IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA193/2020
[2021] NZCA 448

BETWEEN	SHABOR LIMITED Appellant
AND	ROBERT GRAHAM First Respondent
	PINE RIDGE TRUSTEE COMPANY LIMITED Second Respondent

Hearing:	4 May 2021
Court:	Brown, Courtney and Collins JJ
Counsel:	K M Quinn and C B Pearce for Appellant D M O'Neill and P A Depledge for Respondents
Judgment:	15 September 2021 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B Judgment is entered for Shabor on the Fair Trading Act cause of action for $371,000 together with interest at 5 per cent from 3 June 2014.

C The costs judgment is set aside and the matter is remitted to the High Court for reconsideration of costs.

D Shabor is entitled to costs in this Court for a standard appeal on a band A basis, with usual disbursements and certification for second counsel.

REASONS OF THE COURT

(Given by Courtney J)

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Introduction

[1] In 2014 Robert Graham advertised his sheep and beef farm for sale by tender.[1] The advertisement stated that the farm "comfortably winters 7,500 plus stock units

[1] The vendors were actually Robert Graham and Pine Ridge Trustee Company Ltd, of which Mr Graham was a shareholder. For convenience the High Court Judge referred to them collectively as Mr Graham and we do likewise.

with capacity for more". The closing date for tenders was 10 April 2014. Mr Sharp and Mr Borland saw the advertisement. They inspected the farm and thought it would be suitable for deer farming. They submitted a tender of $5,250,110, which was calculated on the basis of the Stock Unit figure in the advertisement. Shabor Ltd (which was incorporated a few weeks later) was the nominated purchaser.

[2] The tender was accepted. Clause 27.3 of the sale and purchase agreement contained a "no-reliance clause" which provided that:

> The Purchaser shall be deemed to have purchased the property acting solely in reliance on the Purchaser's own judgement and upon its own inspection of the property and all other information regarding the property, and not in reliance upon any representative [sic] or warranty made by the Vendor, the Vendor's Agent or Managers other than as expressly set out in this Agreement.

[3] Within a short time of taking over the farm Shabor found that the farm could not carry 7,500 Stock Units over winter. It began work to improve the farm's carrying capacity.

[4] Shabor brought proceedings against Mr Graham for misrepresentation and breach of the Fair Trading Act 1986 (FTA).[2] Both causes of action failed.[3] Fitzgerald J found that although Mr Graham had misrepresented the carrying capacity of the farm, cl 27.3 was conclusive as between the parties for the purposes of the misrepresentation claim and broke the chain of causation for the purposes of the FTA claim.[4] In a separate judgment the Judge awarded costs to Mr Graham.[5]

[5] Shabor appeals. The issues on the appeal are:

(a) In respect of the FTA cause of action:

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2 The proceedings in the High Court also named the real estate agent, Success Realty Ltd, as a defendant. By the time of trial, however, that claim had been resolved.

3 *Shabor Ltd v Graham* [2020] NZHC 507, (2020) 21 NZCPR 440 [High Court decision].

4 At [237].

5 *Shabor Ltd v Graham* [2020] NZHC 1592 [Costs decision].

(i) Did cl 27.3 of the sale and purchase agreement break the chain of causation between Mr Graham's conduct and Shabor's loss (as held by the Judge) for the purposes of ss 9 and 43?

(ii) If not, what is the correct quantum of damages under the FTA cause of action?

(iii) Was the Judge correct to reduce damages by 40 per cent on account of Shabor's own conduct?

(b) On the misrepresentation cause of action:

(i) Did cl 27.3 on its terms purport to preclude reliance on the capacity representation, as held by the Judge?

(ii) If so, is it fair and reasonable for the purposes of s 50 of the Contract and Commercial Law Act 2017 (CCLA) that cl 27.3 be conclusive between the parties, having regard to all the circumstances of the case?

(iii) If it is not fair and reasonable for cl 27.3 to be conclusive, was the Judge correct to disallow estimated labour costs for fencing and therefore to reduce the quantum of damages by $106,122?

[6] If the appeal succeeds, Shabor seeks to have the issue of costs revisited in the High Court.

Factual background

Shabor purchases the farm

[7] Mr Borland, an engineer by occupation, had been involved in deer farming for more than 25 years and farming full time since 2008. Mr Sharp had farmed on his own account since 1976, mainly cattle and sheep but with a focus on deer farming since 1989. The two men wanted to buy a property and farm together.

[8] Mr Sharp and Mr Borland saw Mr Graham's advertisement for the farm on or about 1 April 2014. They thought it looked attractive based on the advertising material and the property information memorandum (PIM). The reported soil test results showed fertiliser levels that were below optimum, but they viewed this as an opportunity to increase carrying capacity beyond the stated 7,500 stock units through improving soil fertility levels.

[9] Mr Sharp and Mr Borland visited the property on 7 April 2014, only three days before tenders closed on 10 April 2014. Their banker, Mr Murphy, accompanied them. The three had already discussed the basis of any price they might offer. It was expected that any price would be calculated on a per Stock Unit basis. Mr Murphy advised that sale prices for farms in the area ranged from $500 to $1,000 per Stock Unit.

[10] Mr Borland, Mr Sharp and Mr Murphy went to the farm to meet Mr Graham and his real estate agent, Mr Gudsell. Accompanied by Mr Gudsell, Mr Sharp, Mr Borland and Mr Murphy toured the property for about two hours. During that time the question of carrying capacity was raised, with Mr Gudsell assuring them of the carrying capacity of 7,500 Stock Units.

[11] After leaving the property Mr Borland, Mr Sharp and Mr Murphy went to a local café to discuss the property. Mr Sharp and Mr Borland calculated a price based on 7,500 Stock Units as represented, multiplied by $700 (based on Mr Murphy's advice about farm sale prices). This produced a price of $5,250,000, to which they added $110 as a precaution against other tenderers who might be using the same figures. They went to a Bayleys office to collect the tender documents.

[12] On 10 April 2014 Mr Borland and Mr Sharp visited their lawyer. They discussed the tender conditions. These took the form of a standard sale and purchase agreement wording with attached "further terms". The further terms included the no-reliance clause as part of a general limitation of liability in cl 27:

> **27.0 Limitations of liability**
>
> The Vendor does not warrant:

> **27.1** The accuracy of any matter, fact or statement in any report or other information on the property prepared or provided by the Vendor's [sic] or its Managers or Agents (including information contained in Schedules to this Agreement), any advertising of the sale of the property or any statement made except in relation to any specific warranty given in this Agreement or
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> **27.2** Any other matter relating to the property or its use or nature or the state of the property in any respect other than expressly set out in this Agreement.
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> **27.3** The Purchaser shall be deemed to have purchased the property acting solely in reliance on the Purchaser's own judgement and upon its own inspection of the property and all other information regarding the property, and not in reliance upon any representative [sic] or warranty made by the Vendor, the Vendor's Agent or Managers other than as expressly set out in this Agreement.

[13] Mr Borland and Mr Sharp made some minor changes to the further conditions, including adding chattels to the chattels list, and submitted an unconditional tender on those terms. They did not seek to make any change to cl 27. The fact that the tender was unconditional was notable; Mr Gudsell gave unchallenged evidence that an unconditional tender for a farm property was rare; in his experience, 90 per cent of tenders are conditional on completion of due diligence. The tender was accepted and the agreement was declared unconditional on 17 April 2014 with settlement due on 3 June 2014. Shabor was the nominated purchaser.

[14] The agreement conferred an option to purchase stock and Mr Borland and Mr Sharp attended the property in late May 2014 to observe the valuation of the stock. Alarm bells began to ring at that point. The number of animals on offer was low and some were in poor condition. The day before settlement Shabor's solicitor wrote to Mr Graham's solicitor expressing concern about the accuracy of the capacity representation and reserving its position. The response was to convey Mr Graham's advice that:

> 1. He has in the past carried at least 7,500 stock units on the property.
>
> 2. With the drought conditions, a different fertilizer policy, our client has utilized over the last couple of years, this has affected the carrying capacity.
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> 3. Our client advised the Real Estate Agents the exact numbers of stock he was carrying and they prepared and presented the information in stock units.

4. Our client understands that there is a very wide variation as to how stock units are calculated.

5. We understand that your clients are capable experienced farmers and would have known the capabilities of any farm they intended to purchase.

[15] After taking over the farm Mr Borland and Mr Sharp saw that their concerns about the carrying capacity were well founded. The actual stock numbers that had been run immediately before the sale were much lower than represented and supplementary feed had been used frequently. Over the winter of 2014 they were able to run only about 4,500 to 5,000 Stock Units. They began increasing the fertiliser application and took other steps to improve the property's carrying capacity.

The statement as to carrying capacity was a misrepresentation

[16] The accuracy of the representation as to the carrying capacity of the farm was critical to both causes of action and the Judge determined this question before considering the issues arising in the respective causes of action.

[17] The accuracy of the statement turned largely on the meaning of "Stock Unit", the term used in the advertising material. Expert witnesses agreed that the standard, accepted measure of a Stock Unit is one breeding ewe weighing 55 kilograms with one lamb. The experts also agreed that one standard Stock Unit equates to 550 kilograms of dry matter eaten per annum. So, one breeding ewe weighing 55 kilograms with one lamb will eat 550 kilograms of dry matter per year. The significance of these figures is that, to carry one Stock Unit without supplementary feed, a farm would need to produce at least 550 kilograms of dry matter per year.

[18] Those basic propositions were uncontentious. But the experts differed on how they could be applied to other types or weights of animals. There were also differing views about how the standard Stock Unit could be used. One view was that the standard Stock Unit rates were intended primarily for feed budgeting purposes. Another view was that the standard Stock Unit rate was commonly used for "back of the envelope" assessments of a property's carrying capacity.

[19] The Judge, however, did not regard the application of the standard Stock Unit to other types or weights of animals as helpful. The purpose of the capacity representation was to convey useful and meaningful information to potential purchasers about the farm's carrying capacity. If the phrase "Stock Units" did not refer to the standard definition, the capacity representation would have been meaningless.[6] The Judge found that the representation conveyed that the farm could comfortably winter the equivalent of at least 7,500 55-kilogram ewes each with one lamb or, framed by reference to the amount of dry matter eaten, could produce the 4,125,000 kilograms of dry matter per annum needed to sustain that number of animals.[7]

[20] Determining the actual carrying capacity of the farm was more difficult. This was because there was no reliable information about historical stock numbers on the farm; Mr Graham had used supplementary feed in the past and the sale of the property had come at the end of two years of serious drought and was significantly under-fertilised.[8] The Judge was unable, so many years later, to accurately assess the property's actual carrying capacity in 2014. However, she did not consider it necessary to do so because all that was required for liability purposes was that the actual carrying capacity be materially lower than 7,500. Further, the calculation of damages was tied to the cost of lifting the property's carrying capacity to that represented, which did not require identifying the actual capacity in June 2014.[9]

[21] The Judge therefore focused on whether, at the time of the sale, the property was capable of producing the agreed 4,125,000 kilograms of dry matter per annum needed to sustain 7,500 Stock Units.[10] On this approach the Judge treated the estimated pasture production and utilisation as better indicators of carrying capacity than historical numbers of stock actually carried on the property.[11]

[22] The Judge found that soil quality, and in particular phosphorus levels, were a key driver of pasture production.[12] If soil is deficient in this nutrient, plants will not

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6 High Court decision, above n 3, at [12].
7 At [13].
8 At [17].
9 At [137(h)].
10 At [18].
11 At [137(a)].
12 At [137(b)].

grow to their maximum capacity which will in turn decrease the amount of stock that can be carried. The "Olsen P" test is commonly used to measure phosphorus levels in soil.

[23] The PIM included the results of soil tests taken from the farm in February 2014, which showed an average Olsen P level of 11 micrograms per millilitre. The evidence of Shabor's key expert witness, Dr Roberts, was that an average Olsen P level of 18 would have been required to support just under 7000 stock units.[13] Dr Roberts also noted that the February 2014 samples were taken from a drought year and during the summer period. This is not recommended because the soil is very dry and can artificially elevate test results, including Olsen P levels.

[24] The Judge concluded that in the past the property may have carried around 7,500 Stock Units and possibly more but that by June 2014 its carrying capacity had declined and at the time of sale it was not able to carry that level of stock.[14] Taking all of the evidence into account, the Judge found that the carrying capacity at the time of sale was around 5,500 Stock Units, possibly up to around 6,000 Stock Units.[15] She held that:[16]

> As the Property's actual carrying capacity in June 2014 was materially lower than 7,500 Stock Units, the Capacity Representation was a misrepresentation (for the purposes of the CCLA) and misleading for the purposes of the FTA.

[25] The Judge also considered that Mr Graham was "somewhat casual" in his estimate of the property's carrying capacity for the purposes of the 2014 advertising materials but found that he did not knowingly under-estimate the advertised carrying capacity.[17] Notably, Mr Graham had listed his farm for sale on two previous occasions, in 2007 and 2012, and had advertised the carrying capacity on those occasions as 8,500 and 8,000 Stock Units.

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13 Dr Roberts' evidence "was not seriously challenged": at [68]. See also at [215].
14 At [137(c)]–[137(d)].
15 At [137(g)].
16 At [137(f)].
17 At [137(j)].

THE FAIR TRADING ACT CLAIM

The parties' positions

[26] In *Red Eagle Corp Ltd v Ellis* the Supreme Court said that in a relatively simple case where there is no doubt about what was said or its meaning and the loss arose from the same event, liability can be established by a two stage inquiry.[18] First, whether the conduct was misleading and deceptive for the purposes of s 9 of the FTA. This question is to be considered in context, including the characteristics of the person affected (e.g. an unsophisticated consumer as opposed to a sophisticated businessperson). The question can be framed conveniently as whether a reasonable person in the plaintiff's position would likely have been misled or deceived by the representation.[19]

[27] Once a breach of s 9 has been proved the inquiry moves to the requirements of s 43 — whether the loss or damage was sustained "by" the conduct of the defendant. This question engages a "common law practical or common-sense concept of causation".[20] It requires proof that the claimant was actually misled or deceived by the defendant's conduct and then whether that conduct was the or an effective cause of the loss. It is possible for one of the effective causes of loss to be the claimant's own conduct in failing to take reasonable care to look after their own interests, in which case the Court can exercise its discretion as to whether the full amount of the loss should be recoverable.[21]

[28] Both parties proceeded, correctly, on the basis that the approach described in *Red Eagle* was appropriate in this case. The first stage of the inquiry was satisfied. Mr Graham accepted that he was acting in trade for the purposes of s 9 of the FTA. The Judge's finding that the statement regarding carrying capacity was misleading and deceptive for the purposes of the FTA is not challenged.[22]

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18 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [27]–[31].
19 *Wellington City Council v Dallas* [2014] NZCA 631 at [21].
20 *Red Eagle Corp Ltd v Ellis*, above n 18, at [29], quoting *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 525.
21 At [30].
22 High Court decision, above n 3, at [137(f)].

[29] The appeal turns on the second stage of the enquiry — causation and loss. The Judge held that no liability arose under the FTA because cl 27.3 had the effect of breaking the chain of causation between the misleading representation and Shabor's loss. The Judge gave an indicative view of the damages and considered that if Mr Graham had been liable, any damages would have been reduced by 40 per cent to reflect Shabor's own conduct.[23]

[30] Shabor says, first, that the Judge erred by giving effect to the legal fiction created by cl 27.3 rather than undertaking an assessment on the totality of the evidence. Secondly, the Judge's (hypothetical) assessment of the level of contributory conduct by Shabor was wrong.

[31] Mr Depledge, for Mr Graham, supported the approach taken by the Judge. Acknowledging that the misrepresentation must have played some part in inducing entry into the contract, he submitted that causation was nevertheless negated by the presence of the no-reliance clause.[24] Alternatively, the misrepresentation was not the dominant cause of loss but rather was overtaken by Mr Sharp's and Mr Borland's failure to carry out any further inquiries after receiving legal advice on the agreement. If the misrepresentation had been a cause of the loss, he supported the Judge's assessment of a 40 per cent reduction for contributory conduct.

Did the Judge err in finding that cl 27.3 broke the chain of causation?

The Judge's finding on causation

[32] The Judge dealt with Shabor's CCLA cause of action before considering the FTA claim, despite the latter having been pleaded first. She held that the CCLA claim failed because cl 27.3 was conclusive as between the parties. In her opening remarks on the FTA cause of action the Judge expressed the view that, where both misrepresentation and breach of the FTA were asserted, a different outcome on each cause of action was unlikely:[25]

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23 At [236].
24 Relying on *Gould v Vaggelas* (1984) 157 CLR 215 at 238.
25 High Court decision, above n 3 (emphasis in original).

> [185] Given the similarities between the two causes of action, in all of the authorities discussed earlier (save for *Waikatolink v Comvita*), the Contractual Remedies Act and Fair Trading Act claims have been treated relatively interchangeably, with no difference in outcome, including on the effect of a no-reliance clause. Again, this is not surprising, given the undoubted consumer focus of the Fair Trading Act. As I have recorded above, neither Mr Sharp or Mr Borland, or as a result, Shabor, purchased the Property as a consumer. It would therefore be somewhat surprising if Shabor was in a *better* position vis-a-vis its contracting counter-party under consumer-focused legislation, than it is under contract-focused legislation.

[33] Following these comments, the Judge set out the approach suggested by the Supreme Court in *Red Eagle* before considering what effect, if any, cl 27.3 had on the FTA claim.[26] On its face cl 27.3 precluded Shabor from asserting that its reliance on the misrepresentation caused or contributed to its loss. But when the agreement was entered into it was not possible to contract out of the FTA.[27] No-reliance clauses such as cl 27.3 were seen as means of circumventing that restriction.[28]

[34] The Judge noted this Court's discussion in *David v TFAC Ltd* in which Arnold J, writing for the Court, had considered that while consumer protection justified not allowing parties to contract out of the FTA, that justification had less force in the context of commercial transactions involving substantial independently advised parties negotiating from positions of equality.[29] Although clauses such as entire agreement clauses and no-reliance clauses were not determinative, they could be relevant in deciding whether there had been misleading and deceptive conduct.[30] But a disclaimer or similar clause may be overwhelmed by oral assurances or other conduct.[31]

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26 At [186]–[187].

27 Subsequent amendments to the Act now permit contracting out in certain circumstances: Fair Trading Act 1986, s 5D, inserted by s 8 of the Fair Trading Amendment Act 2013.

28 *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239 at [62].

29 At [61].

30 At [63], citing *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059 (FCA) at 53,222.

31 At [63], citing *Phyllis Gale Ltd v Ellicott* (1997) 8 TCLR 57 (HC) at 65–66; and *Cornfields Ltd v Gourmet Burger Co Ltd* (2000) 9 TCLR 698 at [41].

[35] The Judge then surveyed subsequent New Zealand cases that had considered this issue — *Pegasus v Draper*,[32] *Overton Holdings Ltd v APN New Zealand Ltd*[33] and *PAE (New Zealand) Ltd v Brosnahan*[34] — and concluded: [35]

> [196] Like the position under the Contractual Remedies Act cause of action, I conclude that the no-reliance clause in this case is effective in defeating the claim under the Fair Trading Act also.
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> [197] In particular, I adopt the approach taken by the Court of Appeal in *PAE (New Zealand) Ltd v Brosnahan* and set out at [195] above. In this case, cl 27.3 was clear in stating that Mr Sharp and Mr Borland, when submitting their tender and entering into the Agreement, relied on their own judgement, and *not* on any representations or warranties given by Mr Graham. Mr Sharp and Mr Borland were aware of the tender terms as of 7 April 2014, and importantly, prior to formulating and submitting their tender. Rather than the effect of the clause being "overwhelmed" by earlier representations, the content of cl 27.3 itself, that it was clearly visible to Mr Sharp and Mr Borland and that they received advice on it, "drew down the curtain of liability". They, as purchasers, were on notice and represented in clear terms to Mr Graham, that they were not relying on any representations made by him. There is no reason why this statement should not bind them in the circumstances of this case.
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> [198] I therefore conclude that cl 27.3 was effective in breaking the chain of causation between the Capacity Representation and Shabor's loss. For the reasons briefly set out at [233]–[236] below in relation to damages, had I not found cl 27.3 broke the chain of causation in this case, in the second step of the analysis endorsed in *Red Eagle*, I would have reduced Shabor's damages claim to take into account what I consider to have been its haste in entering into this significant transaction, and consequent failure to conduct appropriate due diligence (which as noted, was a theme of a number of experts' evidence).

The ground of appeal

[36] Mr Quinn, for Shabor, submitted the Judge's view that it would be unlikely for CCLA and FTA claims arising in the same proceeding to produce different outcomes disclosed an error because the two causes of action required different approaches to the question of causation. It is correct that different issues arise under each. We agree that the Judge's comments had the potential to distract from the approach required for the FTA causation enquiry and, as we come to shortly, we think that the Judge did err in her approach to the question of causation.

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32 *Pegasus Town Ltd v Draper* [2011] NZCA 140, (2011) 13 NZCPR 51.
33 *Overton Holdings Ltd v APN New Zealand Ltd* [2015] NZCA 526, (2015) 17 NZCPR 251.
34 *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2009) 10 TCLR 626.
35 High Court decision, above n 3 (footnote omitted and emphasis in original).

[37] Mr Quinn submitted that cl 27.3 created a legal fiction that Shabor had not relied on the misrepresentation, which the Judge wrongly treated as determinative of the causation issue. Instead, the Judge should have asked whether, as a matter of fact, Shabor's directors had actually relied on the misrepresentation. Mr Quinn also submitted that the Judge's reliance on *PAE* was misplaced, since that case did not represent an accurate parallel with circumstances of this case.

[38] Mr Quinn argued that the evidence pointed strongly towards Mr Sharp and Mr Borland having been actuated by the misrepresentation in entering into the contract, particularly the speed with which they made the decision to tender for the farm, their use of the misrepresentation to formulate the tender price, the lack of any steps towards due diligence and their unchallenged evidence that they would not have tendered at that price if they had known the true position. He also pointed out that, when considering damages on the hypothetical basis, the Judge herself considered that "Mr Sharp and Mr Borland placed wholesale reliance on a carrying capacity set out in advertising materials".[36] Although obiter (given the Judge's conclusion on causation), Mr Quinn submitted that this comment accurately reflected the evidence. Further, it was consistent with the Judge's view that, had the FTA claim succeeded, damages would have been reduced by 40 per cent to reflect Shabor's own conduct.[37] As Mr Quinn put it, the obvious question is what the cause of the other 60 per cent was — the answer being that Mr Graham's conduct remained an effective, indeed the dominant, cause of Shabor's loss.

[39] Mr Depledge submitted that the capacity representation was not the dominant cause of the loss; it was overtaken by Mr Sharp's and Mr Borland's failure to carry out any further inquiries after receiving legal advice on the agreement. He emphasised the consumer protection policy of the FTA, which did not extend to protecting purchasers who fail to look after their own interests in a manner that is unreasonable in the circumstances. He relied heavily on the statement by Elias J (as she then was) in *Des Forges v Wright* that "[t]he Fair Trading Act is not designed to provide a guarantee to purchasers who fail to look after their own interests in a manner which is

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36 At [233].
37 At [236].

reasonable in the circumstances"[38] and by the Supreme Court in *Red Eagle* that "[c]onduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer".[39]

[40] Mr Depledge argued that these cases had changed the approach taken in New Zealand, which now emphasises the need for purchasers to take reasonable steps to protect themselves. He dismissed as not relevant the Australian decisions relied on by Shabor and invited us to disregard the subsequent New Zealand cases that have treated the question of causation as requiring consideration of the evidence generally — *Leigh v MacEnnovy Trust Ltd*,[40] *PAE*[41] and *Waikatolink Ltd v Comvita New Zealand Ltd*[42] — either because of factual differences or for want of adequate analysis of the issue.

Discussion

[41] We start our discussion with Mr Depledge's argument that Shabor's failure to look out for its own interests could, and did, effectively counter the effect of the misrepresentation for the purposes of the causation inquiry. This approach is not consistent either with *Red Eagle* or with the settled approach to assessing the effect of no-reliance and similar clauses. The statements in *Des Forges* and *Red Eagle* on which Mr Depledge relied were directed towards determining whether the conduct in question had amounted to a breach of s 9, specifically whether a reasonable person would have been misled or deceived by the conduct in question. They did not concern whether conduct that had been held to be a breach of s 9 caused the loss complained of. Accordingly, we do not accept the submission that those cases resulted in any difference in the approach to the causation inquiry.

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38 *Des Forges v Wright* [1996] 2 NZLR 758 (HC) at 765.
39 *Red Eagle Corp Ltd v Ellis*, above n 18, at [28].
40 *Leigh v MacEnnovy Trust Ltd* (2010) 12 TCLR 790 (HC).
41 *PAE (New Zealand) Ltd v Brosnahan*, above n 34.
42 *Waikatolink Ltd v Comvita New Zealand Ltd* (2010) 12 TCLR 808 (HC).

[42] In *David*, this Court made it clear that whether a disclaimer clause was effective would depend on the totality of the evidence. Arnold J expressly referred to French J's observations in *Kewside Pty Ltd v Warman International Ltd* that:[43]

> A disclaimer or exclusion clause will affect liability for misleading or deceptive conduct only if it deprives the conduct of that quality or breaks the causal connection between conduct and loss. Whether it has that effect in a given case is a question of evidence and not a question of law.

[43] In *Campbell v Backoffice Investments Pty Ltd* French CJ elaborated on the circumstances in which disclaimers might be held to be effective in breaking the causal connection between misleading and deceptive conduct and loss:[44]

> [31] Where the impugned conduct comprises allegedly misleading pre-contractual representations, a contractual disclaimer of reliance will ordinarily be considered in relation to the question of causation. For if a person expressly declares in a contractual document that he or she did not rely upon pre-contractual representations, that declaration may, according to the circumstances, be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from the entry into the contract. In many cases, such a provision will not be taken to evidence a break in the causal link between misleading and deceptive conduct and loss. The person making the declaration may nevertheless be found to have been actuated by the misrepresentations into entering the contract. The question is not one of law, but of fact.

[44] Prior to the amendment permitting parties to contract out of the FTA this approach was consistently followed in New Zealand. In *Phyllis Gale Ltd v Ellicott* (decided before *Campbell* but citing *Kewside*), in response to the submission that a disclaimer clause may provide some evidence from which the Court could conclude that the claimant was not in fact influenced by the misrepresentation, the Judge said that evidence to that effect was not present and, in fact, was to the contrary.[45]

[45] *PAE* concerned the purchase of shares in a company. Directors of the vendor company made representations about turnover and profitability that were found to be materially incorrect. The purchaser was a substantial company (a subsidiary of a multi-national company) and its lawyers had prepared the agreement, which contained

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43 *David v TFAC Ltd*, above n 28, at 63, quoting *Kewside Pty Ltd v Warman International Ltd*, above n 30, at 53,222.

44 *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (2009) 238 CLR 304 (footnotes omitted).

45 *Phyllis Gale Ltd v Ellicott*, above n 31, at 65–66.

clauses excluding any implied or general warranty and acknowledging that only the warranties expressly recorded in the contract would apply. The FTA claim failed on the ground that the purchaser's reliance on the representations was unreasonable. But, obiter on the question of causation, the Court referred to *David* and considered that in agreeing in unequivocal terms, at the purchaser's instigation, what the directors had said and done before the agreement no longer mattered; they effectively "drew down the curtain of liability, excluding from it all preceding conduct [and by this means] they also broke the chain of causation".[46] It is notable, however, that the aspects critical to the outcome in *PAE* are absent in this case — the international commercial context, the long negotiation period and the fact that the entire agreement clause had been introduced by the purchaser itself.

[46] *Leigh v MacEnnovy Trust Ltd* concerned the purchase of an apartment "off the plans" where the agreement contained an entire agreement clause.[47] The purchasers cancelled the agreement for misrepresentation, relying on both the Contractual Remedies Act 1979 (CRA) and the FTA. On the FTA cause of action Harrison J expressly found that the representations were an effective operating cause of the purchasers' loss and that their admissions in the agreement had not operated to break the chain of causation.[48] He noted that the respondent had not attempted to raise the no-reliance clause in defence of that cause of action, presumably accepting "that the policy of consumer protection inherent in the FTA would be defeated by upholding a contractual acknowledgement by a purchaser that she had not been induced to execute a contract by a misleading or deceptive statement which was not set out in the agreement, when the contrary was true, would be defeated".[49] Mr Depledge submitted that Harrison J had not undertaken an analysis of cases such as *David* and *PAE* and so the decision ought to be disregarded. We disagree. *David* was cited in support of the Judge's conclusion and, given the settled position of the law by then, further analysis was unnecessary. It is plain from the Judge's factual findings that he was following the *Kewside* approach.

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46 *PAE (New Zealand) Ltd v Brosnahan*, above n 34, at [46].
47 *Leigh v MacEnnovy Trust Ltd*, above n 40.
48 At [53].
49 At [54].

[47] In *Comvita*, in the context of an intellectual property agreement induced by misrepresentations, Harrison J rejected the argument that the entire agreement clause was conclusive evidence that the claimant had not relied on the misrepresentations. He considered that, to the contrary, the acknowledgement contained in the clause "was overwhelmed by the weight and effect of [the] assurances".[50]

[48] In *Pegasus Town Ltd v Draper*, this Court referred to the passage in *David* already cited above at [34] as setting out the principles to be applied.[51] The case concerned misrepresentations made to purchasers of land in a residential development. The Court was satisfied that the disclaimers and exclusion clauses "were overcome by the oral assurances and the silence of the agents on the question of possible proposals [and] were not such as to deprive the conduct of the quality required by the [FTA]".[52]

[49] It is plain that the correct approach to causation where a no-reliance clause forms part of the contract is that explained in *Kewside* and *Campbell* and approved by this Court in *David*. Therefore, the question for the Judge in this case was whether, as a matter of fact, Shabor had relied on the misrepresentation and whether that reliance caused loss as a result of Shabor purchasing the farm at the tendered price. Clause 27.3 formed part of the body of evidence to be considered but was not, in itself, determinative.

[50] The Judge expressly stated her intention to rely on *PAE*, implying that she was following the *Kewside* approach.[53] However, the Judge did not consider all the relevant evidence. It will be recalled that the facts identified by the Judge as leading to the conclusion that Mr Borland and Mr Sharp had not relied on the misrepresentation were (1) the statement in cl 27.3 itself that they had not relied on representations made by Mr Graham (2) they were aware of the terms of the tender when they formulated the offer and (3) they received legal advice before submitting the tender. On the basis of these facts the Judge concluded that cl 27.3 was effective in breaking the chain of causation between the misrepresentation and Shabor's loss.[54]

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50 *Waikatolink Ltd v Comvita New Zealand Ltd*, above n 42, at [109].
51 *Pegasus Town Ltd v Draper*, above n 32, at [47].
52 At [48].
53 High Court decision, above n 3, at [197].
54 At [198].

The facts identified by the Judge were certainly relevant but there was other relevant evidence that the Judge did not consider.

[51] First, Mr Sharp and Mr Borland gave unchallenged evidence that they believed the representation as to carrying capacity to be accurate and relied on it in formulating the tender. This evidence was striking in its clarity regarding the immediate reliance placed on the misrepresentation to calculate the offer, before Mr Sharp and Mr Borland had seen the tender documents.

[52] Secondly, the very short time frame between inspection of the farm and the tender closing meant that Mr Sharp and Mr Borland had no other source of information about the carrying capacity, as Mr Graham must have known. So both parties proceeded on the basis that, regardless of what cl 27.3 said, the only source of information about the carrying capacity was the statement in the advertising materials.

[53] Thirdly, cl 27.3 was in very general terms whereas the capacity representation was specific and central to the advertising. This differs from *PAE*, in which the parties had agreed on express warranties that would be relied on, and the entire agreement clause merely had the effect of excluding those that were not express.

[54] In our view the weight of the evidence showed that, notwithstanding the acknowledgement recorded in cl 27.3 and the fact that Shabor was legally advised, Mr Borland and Mr Sharp did rely on the misrepresentation. Whether they were careless to do so, as the Judge found, is a matter for the later enquiry regarding contributory conduct. We do not accept Mr Depledge's submission that continued reliance on the misrepresentation following the receipt of legal advice made the previously reasonable reliance unreasonable. The enquiry at this stage is subjective — were Mr Sharp and Mr Borland actually misled?

[55] The circumstances of this case differ significantly from those relied on by Mr Depledge as examples of a representee failing to look after its own interests. Both *Fletcher Construction NZ and South Pacific Ltd v Cable Street Properties Ltd*[55] and

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[55] *Fletcher Construction NZ and South Pacific Ltd v Cable Street Properties Ltd* CA271/98, 9 September 1999 at [39].

Niagara Sawmilling Co Ltd v Carter Holt Harvey Ltd[56] involved very experienced commercial parties engaged in truly commercial transactions (vendor and property developer in the first and landlord and tenant in the second). In both cases the correct position could have been ascertained by seeking further advice or information which is not the case here, as we discuss below.

[56] We are satisfied that the Judge erred in her assessment of the evidence as to reliance. This ground of appeal is made out.

[57] Before moving to the quantum issues, we note that whether a damages award should follow a finding of liability under the FTA is a matter of discretion. We consider that this case is one in which the discretion is properly exercised. Mr Graham did not suggest otherwise. The discretion is very broad — "a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act".[57] Factors relevant to the exercise of the discretion include the degree of blameworthiness of the defendant and the extent to which the plaintiff has failed to protect their own interests.[58] It is apparent from some of the cases we have discussed that, while the existence of the no-reliance clause is relevant to the exercise of the discretion, particularly where the transaction is commercial in nature, it is not determinative against a remedy.[59]

What was Shabor's loss?

The Judge's indication

[58] Notwithstanding the Judge's conclusion on liability under the FTA, she considered the issue of damages under both the CCLA and FTA causes of action. As to the latter she stated the correct approach as being that:[60]

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56 *Niagara Sawmilling Co Ltd v Carter Holt Harvey Ltd* [2012] NZHC 441 at [62]–[66].

57 *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 404. See also *Red Eagle Corp Ltd v Ellis*, above n 18, at [31].

58 *Goldsbro v Walker,* above n 57, at 406.

59 *Waikatolink Ltd v Comvita New Zealand Ltd*, above n 42, at [167]; and *Leigh v McEnnovy Trust Ltd*, above n 40, at [59]–[61].

60 High Court decision, above n 3, (footnotes omitted) citing *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA); and James Edelman *McGregor on Damages* (20th ed, Sweet & Maxwell, London 2018) at [49-028] and [49-058].

> [230] Damages under s 43 of the Act are calculated on the tort measure of damages. Thus, rather than compensation to secure performance of 7,500 Stock Units, damages are (generally) calculated as if the misrepresentation had not been made. In those circumstances, "[t]he normal measure of damages is the value transferred, generally represented by the contract price, less the value received, whether of property or of services or of money".

[59] Shabor had claimed the difference between the price paid and the value of the farm given its actual carrying capacity. The Judge held that the difference in the value of the property had it carried 7,500 Stock Units compared with the 5,500 Stock Units it actually carried was approximately $530,000.[61]

[60] Shabor also claimed operating losses of approximately $450,000, said to have resulted from running the property at less than the anticipated number of Stock Units. This figure was based on evidence from Shabor's accountant, Mr Gray, who said that Shabor had suffered a net loss of $472,209 in the 2014 financial year, almost all attributable to the operations at the subject property (as opposed to the other farm that Shabor owned). It appeared that there had been no comment from Mr Graham's witness on this evidence.

[61] The Judge did not make a specific finding as to whether the operating loss was claimable. Instead she said:[62]

> But even accepting for present purposes the total of … diminution in value and … operating loss (given a total of $980,000), I would have reduced the Fair Trading Act damages award to reflect what I consider to be Shabor's own conduct contributing significantly to that loss.

Quantum of loss

[62] There is no challenge to Shabor's right to recover the difference between the purchase price and the actual value of the farm. We note Mr Sharp said in evidence that had he suspected the carrying capacity was materially less than that represented, Shabor would not have tendered at the price it did. Reliance on the misrepresentation led Shabor to pay more than it otherwise would have for the farm.

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61 At [212(e)], [228] and [231].
62 At [233].

[63] The position regarding the operating losses was less clear. In submissions, Mr Depledge said it was not disputed that if Shabor had established liability, diminution in value and compensation for operating losses may have been the appropriate approach to damages under the FTA cause of action. Apart from a subsequent note in the submissions that Shabor's quantification of its operating losses did not take into account the fact that Shabor was also undertaking an expensive deer conversion, including the transfer of deer from another farm which should therefore have been classified as income from that farm, there was simply a general complaint that Shabor had not attempted to apportion income accurately.

[64] We are not satisfied that the operating losses are claimable under the FTA. Shabor pleaded the same losses in the FTA and misrepresentation causes of action. However, the measures of damages for these causes of action are different. In the former, the tort measure is generally applicable; in the latter, expectation damages may be recovered. In *Cox & Coxon v Leipst* this Court explained, in the context of a claim under the FTA that:[63]

> Where there has been an actionable wrong, it is a general and basic principle of law that the remedy by way of monetary award is to put the wronged party in the same position as he or she would have been in but for the wrong. Where the wrong is misrepresentation leading to a contract for purchase of property, the position to be restored is that which would have enured had the misrepresentation not been made. … If [the purchasers] would not have purchased at all, then prima facie their loss would be based on the difference between the value of the property and the price paid or, in some circumstances, the loss of an opportunity to buy a different property. On the other hand, if they still would have purchased, the resulting loss could only be one arising in some collateral way, such as lost opportunity to buy at a reduced price or some other direct out of pocket consequence.

[65] This decision was explained further in *Harvey Corp Ltd v Barker*.[64] That case concerned the purchase of a property in reliance on a misrepresentation that the property included part of a driveway and ornamental gates. In fact, both were situated across a paper road vested in the local authority. Blanchard J, for the Court, said:[65]

> The proper question in a claim … under s 43 is whether the [claimants] are worse off as a result of the making of the representation – by changing their position in reliance on it – not whether they have been unable to realise a

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63 *Cox & Coxon v Leipst*, above n 60, at 26 per Henry and Blanchard JJ.
64 *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 (CA).
65 At [14].

> benefit because of the failure of the vendors to convey a property without the defect complained of. The [claimants] accordingly had to prove that the misrepresentation of the property had caused them to act in a way which resulted in a loss. Normal measures of such a loss are whether what has been acquired is worth less than what was paid and/or whether there has been wasted expenditure. … To the extent that the [claimants] might by reason of the misrepresentation have paid too much for the land – and so did not get full value for their expenditure – the "lost" additional money would be recoverable under s 43. But, in order to sustain such a claim, it was necessary for them to show that they paid more than the market value of the property as it actually was, …

[66] The operating losses claimed represent the costs incurred by Shabor to improve the quality of the farm, including increasing its carrying capacity. That cost was not incurred in reliance on the misrepresentation. To the contrary, recovering the operating losses would restore Shabor to the position it would have been in had the misrepresentation been true, i.e. the contractual measure. On the other hand, the difference in value would place Shabor in the same position it would have been in had it paid the true value of the farm, i.e. it had a farm that needed work to increase its carrying capacity.

[67] In our view the correct quantum is the Judge's assessment of the difference between the price paid and the actual value — $530,000.

Contributory conduct

[68] On a broad brush assessment the Judge indicated that she would have reduced the FTA damages award by 40 per cent for Shabor's own conduct:[66]

> As discussed earlier, despite the significance of the transaction, its entry into the Agreement was hasty; I accept the experts' evidence that more due diligence ought to have been carried out; Mr Sharp and Mr Borland placed wholesale reliance on a carrying capacity set out in advertising materials expressed in Stock Unit terms, without ascertaining the basis upon which that had been calculated; and failed to take steps available to protect its position, such as negotiating appropriate clauses in the Agreement or making its tender conditional on due diligence.

[69] Mr Quinn read this passage as meaning that the Judge had relied on the mere fact of reliance on the misrepresentation as contributory conduct. We do not read the passage in this way. Rather, we understand the reference to "wholesale reliance" as

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66 High Court decision, above n 3, at [233].

merely emphasising Shabor's failure to ascertain the basis for the representation. This would reflect the fact that reliance itself cannot be a contributing cause of loss; reliance provides the basis on which a claimant asserts they have been misled or deceived and establishes causation, but it is not a factor in the next stage, which is concerned with other conduct that contributed to the loss.

[70] The Judge's reasons for concluding that any damages should be reduced by 40 per cent can be therefore summarised as being that Shabor (1) entered into the agreement in haste, without taking steps to ascertain the true position regarding carrying capacity, and (2) failed to protect its position by negotiating the terms of the agreement or making its tender conditional upon due diligence.

[71] As to the haste with which Shabor entered into the agreement, Mr Quinn pointed out that Mr Sharp and Mr Borland had visited the property on 7 April 2014 and the date for tenders closed on 10 April 2014, just three days later. The Judge did not identify any specific step that could have been undertaken in that 72-hour period which would have shown the representation as to carrying capacity to be false.

[72] None of the witnesses identified specific steps that could have been taken within the short time available to ascertain the true position. Mr Graham suggested at trial that the presence of machinery for feeding out, which was visible on the property during the inspection, indicated that supplemented feed was being used. Mr Borland had seen the equipment but did not ascribe any significance to that; in evidence he explained that the equipment looked new or near new and, knowing that Mr Graham was selling the farm, saw nothing unusual about Mr Graham having new equipment to (presumably) take to his new farm. The Judge made no finding on this point.

[73] There was no evidence as to what else Mr Sharp and Mr Borland could have done that would have alerted them to the inaccuracy in the representation. It was not in dispute that they knew the low Olsen P readings indicated that more fertiliser would be required to improve the soil fertility. But Mr Sharp did not accept that this meant anything in relation to the carrying capacity as represented. He simply understood the low Olsen P levels as indicating that if they wanted to improve production beyond the

represented carrying capacity, more fertiliser would be required. There was no challenge to the reasonableness of this view.

[74] Mr Sharp and Mr Borland were asked about whether they had considered consulting a valuer or farm consultant prior to tendering for the farm. They both said they had not, though indicated that time may have been against them to do so. There was no evidence as to what a farm consultant might have advised in that time frame that could have made a difference to their understanding of the farm's carrying capacity.

[75] Mr Depledge submitted that the tight time frame counts against Shabor because it was not Mr Graham's fault that only three days remained and Shabor had the choice of not proceeding to tender. We do not accept that argument. It is not for a party who has made a misrepresentation intended to induce an offer to say that the other party ought not have proceeded. To the contrary, the fact that only very little time was available to a purchaser viewing the property on 7 April 2014 meant that Mr Graham must have realised that the only means of ascertaining the carrying capacity of the property was by relying on the misrepresentation.

[76] We agree, however, that the failure to include some contractual protection in the tender justified a reduction. Mr Quinn acknowledged this but maintained that it justified a reduction of only 25 per cent at most. It was evident from the cross-examination that the possibility of including a due diligence provision in the agreement was not considered. But Mr Gudsell (the real estate agent) and Mr Matheson (an agricultural consultant) gave evidence that such a condition is commonly included in agreements for sale and purchase of farms. Given that Shabor was legally advised prior to submitting the tender, this was a reasonable step for Shabor to have taken.

[77] However, failure to require a due diligence period could only have contributed to Shabor's loss if there was a reasonable possibility that doing so would have disclosed the true carrying capacity of the farm. But there was no evidence as to what a reasonable due diligence period would have been or what information could have been obtained within that time frame.

[78] The experts generally agreed that the best objective benchmark for carrying capacity was soil fertility but it was accepted that soil sampling was most effective in the winter, some months after the settlement date. Some of the experts would have put weight on what the farm had historically carried. Mr Gudsell suggested that information about livestock numbers, financial records and farm diaries could have been requested. But the documents that contained this information were likely to be difficult to identify, as was evident from the difficulty the parties had at trial.

[79] Mr Gudsell also suggested that a valuation could have been obtained but, self-evidently, a valuation would be based on the known carrying capacity, which was then thought to be 7,500 Stock Units as a result of the misrepresentation. Information that showed the actual carrying capacity was the only information that could have made a difference and, for the reasons discussed, it was uncertain what financial records or diaries would have been produced.

[80] Realistically, further enquiries within a due diligence period of, say, two months could likely have done no more than demonstrate that more work would be required to confirm the carrying capacity. However, the tenor of the evidence generally suggested that a number of warning signs would have emerged if further enquiries had been made. These included the apparently poor condition of the stock, which had caused Mr Borland and Mr Sharp concern when they attended the stock sale in May 2014. Further inquiries would likely have disclosed the fact of supplementary feeding. All that was needed was sufficient information to have alerted Shabor to the possibility that the farm was not actually carrying 7,500 Stock Units. Shabor could then have made a more informed decision whether to proceed in the knowledge of that possibility or withdraw.

[81] In fixing on 40 per cent as the appropriate reduction for Shabor's own conduct, the Judge made a broad-brush assessment, as indicated in *Red Eagle*.[67] She referred to the reductions of 50 per cent applied in all of *Comvita*,[68] *Poplawski v Pryde*[69] and *Red Eagle*. The Judge did not explain the differences between those cases and this

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67 *Red Eagle Corp Ltd v Ellis*, above n 18, at [39].
68 *Waikatolink Ltd v Comvita New Zealand Ltd*, above n 42.
69 *Poplawski v Pryde* [2013] NZCA 229, (2013) 13 TCLR 565.

case that led her to conclude that a lesser reduction was appropriate. However, it is clear that there are differences.

[82] The claimant in *Comvita* had made no attempt to satisfy itself that it was paying fair value for the intellectual property in question, despite being on direct notice that it had little if any real value. It had also failed to protect its interests through contractual provisions during arm's length negotiations.[70] It was therefore considered to have "contributed materially" to its loss, with the Judge seeking to do justice "between two sophisticated commercial entities".[71] The claimant in *Poplawski* had similarly disregarded independent legal advice to seek security before advancing a deposit for the purchase of a helicopter.[72] The claimant in *Red Eagle* had failed to make rudimentary checks before advancing a substantial loan. In both *Red Eagle* and *Poplawski* the claimants were described as having been "very neglectful" of their interests.[73]

[83] In this case it cannot fairly be said that Shabor was very neglectful of its interests. Its only failing was not to have inserted a due diligence clause in the agreement. But, as discussed, a due diligence clause would not have led Shabor to discover the correct position — it could only have shown the possibility that the carrying capacity of the farm had been overstated. We think that greater weight was put on Shabor's conduct that was justified. We put the appropriate reduction for contributory conduct at 30 per cent.

THE MISREPRESENTATION CLAIM

The issues

[84] As noted already, the Judge held that the statement about carrying capacity misrepresented the position and that it was self-evident that the advertising materials were intended to induce the purchasers to enter the contract.[74] Those findings are not challenged.

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70 *Waikatolink Ltd v Comvita New Zealand Ltd*, above n 42, [162]–[167].
71 At [169]–[170].
72 *Poplawski v Pryde*, above n 69, at [68]–[72].
73 *Red Eagle Corp Ltd v Ellis*, above n 18, at [39]; and *Poplawski v Pryde*, above n 69, at [60].
74 High Court decision, above n 3, at [138].

[85] As in the FTA cause of action, cl 27.3 was the central issue in the misrepresentation claim. Shabor argued that, properly construed, cl 27.3 did not preclude any complaint by Shabor that it had relied on the misrepresentation to its detriment. If it did, s 50 of the CCLA would be engaged and the question arose whether it was fair and reasonable for cl 27.3 to be conclusive between the parties.

Did cl 27.3 preclude inquiry into reliance on the misrepresentation?

[86] Shabor maintained that, properly construed, cl 27.3 did not preclude reliance on any express representation, including the capacity representation. For convenience we set out cl 27 again:

> **27.0 Limitations of liability**
>
> The Vendor does not warrant:
>
> **27.1** The accuracy of any matter, fact or statement in any report or other information on the property prepared or provided by the Vendor's [sic] or its Managers or Agents (including information contained in Schedules to this Agreement), any advertising of the sale of the property or any statement made except in relation to any specific warranty given in this Agreement or
>
> **27.2** Any other matter relating to the property or its use or nature or the state of the property in any respect other than expressly set out in this Agreement.
>
> **27.3** The Purchaser shall be deemed to have purchased the property acting solely in reliance on the Purchaser's own judgement and upon its own inspection of the property and all other information regarding the property, and not in reliance upon any representative [sic] or warranty made by the Vendor, the Vendor's Agent or Managers other than as expressly set out in this Agreement.

[87] In the High Court, Shabor had submitted that cl 27.3 was internally contradictory: the statement that the purchaser had relied on "all other information regarding the property" at cl 27.3 contradicted the next statement that the purchaser had not relied on "any representative [sic] or warranty made by the Vendor, … other than as expressly set out in this Agreement". On this argument, Shabor maintained that the ambiguity required the clause to be interpreted *contra proferentem* with the result that "all other information regarding the property" would be read as referring to information actually received but, consistently with the two previous sub-clauses, not

any implied representations. The purchaser would therefore be entitled to rely on information supplied by the vendor.[75]

[88] The Judge did not accept that cl 27.3 was ambiguous. Acknowledging the awkwardness of the drafting, the Judge nevertheless considered that the overall objective intent was clear:[76]

> … namely that the purchaser is deemed to have purchased the Property acting "*solely in reliance on its own judgement*", together with its "*own inspection of the Property and [its own inspection of] all other information regarding the Property*["], and importantly, that it "*has not relied on any representation or warranty by the Vendor …*" The concept of relying on the purchaser's own inspection of the Property and its own inspection of "*all other information regarding the Property*" must be something different to not relying on "*any representation by the Vendor*". The former is no doubt directed to other objective information concerning the Property itself, such as the soil test results and the fertilizer application records and so on, rather than the vendor's own statements or representations about the Property.

[89] Before us, Mr Pearce, for Shabor, argued that the Judge had effectively rewritten the clause in favour of Mr Graham by adding the words "its own inspection of" before the words "all other information". He argued that this produced an unlikely construction because the natural meaning of inspection relates to physical things such as property — one does not inspect information.

[90] In our view the Judge approached the construction of cl 27.3 correctly. Treating the words "upon its own inspection" as relating to both the property and "all other information" would be grammatically correct and within the plain and ordinary meaning of the words. In particular, we regard the use of "inspection" in relation to "all other information" as within the bounds of plain and ordinary language. This is because information relating to property frequently (indeed almost invariably) takes the form of documentation such as reports and maps and it is usual to speak of inspecting documents. On this approach, cl 27.3 clearly purports to preclude inquiry as to reliance on the capacity representation. This ground of appeal fails.

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75 At [167].
76 At [168] (emphasis in original).

Was it fair and reasonable for cl 27.3 to be conclusive between the parties?

Section 50 of the CCLA

[91] Section 50 of the CCLA provides that:[77]

> **50 Statement, promise, or undertaking during negotiations**
>
> (1) This section applies if a contract, or any other document, contains a provision purporting to prevent a court from inquiring into or determining the question of—
>
> (a) whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
>
> (b) whether, if it was so made or given, it constituted a representation or a term of the contract; or
>
> (c) whether, if it was a representation, it was relied on.
>
> (2) The court is not, in any proceeding in relation to the contract, prevented by the provision from inquiring into and determining any question referred to in subsection (1) unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to the matters specified in subsection (3).
>
> (3) The matters are all the circumstances of the case, including—
>
> (a) the subject matter and value of the transaction; and
>
> (b) the respective bargaining strengths of the parties; and
>
> (c) whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

[92] The Judge undertook an extensive review of the cases relating to s 50. There is no criticism of that review and it is sufficient for us to summarise the relevant principles, which are now well-settled.

[93] Section 50 applies where the terms of a contract purport to preclude the court from inquiring into one of the factual questions set out in s 50(1): whether a statement undertaking or promise was made prior to the contract, if so whether it constituted a representation and if so whether the representation was relied on. If s 50(1) is engaged,

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[77] Section 50 of the CCLA replaced s 4(1) of the Contractual Remedies Act 1979 and is in very similar terms. The cases decided under s 4(1) continue to be relevant.

then s 50(2) permits the court to inquire into those questions unless it considers that it is "fair and reasonable" that the provision be conclusive between the parties having regard to all the circumstances of the case, which include the three matters specified in s 50(3): the subject-matter and value of the transaction, the respective bargaining strengths of the parties and whether any party had legal representation or advice.

[94] There is no need to go behind the plain words of s 50. In *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* the Supreme Court said:[78]

> Section 50 does not mandate a general empowerment to determine the "true bargain" between the parties. Instead the task of the court is to assess whether in all the circumstances, it is fair and reasonable for [any provision engaging s 50(1)] to be conclusive between the parties.

[95] The leading authority as to when it will be fair and reasonable for a no-reliance clause or similar to be conclusive remains *Brownlie v Shotover Mining Ltd*, decided in the context of s 4(1) of the Contractual Remedies Act. This Court observed:[79]

> There can be nothing inherently unfair in such an exclusionary clause. It is highly desirable that written contracts should be so drawn as to state all the terms of the intended contract, and so avoid the uncertainties which can arise from allegations of verbal representations or collateral warranties. If parties have not agreed to include express warranties in their written contract, then it is reasonable for them to state expressly that verbal warranties are excluded. Other matters relevant under the section in determining whether it is fair and reasonable to enforce the clause indicate "all the circumstances of the case". This was a commercial contract between commercial parties each with separate legal advice. The subject matter and value of the transaction were sufficiently substantial to justify the expectation that each party would be familiar with its terms and intended to be bound by them. The respective bargaining strengths of the parties would not justify any special indulgence to either. Both parties were represented and advised by solicitors at the relevant time.
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> …
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> It would be a matter of concern if commercial people acting in good faith could not, in entering into a transaction such as this, achieve certainty by a written contract excluding liability for prior statements by one of them if that is what they wished to do.

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78 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at [132] (footnote omitted).

79 *Brownlie v Shotover Mining Ltd* CA 187/87, 21 February 1992 at 31–33.

[96] In *PAE*, also decided under s 4(1) of the Contractual Remedies Act, this Court summarised the purpose and effect of the provision:[80]

> Section 4(1) recognises a wide judicial discretion to determine whether it is "fair and reasonable that the provision should be conclusive". While the issue is to be determined "having regard to all the circumstances of the case", the specified criteria focus the inquiry on an assessment of the relative positions of the parties and their access to independent legal advice. Its apparent purpose is to protect one party's relative vulnerability from another party's power to impose an exemption from liability which is contrary to the factual reality or an existing legal obligation and is thus unreasonable and unfair. Section 4(1) is a mechanism for striking balances, both individually between parties and conceptually between freedom of contract and unfair or unreasonable commercial conduct.

The Judge's conclusion

[97] On this critical issue the Judge said:[81]

> [170] … I take into account that the Capacity Representation was in written form, rather than verbal, and thus its terms were clear. It also appears to have been verbally reiterated by Mr Gudsell (as Mr Graham's agent) during the 7 April 2014 tour of the Property. Mr Sharp and Mr Borland took it into account when formulating their tender price. It could also be argued that there is an "information asymmetry" between the parties, given Mr Graham, having owned the Property for some 14 years, would have been intimately familiar with it, compared to Mr Sharp and Mr Borland's relative lack of knowledge from their single two hour visit.
>
> [171] Despite the factors weighing against conclusiveness, I am nevertheless satisfied it is fair and reasonable for cl 27.3 to be conclusive as between Mr Graham and Shabor.

[98] The Judge identified a number of reasons for her conclusion:[82] These included the factors identified in s 50(3)(a) and (c) — the subject matter and value of the transaction and the fact that the parties had legal representation. In addition:

(a) Mr Sharp and Mr Borland were experienced farmers, not naïve contracting parties.

(c) Clause 27.3 was not a standard clause but had been expressly added to the sale and purchase agreement. If cl 27.3 was not conclusive it would

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80 *PAE (New Zealand) Ltd v Brosnahan*, above n 34, at [15].
81 High Court decision, above n 3.
82 At [172]–[181].

effectively convert the representation into an implied warranty, contrary to cl 27.1.

(d) Mr Sharp and Mr Borland had the terms of the agreement prior to submitting the tender. They were therefore on notice that Mr Graham did not accept responsibility for representations made in advertising materials.

(e) Mr Sharp and Mr Borland were able to, and did, make amendments to the further terms of the agreement. They could have amended cl 27.3 or made their tender conditional on completing due diligence.

(g) There was no fraud or wilful concealment by Mr Graham.

(h) Mr Sharp and Mr Borland had submitted an unconditional tender in haste, without undertaking due diligence.

[99] Shabor maintains that the Judge erred in her assessment as to whether it was fair and reasonable that cl 27.3 should be conclusive. Section 50 of the CCLA required an evaluative assessment by the Judge; if this Court considers the Judge's assessment was wrong, it must undertake its own, fresh, assessment.[83]

Was there error by the Judge?

[100] Mr Pearce made a number of criticisms of the Judge's assessment. Some overlap and we deal with those together.

The subject matter and value of the transaction and the nature of the parties

[101] The Judge described the purchase as a reasonably significant commercial transaction rather than one involving consumers or the purchase of residential property for personal use. She considered that these factors pointed towards it being fair and reasonable to treat cl 27.3 as conclusive between the parties.[84] The Judge's

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83 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
84 High Court decision, above n 3, at [172].

characterisation of the transaction was, presumably, a reference to the comparison drawn in *Snodgrass v Hammington* between a commercial contract involving commercial parties (such as that in *Brownlie*) and the sale of an ordinary private house in an urban area.[85]

[102] Mr Pearce submitted that the commerciality and value of the sale did not justify allowing Mr Graham to rely on clause 27.3. At most it was a neutral factor; the corollary was that the size and nature of the transaction called for similar or greater caution by Mr Graham in making representations about the property. Mr Pearce relied on *Mitchell v Murphy*, which involved the purchase of a residential townhouse.[86] Gordon J treated the subject matter and value of the contract as neutral on the basis that they were sufficiently substantial to have engendered in each party a need for caution.[87] Mr O'Neill, for Mr Graham, did not accept that *Mitchell* represented the correct approach, pointing out that it was contrary to that taken in *Brownlie*.[88]

[103] We agree that the approach taken in *Mitchell* cannot be correct because it would undermine s 50(3)(a). If the significance of a transaction being a high value commercial contract were neutralised by a corresponding need for caution by both parties, it is difficult to see how those factors would ever contribute to the assessment of whether it was fair and reasonable for a no-reliance clause to be conclusive. We think the better view is that the subject matter and value of the contract are factors that may indicate the relative positions of the parties and any vulnerabilities.

[104] However, we do not agree entirely with the Judge's characterisation of the transaction. Although the transaction involved a reasonably substantial farming operation, it is not easily compared with other cases of a distinctly commercial character such as *PAE* and *Comvita*.

[105] Mr Graham had farmed for a living for more than 20 years and lived on the farm. There was evidence that he had other commercial interests, though it was not

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85 *Snodgrass v Hammington* (1994) ANZ ConvR 159 (HC), citing *Brownlie v Shotover Mining Ltd*, above n 79.
86 *Mitchell v Murphy* [2019] NZHC 3262.
87 At [244], citing *Sipka Holdings Ltd v Merj Holdings Ltd* [2015] NZHC 1980 at [57].
88 *Brownlie v Shotover Mining Ltd*, above n 79, at 32.

clear the extent to which that experience preceded the sale of the farm. Shabor was a private company incorporated as a vehicle for Mr Sharp and Mr Borland to farm together. They were experienced farmers (and Mr Borland had been an engineer) but there was no evidence that they had experience in business beyond running a farm. Mr Borland also lived on the farm after Shabor purchased it.

[106] This aspect overlaps with the Judge's finding that although there was an information imbalance in the strict sense, Mr Sharp and Mr Borland were "experienced farmers … not naïve contracting parties, wholly dependent on information from their contracting counter-party".[89] For the reasons just discussed, we do not consider that Mr Sharp's and Mr Borland's farming experience means that they should be viewed as experienced contracting parties. Nor is it right to suggest that they were (or claimed to be) wholly reliant on information from Mr Graham; they asserted reliance only in relation to the specific representation about carrying capacity.

[107] However, our different view of the commerciality of the transaction and the nature of the parties does not necessarily mean that the Judge was wrong to treat cl 27.3 as conclusive — the other circumstances of the case need to be considered.

Mr Graham's conduct and Mr Sharp's and Mr Borland's lack of care

[108] Mr Pearce made a number of submissions directed towards Mr Graham's knowledge and conduct. First, Mr Graham must have thought that carrying capacity would be important to prospective purchasers given its prominence in the marketing material and the Judge erred in not taking that fact into account. This submission reflected the comment to that effect made in *Ellmers v Brown*, where representations about the application of fertiliser were included in advertising material for the sale of a farm.[90] We think it self-evident that Mr Graham knew carrying capacity would be important to a prospective purchaser, but that does not advance Shabor's position because it is inherent in s 50 that representations recognised as important to both parties may be excluded from scrutiny by the courts.

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89 High Court decision, above n 3, at [173].
90 *Ellmers v Brown* (1990) 1 NZ ConvC 190,568 (CA) at 190,577.

[109] Secondly, the Judge emphasised Mr Sharp's and Mr Borland's carelessness in believing the representation while ignoring Mr Graham's carelessness in making it. We have already noted that the Judge made a specific finding that Mr Graham had been careless.[91] Although not expressed, we think it is apparent that this finding was carried through to the Judge's reasoning on whether cl 27.3 should be conclusive under s 50. So we do not accept that the Judge ignored that aspect of Mr Graham's conduct when she later took into account Mr Sharp's and Mr Borland's failure to look out for their own interests in their keenness to purchase.

[110] As to the latter, the Judge took into account the fact that Mr Borland and Mr Sharp were "obviously very keen" to purchase a property and had submitted an unconditional tender on the basis of a single two-hour visit. She also took into account the evidence that they had not undertaken sufficient due diligence.[92] We have already considered these aspects in our discussion about the FTA claim. There was no evidence that further inspection of the property prior to submitting the tender might have alerted a prospective purchaser to the inaccuracy of the representation. Therefore, we agree that any failure by Mr Sharp and Mr Borland prior to submitting the tender is not a factor that supported a finding that it was fair and reasonable to treat cl 27.3 as conclusive.

[111] As discussed earlier, however, Shabor could have better protected itself by reserving a right to conduct due diligence in the post-tender period. There was a reasonable possibility that doing so would have alerted it to the possibility that the carrying capacity had been misrepresented. But it seems unlikely that significant weight was put on this perceived carelessness because, after discussing the lack of care shown by Mr Borland and Mr Sharp, the Judge observed that these factors were "not determinative or of very significant weight", given that lack of due diligence, even when contractually available, did not make reliance on a representation unreasonable.[93]

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91 High Court decision, above n 3, at [137(j)].
92 At [180].
93 At [180], citing *Best of Luck Ltd v Diamond Bay Investments Ltd (No 2)* HC Auckland CIV-2007-404-2043, 11 October 2007 at [121]–[128] and [132].

Was Mr Graham's conduct fraudulent?

[112] Shabor pleaded that the representation as to carrying capacity had been made "falsely" but there was no elaboration. It was not obvious from the judgment that fraud was clearly asserted at trial, as is required for allegations of fraud.[94] Before us Mr O'Neill asserted, without challenge, that fraud had not been raised in the High Court. Nevertheless, the Judge made an express finding that there had been no fraud:[95]

> … Mr Graham was somewhat casual in his estimate of the Property's carrying capacity … Mr Graham did not check or verify his own assessment of around 7,500 Stock Units, and in fact accepted there might have been "some doubt" about that in hindsight. But while Mr Graham was perhaps casual in his assessment of the Property's carrying capacity in 2014, there was nothing deliberate or sinister in this context; in other words, Mr Graham did not *knowingly* underestimate the advertised carrying capacity.
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> …
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> … [T]o the extent Mr Graham's conduct is relevant, there was no fraud, wilful concealment or misstatement of the true position. I accept that when he spoke with Mr Gudsell in early 2014, Mr Graham genuinely believed the Property's carrying capacity to be around 7,500 Stock Units.

[113] Mr Pearce argued that these findings were wrong. He said that the evidence brought Mr Graham within the third limb of *Derry v Peek*, being a misrepresentation made recklessly, careless whether it was true or false.[96] It was factor, he said, that went against treating cl 27.3 as conclusive between the parties.

[114] In *Brownlie* this Court considered that fraud in the making of a representation would not necessarily preclude an exclusion clause or similar being conclusive between the parties but would be a factor of considerable weight.[97] Those comments were made in the context of an allegation of "common law fraud at its highest level"; that the defendant had made the representations "knowing them to be false and with an intent to defraud".[98] This was a serious allegation requiring proof of conscious

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94 *Brownlie v Shotover Mining Ltd*, above n 79, at 34.
95 High Court decision, above n 3, at [137(j)] and [179] (emphasis in original).
96 *Derry v Peek* (1889) 14 App Cas 337 (HL) at 374 per Lord Herschell, followed in New Zealand in *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA) at [48].
97 *Brownlie v Shotover Mining Ltd*, above n 79, at 33–34.
98 *Shotover Mining Ltd v Brownlie* HC Invercargill CP96/86, 30 September 1987 at 131.

deceit. The trial Judge had found that Mr Brownlie knew the representations "were exaggerated and were not reliably based, and at worst were downright wrong".[99]

[115] This case is not at that level. *Derry v Peek* has not expressly been endorsed in the contractual misrepresentation context and we are doubtful that a representation made with an honest belief as to its truth would justify not treating a contractual provision as conclusive under s 50(1) of the CCLA. In *Amaltal Corp Ltd v Maruha Corp* this Court endorsed the three-part test in *Derry v Peek* for the purposes of the tort of deceit but went on to say:[100]

> [50] The critical features of the tort are therefore that the representor must have lacked an honest belief in the truth of his statement; "carelessness" is not to be equated with "dishonesty"; and even recklessness in the sense of gross negligence will not suffice, unless there is a conscious indifference to the truth.

[116] In any event, we are satisfied that Mr Graham's conduct falls short of fraud under *Derry v Peek*. Mr Pearce relied on a single passage of cross-examination in which Mr Graham said he had provided the 2013 capacity figures in the PIM, which led to the following exchange:

> Q Well why is that relevant? Why are you telling us that?
>
> A That, that is because, … they could look at that and they could see 2013, '11,'12, if they bothered to ask me, in fact even if you go back to 2002, this is how much was carried. They could look at the conditions of the pasture, they could look at the fertiliser use over the previous two years, they could see that no fertiliser had been put on that year, they could see, for some strange reason they never requested that fertiliser was put on by me, which is quite a common practice, they could see that, yes, the fertiliser was going down, so there was doubt about whether it would carry 7,500 in 2014.
>
> Q Doubt in whose mind, Mr Graham?
>
> A As I've said before –
>
> Q Any doubt in your mind?
>
> …
>
> A There would've been a little bit of doubt, but if I hadn't, hadn't had a farm on the market and was not selling it and carried on, there would've been, there would've been no doubt at all.

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99 At 141.

100 *Amaltal Corp Ltd v Maruha Corp*, above n 96.

[117] Mr Pearce submitted that the Judge had wrongly treated the evidence as conveying that there "may have been" some doubt about the figure when the effect of the evidence was that there was in fact doubt about the carrying capacity.[101] However, looking at Mr Graham's evidence overall, his concession that there would have been "a little bit of doubt" assumes much less significance; the accuracy of the 7,500 figure was put to him several more times after that exchange, and each time he confirmed it.

[118] On the totality of the evidence and given the advantage the Judge had in observing Mr Graham during lengthy cross-examination, we are satisfied that she was entitled to come to the conclusion she did. There was no fraud that might justify not treating cl 27.3 as conclusive.

The contractual context, including the failure to insert a due diligence clause

[119] Most of the factors the Judge identified as supporting the conclusiveness of cl 27.3 related to the circumstances in which the tender was submitted. Mr Pearce submitted that these factors did not support the conclusion the Judge reached.

[120] The first related to the terms of sale. These were contained in the standard form for "particulars and conditions of sale for real estate by tender" approved by both the Real Estate Institute of New Zealand and the Auckland District Law Society (ADLS). Attached to the standard terms was a section headed "Further Terms", which included cl 27. The Judge had ascribed significance to the fact that cl 27.3 was a "further term" rather than a standard term that was "buried" in the fine print of the ADLS agreement.[102]

[121] Mr Pearce argued that this was an error because the clause simply formed part of the printed terms of tender supplied to all prospective purchasers — it was not the result of negotiations between the parties. Mr Quinn distinguished the case from *PAE* and *Comvita*, in which the subject clauses had been the subject of express negotiations between the parties.

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101 High Court judgment, above n 3, at [80].
102 At [174].

[122] It is correct that the clause was not the product of the kind of intense negotiation that was a feature of *PAE* and *Comvita*. But it could not be said that the clause was obscured in the fine print of a standard contract, nor that it was imposed on Shabor. The "further terms" appeared in a separate part of the agreement. They addressed matters that would have been directly relevant to Shabor, such as the certificates of title, the care and saving of pasture for the purchaser's benefit, tax issues, the effect of the Afforestation Grant Deed between Mr Graham and the Waikato Regional Council and chattels. As the Judge noted, Shabor made amendments to some of the "further terms".[103] We do not accept that Shabor and/or its solicitor could have failed to notice cl 27, particularly given the reference in cl 27.1 to the advertising materials. In these circumstances, the Judge was right to treat the appearance of cl 27.3 in the "further terms" section as significant.

[123] Nor do we accept the criticism of the Judge's finding that Shabor received "bespoke" legal advice.[104] Although there was no direct evidence to that effect, it is the only inference available from the fact that Mr Borland's solicitor was consulted about the agreement and agreed to act for Shabor, and that amendments were made to the terms. It was apparent from Mr Borland's and Mr Sharp's evidence that neither would have amended the agreement without the advice of Shabor's solicitor.

[124] The next factor was Shabor's failure to make amendments to cl 27.3, including to require a due diligence provision. The Judge noted that amendments had been made to other clauses.[105] And further, Mr Gudsell had said in evidence that, in his experience, it was rare for farm purchases not to be conditional on due diligence. The Judge referred to *PAE* and *Comvita* as showing that the ability to protect oneself through negotiation of suitable clauses was relevant to the conclusions on disclaimers.[106] As discussed, the evidence did not show what period of due diligence would have been reasonable or what steps could have been taken to establish the actual carrying capacity of the farm. But there is a reasonable possibility that sufficient information could have been obtained for Shabor to realise that the representation might not have been accurate.

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103 At [177].
104 At [178].
105 At [177].
106 At [177].

[125] The Judge was therefore correct to place weight on the circumstances in which the tender was submitted

Effect of cl 27.3

[126] Mr Pearce's last criticism related to the Judge's statement that if cl 27.3 was not treated as conclusive between the parties, the effect would be to "convert the [earlier] representations about [carrying capacity] into an implied warranty when they were expressly excluded" by cl 27.1.[107] We accept Mr Pearce's argument that this approach was wrong because, whenever s 50 is engaged in relation to an entire agreement or no-reliance clause, the effect of finding it not to be conclusive would be to treat the misrepresentation as an implied warranty under s 35.[108]

The Judge's conclusion was correct

[127] Although we have held that the Judge erred in some respects, we are nevertheless satisfied that her conclusion was correct.

[128] We accept that the transaction lacked the distinct commercial flavour present in other cases, and that Mr Sharp and Mr Borland were not experienced contracting parties. But nor was there any significant disparity between the parties' respective bargaining strengths.

[129] To the extent that the Judge placed weight on any perceived carelessness by Shabor, we agree that this was an error. But it is clear the Judge did not consider this to be a significant factor. It is also apparent that she did not treat the presence of cl 27.3 as determinative.

[130] We agree with the Judge that cl 27.3 was a clear term of the agreement, and that Mr Sharp and Mr Borland must have been aware of it and received advice on it. Importantly, they had the opportunity to make the tender conditional on due diligence, which may well have alerted them to the inaccuracy of the representation. Finally,

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107 At [175], quoting *PAE (New Zealand) Ltd v Brosnahan*, above n 34, at [22].

108 Mr Pearce referred to *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879 at [53(a)], where this Court noted that a misrepresentation "operates in effect as a warranty" which the representee should normally be able to take at face value.

there was no fraud on Mr Graham's part that might have tipped the balance in favour of Shabor.

[131] In these circumstances, we consider that it is fair and reasonable for cl 27.3 to be conclusive between the parties. This conclusion means that the challenges to the quantum issues fall away.

RESULT

[132] The grounds of appeal on the FTA cause of action are made out. Specifically, we have concluded that:

(a) Clause 27.3 did not break the causal connection between the misrepresentation and Shabor's loss.

(b) The quantum of Shabor's loss is $530,000, being the difference between the price paid and the actual value of the farm in 2014.

(c) There should be a 30 per cent reduction for contributory conduct by Shabor in failing to protect its own interests by requiring a due diligence clause in the agreement.

[133] The grounds of appeal on the misrepresentation cause of action are not made out. We have concluded that the Judge was right to find that:

(a) on a proper interpretation, cl 27.3 precludes inquiry into reliance on the misrepresentation; and

(b) it is fair and reasonable that cl 27.3 should be conclusive between the parties.

[134] The appeal is therefore allowed in part. Judgment is entered for Shabor on the Fair Trading Act cause of action for $371,000 together with interest at 5 per cent from 3 June 2014.[109]

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[109] Interest on Money Claims Act 2016, s 2 and sch 1, pt 1, cl 1; Judicature Act 1908, s 87; and

[135] The costs judgment is set aside and the matter remitted to the High Court for reconsideration of costs.

[136] Shabor is entitled to costs in this Court for a standard appeal on a band A basis, with usual disbursements and certification for second counsel.

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Judicature (Prescribed Rate of Interest) Order 2011, cl 4.