

## PGGW appeal decision highlights the need for proper due diligence in farm purchases

### Court of Appeal reduces damages payable to West Coast dairy farmers

#### Background

Philip and Julie Routhan purchased a West Coast dairy farm for \$2.8m in December 2010. PGG Wrightson Real Estate Ltd (**PGG**) were found to have induced the purchase with a statement that the farm was producing an average of 103,000KgMS (Milk Solids per Kilogram) per season.

After taking possession, the Routhans faced significant challenges in meeting the promised production figures – with the farm only producing 85,000KgMS in the 2010/2011 season.

In an attempt to meet the advertised figures, the Routhans undertook significant capital expenditure, including:

- installing a new concrete feed pad (\$440,000);
- refencing the entire farm (\$250,000);
- replacing and renewing the entire pasture of the farm over three years (\$150,000);
- applying unbudgeted additional fertilizer (\$150,000);
- replacing the water system (\$116,000);
- installing feed troughs in the cow shed (\$8,000); and
- resurfacing the laneways and replacing the culverts (\$150,000).

Believing the cows were responsible for the low production, the Routhans also attempted to terminate the lease of the cows from the previous Vendor, leading to a contractual dispute. An arbitrator ruled against the

Routhans, finding them liable to the Vendor for damages.

During this dispute, it came to light that over the 2007, 2008, and 2009 seasons, the production rate had been in a steady decline with the farm only producing an average of 98,720KgMS each season.

The Routhans argued that if they had known the farm's true production history, they would have investigated why the production was declining instead of yielding the advertised 103,000KgMS.

A sharp drop in milk prices contributed to the Routhans' inability to meet their lending requirements, forcing them to sell the farm for \$1.5 million and an associated farm property also at a loss.

#### The High Court Decision

The Routhans sued PGG for negligent misstatement and breach of section 9 of the Fair-Trading Act, claiming losses of \$3.18 million. They claimed they would have never purchased the farm if they were aware of its actual production levels.

In response, PGG cited a disclaimer and argued that the Routhans' misfortune was due to their lack of experience as farmers, failure to conduct thorough due diligence, and failure to mitigate their losses when it became evident that the farm could not sustain the promised production level.

The High Court determined that the misleading statement regarding production levels was material to the Routhans' decision to purchase the farm. The Court found that PGG breached its duty of care by providing inaccurate or misleading information.<sup>1</sup>

The disclaimer did not protect PGG from liability for the misrepresentation, with the Court finding it only applied to information obtained from a vendor under certain circumstances. PGG also unsuccessfully argued that the claim was time-barred, with the Court finding that

<sup>1</sup> *Routhan v PGG Wrightson Real Estate Ltd* [2021] NZHC 3585.

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the Routhans could not reasonably have discovered the correct production levels until late 2014.

In assessing loss, the Court found that the recoverable losses suffered by committing to the purchase of the farm included the loss of equity in the farm and the run-off property through the forced sale in 2020, as well as the loss of investment in capital improvements on the farm.

The Court also considered contributory negligence on the part of the Trust, finding merit in PGG's criticism that certain capital expenditures were not adequately justified and contributed to the Trust's losses.

As a result, the Court determined that the Routhans' contribution to their losses reduced the damages awarded by 20%, resulting in a \$1,697,600 award of damages.

PGG appealed the decision to the Court of Appeal.

### The Court of Appeal Decision

PGG argued that it did not assume a duty to protect the Routhans against their subsequent investment and forced sale losses and that there was no causal nexus between these losses and their representation.

The Court rejected PGG's other appeals against the findings relating to the disclaimer, the claim being time-barred, and the Routhans' contributory negligence only being 20%.

The Court agreed with the High Court that the Routhans would not have purchased the farm if they had known its actual position. However, they focused on whether the losses were within the scope of PGG's duty, applying the principle that an adviser will not be liable for the full range of risks associated with a particular transaction if their contribution was limited to advice or formed only part of the decision to proceed.<sup>2</sup>

The information provided by PGG was intended to decrease the risk of the Routhans overpaying for the farm. Thus, it was pivotal in their decision to complete the purchase. By assuming responsibility for the accuracy of this information, PGG was liable for the consequences of it being negligently incorrect.

However, the information on milk production was only one factor that influenced the Routhans' decisions. PGG was not involved in the other factors relevant to the Routhans' initial purchase nor their subsequent decisions to invest significant capital in the farm.

Therefore, PGG did not assume responsibility or liability for the subsequent capital investments and forced sale losses incurred by the Routhans. The Court found that these losses were outside the scope of PGG's duty: PGG could not reasonably be expected to bear the consequences of decisions over which it had neither input nor control.

Further, the Court held that the causal link for a claim of negligence or the clear nexus required by the FTA was not made out, stating that the causal nexus between PGG's misrepresentation and the various subsequent investment decisions was "very tenuous".

Therefore, the correct measure of loss was the difference between the price paid by the Routhans and the property's true market value at the time had it been accurately described. The Court concluded that this loss amounted to \$300,000.

### Matters to consider

This case is a cautionary tale, emphasising the importance of purchasers undertaking proper due diligence and verifying the veracity of key data such as production values.

Not only were the Routhans' damages reduced from \$1.7 million to \$300,000, but costs were also awarded against them, perhaps leaving the farmers worse-off

<sup>2</sup> PGG Wrightson Real Estate Ltd v Routhan [2023] NZCA 123 At [114], citing Manchester Building Society v Grant Thornton UK LLP [2022] AC 783.

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than they had been before making their claim. Litigation of this nature can be time consuming and expensive.

From an agent's perspective, the case displays that courts will interpret disclaimers strictly, showing that they will be unlikely to provide protection when the agent receives information indirectly and/or from sources other than the Vendor.

### Want to know more?

If you have any questions about farm purchases or sales, please contact [David Goodman](#), [Reuben Adams-Cook](#) or a member of our specialist [Rural and Agribusiness Team](#).