boyce*, the Court of Appeal analysed the difference between damages for stress in contract and in tort, saying that stress damages for breach of ordinary commercial contracts would be unusual, given that stress is an ordinary incident of commercial life.¹⁰⁷ However, the Court “by contrast” saw one of the very purposes of imposing duties on professional persons to take reasonable care to safeguard the interests of their clients is to enable the clients to have justified faith in them.¹⁰⁸ In that case, \$25,000 was awarded to the plaintiffs as a result of the defendant’s breach of fiduciary duty.

[773] The plaintiffs relied on the cases of *Heslop v Cousins* and *Arthur Andersen & Co v Gibson*. *Arthur Andersen*, a 2002 case, bears some resemblance to the current case, being a solicitor’s negligence case in which advice from a solicitor was a factor in the collapse of a company. Laurenson J found that the collapse was primarily due to a systemic fault in the company. He awarded general damages anyway to compensate for the behaviour of the firm following the claim against them. The litigation took over ten years, and the firm failed to understand their fiduciary duties, and adopted a litigation strategy which meant that the dispute was “extraordinarily long, complex and costly”. Laurenson J fixed costs at \$70,000 or \$7,000 per year of litigation and stated:¹⁰⁹

The defendant was not being deprived of an additional benefit ... he was seeking to recover, in effect, his entire financial worth. His determination to pursue his claim has resulted in the loss of his marriage and other significant relationships. The stress arising from this litigation has been extreme and it should not have been so.

¹⁰⁵ *Laws of New Zealand Negligence* (online ed) at [102], citing *Chase v de Groot* [1994] 1 NZLR 613 (HC) and *Chase v de Groot* HC Dunedin CP141/90, 6 September 1993.

¹⁰⁶ *Byron Avenue*, above n 104, at [153].

¹⁰⁷ *Mouat v Clark Boyce*, above n 104.

¹⁰⁸ At 569.

¹⁰⁹ *Arthur Andersen*, above n 103, at [253].

[774] In *Heslop*, Chisholm J awarded \$100,000 in general damages, which appears to be the highest general damages award in New Zealand. The litigation ensued over a property deal which, due to breaches on the part of their solicitor, resulted in the plaintiffs losing the chance to sell their property and retain a valued option to buy back a related family orchard. Instead, they were bankrupted. Chisholm J considered that general damages for the stress of litigation due to the conduct of defendant could not succeed, as it would be covered in a costs award. However, general damages were appropriate considering the exacerbation of the defendants' existing depression and stress symptoms, and the anxiety, humiliation, pain and suffering caused by the solicitor's breaches including being bankrupted which was something particularly devastating to them. The husband and wife plaintiffs received \$50,000 each.

[775] I have also considered other cases in which general damages have been awarded, with awards ranging from \$10,000 to \$30,000, although in some cases divided between two plaintiffs.¹¹⁰

Analysis and findings

[776] There is no clear scale for awarding general damages. The level of general damages which is appropriate is essentially at my discretion, taking into account the level of stress and general impact the defendant's negligence has had on Mr Carr.

[777] I acknowledge the significant impact on Mr Carr from the loss of BSF and his consequential struggles. The impact on Mr Carr appeared to have been overwhelming. Although the delay in this case being determined, and the consequent delay in regaining some of his losses was not due to litigation tactics (unlike *Arthur Andersen*), the delayed resolution clearly aggravated the effect on Mr Carr. His entire life has been disrupted for a significant period of time. Liability was conceded by the defendant only in the weekend before the trial was due to commence.

[778] In keeping with the other cases at the higher end of the damages range, the loss to Mr Carr involved not only in essence his entire livelihood (rather than a discrete

¹¹⁰ *Brouwers v Street* [2010] NZCA 463, [2011] 1 NZLR 645; *Steffensen v BGW Investments Ltd (formerly Broadbase Otago Ltd)* [2014] NZHC 1828; *MacLean v Annan & Co* HC Tauranga CIV 2009-470-868, 18 November 2011.

investment), but also had a personal dimension given his connection to BSF and his personal desire to retain it in his family.

[779] He was not bankrupted, as occurred to Mr Heslop, and neither did he provide specific medical evidence of particular harms to his health other than the general strain and stress of ongoing negotiations with lawyers and financial institutes which can be readily recognised. It was also evident that there had been a great deal of personal pressure on Mr Carr as a result of borrowing from friends and family to cover his debts. As well, coming so close to bankruptcy was likely highly stressful and embarrassing.

[780] The level of harm to Mr Carr was evidently at the high end of the spectrum. I agree that it went beyond the harm to those involved in leaky buildings litigation. However, it appears that the top end of the general damages range is infrequently used. An award of \$100,000 would be significantly higher than the types of awards given previously for general damages, especially given that the \$100,000 award in *Heslop* was for two separate plaintiffs' stress. The damage to Mr Carr, although comparable to *Arthur Andersen*, did not involve the flagrant behaviour on the part of the solicitors in that case which was clearly a strong reason for the high award.

[781] In all the circumstances, I am satisfied that an award of \$50,000 in general damages is appropriate.

Interest

Submissions

[782] The defence challenged the plaintiffs' claim for interest. The plaintiffs aggregated the individual heads of loss pleaded, and claimed interest on the global amount under the Judicature Act 1908 from 31 May 2007. In Mr Ring's submission, this was too simplistic. Each head of loss had to be considered separately, and separate discretions had to be exercised on a principled basis in relation to each, taking into account and giving due weight to the relevant factors.

[783] Mr Ring described the justification for an award of interest as that "the defendant should have admitted the claim when made and offered a proper sum by way of damages."¹¹¹ However, in Mr Ring's submission, the underlying origins of this principle were cases where, because of the defendant's wrongful conduct, the plaintiff has been deprived of the use of money which he or she would otherwise have enjoyed. For that reason, the usual starting date for interest is the date on which the cause of action accrued.¹¹² It loses much of its logic and force when the plaintiff has not been deprived of money but an asset which the plaintiff would have kept, said Mr Ring.

[784] In particular, the defence took issue with the interest calculations running for the period between January 2010 and June 2014, which was the period in which the parties embarked on the ultimately unsuccessful arbitration. The plaintiffs issued the current proceeding during that period to avoid the time-bar, but they remained effectively stayed until October 2014. In Mr Ring's submission, interest should not accrue during that period, for essentially the same causation argument relied on by GCA in respect of its liability for the arbitration costs. This would mean that a 4 ½ year period from January 2010 to the end of June 2014 would not attract interest.

[785] GCA proposed that, for convenience, in relation to heads of loss for which interest might otherwise be justified from 2007, the Court should award interest for the remaining 4½ years period, at a blended interest rate of 6.5 per cent to account for the changes in interest rates since that period.

[786] Where the plaintiffs have actually expended money, GCA accepted that, in principle, the plaintiffs were entitled to interest from that date. However, where no payments have yet been made, in Mr Ring's submission, no interest was warranted as they have not lost the benefit of that money.

[787] The heads of loss in this category are:

- SCF – interest on \$35,000 at 5 per cent from 3 March 2015.

¹¹¹ *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 (SC) at [23], citing Law Revision Committee *Second Interim Report* (March 1934) (UK), at [8] – [9].

¹¹² *Day v Mead* [1987] 2 NZLR 443 (CA) at 463.

- Mr Le Fleming – not yet paid, so no interest.
- Mr O’Connell’s schedule of services – not yet paid, so no interest.
- GCA & Les Taylor invoices – not yet paid, so no interest.
- arbitration invoices – not yet paid, so no interest.
- Arbitration experts’ costs (if any damages awarded) – interest on \$83,740, at 5 per cent, from 23 November 2010, being the date of the last payment.

[788] In respect of other specific assets, GCA said:

- (a) BSF, plant and equipment, and the ASA cows: because the claim was for loss of the difference in value as at 31 May 2007, the amalgamated 6.5 per cent interest rate should apply over the 4 and a ½ year period, excluding the delay for the arbitration.
- (b) Patearoa House and the Creek Block: because Mr Carr intended to give away these properties shortly after 31 May 2007, he had not been deprived of their value for more than a *de minimis* period and therefore damages were not appropriate. If the Court rejected that submission, the Creek Block should be treated in the same way as BSF. As noted above, I have rejected the suggestion that the Creek Block was to be given away.
- (c) General damages: Mr Ring referred to what he described as the accepted principle that interest is awarded from the date the proceedings are issued. He said the date should be 21 October 2014, the date of the pleading which signalled the commencement of this stage of proceeding, following the stay. 5 per cent interest was applicable at that time.

[789] In Mr Cooke’s submission, there was no disentitling conduct on the plaintiffs’ part and interest should run at the statutory rate from the date of breach down to the

date of payment, including for general damages. He said that, had the defendant immediately admitted liability, damages would either have been fixed shortly after 31 May 2007, or after the judgment of the Court of Appeal (February 2009).

[790] The fact that both parties might have been responsible for the arbitration misfiring is irrelevant, in Mr Cooke's submission. Had GCA admitted liability, it would never have been needed. It was subject to rights of appeal which were frustrated by GCA, not the plaintiffs, taking the point that the appeal right was unenforceable.

Assessment

[791] The discretion to award interest is unfettered,¹¹³ and to be exercised as the justice of the case requires.¹¹⁴ I accept there is flexibility to award a blended interest rate, and apply interest over a reduced period if appropriate.

[792] As the Court of Appeal said in *Day v Mead*:¹¹⁵

In the end it is a question of what the justice of the case requires. There are no inflexible rules as to the rate to be awarded or the date from which it should run.

[793] GCA has acknowledged it was negligent. It could have done so from the outset and, had it done so, there would have been no arbitration and nine year period during which the plaintiffs were deprived of their money. The source of the delay was the failure to acknowledge, not the failure of the arbitration. I agree with the plaintiffs that there is no reason for interest to be suspended for the period of the arbitration and subsequent appeals. As Mr Cooke said, had the defendants acknowledged liability from the outset, the arbitration, its costs and the delay would not have been incurred.

[794] Furthermore and significantly, GCA, or its insurers, has had the benefit of the funds for the whole of the 9 year period. I agree with Mr Cooke that it would not be right for GCA to retain the benefit of those monies without paying interest at the statutory interest rate. Lord Denning in *Jefford v Gee*, in the context of a case on

¹¹³ *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) at 846.

¹¹⁴ *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n 111, at [70]; Judicature Act 1908, s 87(1).

¹¹⁵ *Day v Mead*, above n 112, at 464.

personal injury damages and general damages, quoted from the Law Revision Committee and said:¹¹⁶

In practically every case a judgment against the defendant means that he should have admitted the claim when it was made and have paid the appropriate sum for damages. There are of course some cases where it is reasonable that he should have a certain time for investigation, and in most cases the Court may well award interest only from the date when such reasonable time had expired

[795] I do not accept the defendant's reasoning in respect of the Patearoa House. Mr Carr might have had the intention of giving it to Mr O'Connell but it was part of recognition for services rendered. The interest in that property has been lost for nine years.

[796] I accept that interest can be awarded in respect of liabilities which the plaintiffs have incurred but which they have not yet paid. Some of the costs incurred have been invoiced but not paid, and some, for instance Mr O'Connell's fees, have not yet been invoiced. The reason for that is clear. Mr Carr did not have the means to pay the invoices, a factor which is, at least to some extent, also attributable to the defendant's breach and its effect on Mr Carr. Mr Carr will have an additional liability to his creditors to pay interest and for that reason, interest at the Judicature Act rate cannot be criticised. It may be that the plaintiffs should have specifically addressed this in the statement of claim but it cannot be said that the defendant has been prejudiced by that failure.

[797] The prescribed rate has changed several times since 2007.¹¹⁷ The change in the prescribed rate over the period works out at 6.5 per cent on average. I accept the submission that this should be the rate which applies for ease of calculation.

[798] For these reasons, the plaintiffs are entitled to interest at 6.5 per cent from the date of breach in respect of the assets, from the date of expenditure in the case of money already expended, and from the date of invoice or date when the work would have invoiced in the case of money not yet expended.

¹¹⁶ Law Revision Committee *Second Interim Report* (March 1934) (UK) at [8]; cited with approval in *Jefford v Gee* [1970] 2 QB 130 at 144.

¹¹⁷ From 1 August 2002 to 30 June 2008 - 7.4 per cent; 1 July 2008 – 30 June 2011 - 8.4 per cent; from 1 July 2011 - 5.0 per cent.

[799] General damages should also attract interest as from the date of breach. There is no fixed rule as to the commencement date for interest, although it is not uncommon in tort cases to delay the commencement of interest until the date of issue of the proceedings.¹¹⁸ However, the date of accrual approach is also often used and seen as required by justice, since that is the date from which the obligation to pay damages stems.¹¹⁹ This general principle was recognised by the Court of Appeal in *Jefford v Gee*, as noted in the extract above, specifically in the context of general damages in personal injury cases.

[800] Given that the general damages are to acknowledge Mr Carr's suffering over the last nine years of his life as a result of GCA's negligence, it is just and fair that interest runs from the date of breach.

GCA payments

[801] GCA accepted that it should not be entitled to an offset in respect of the advances made for the purpose of funding past and future litigation expenses, and to help secure ASA assets. However, GCA sought an offset to the extent of the plaintiffs' misapplication of their advances, and interest on the misappropriated funds. The funds were misappropriated the day after payment.

[802] In respect of the counterclaim, GCA is also entitled to interest at the same rate, from the date of the misapplication of funds.

Result

[803] For the reasons given, the plaintiffs are awarded damages as follows:

Loss of BSF	\$8,595,144
Patearoa House	\$136,000
Creek Block	\$647,150
ASA cows	\$458,100
Plant and Equipment	\$250,000
Litigation and other costs	\$628,171

¹¹⁸ *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 530.

¹¹⁹ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 717; *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n 111, at [23].

General damages	\$50,000	
Sub total		\$10,764,565
Less:		
ASA expenditure	\$919,054	
Counterclaim	\$215,471	
50% arbitrator's costs	\$97,198	
		\$9,532,842

[804] The plaintiffs are entitled to interest at the prescribed rate from the dates set out above. The defendant is entitled to interest on the counterclaim.

[805] If there is any issue as to calculations, leave is given to refer the matter back to me.

[806] The issue of costs might involve some complexity. If agreement cannot be reached, the parties are to file memoranda within 40 days addressing the issues where there is not agreement and with submissions as to whether the issues can be dealt with on the papers or whether hearing time will be required.

Thomas J