IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-1299
[2016] NZHC 2742

BETWEEN	NZX LIMITED Plaintiff/First Counterclaim Defendant
AND	RALEC COMMODITIES PTY LIMITED First Defendant/First Counterclaim Plaintiff
	RALEC INTERACTIVE PTY LIMITED Second Defendant/Second Counterclaim Plaintiff
	GRANT DAVIS THOMAS Third Defendant
	GRANT THOMAS NOMINEES PTY LIMITED Fourth Defendant
	DOMINIC LUKE PYM Fifth Defendant
	PYM FAMILY PTY LIMITED Sixth Defendant
	NZX HOLDING NO 4 LIMITED Second Counterclaim Defendant
	MARK RHYS WELDON Third Counterclaim Defendant

Hearing:	2-6 May; 9-13 May; 16-20 May; 23-27 May; 30 May-2 June; 7-10 June; 13-17 June; 20-24 June; 27-30 June; 11-13 July 2016
Counsel:	B R Latimour, D J Cooper, B M Cash, R D H Massey, J P T Danaher, L R Hardcastle and E J Couper for plaintiff/counterclaim defendants (except Mr Weldon) T J North QC, J K Scragg, C V Nicholson, G S J Berlic, C R Gubb and T A V McKeown for defendants/counterclaim plaintiffs A R Galbraith QC and D J Cooper for third counterclaim defendant
Judgment:	15 November 2016

RESERVED JUDGMENT OF DOBSON J

Contents

Introduction and summary

[1] These proceedings involve:

(a) Claims by the plaintiff (NZX) alleging:

- misrepresentations that induced it to enter into a sale and purchase agreement (SPA) for the purchase of businesses from the defendants (Ralec), and

- breaches of warranty and false or misleading statements in breach of the Fair Trading Act 1986 (FTA) arising in the same transaction.

(b) Claims by NZX against the third to sixth defendants as guarantors of Ralec's liability, or as assignees of the benefits under the SPA.

(c) Counterclaims by Ralec alleging:

- breaches by NZX of its post-acquisition obligations to resource the businesses in a way that compromised the prospects of Ralec earning additional consideration payments (earn-outs) for their sale; and

- pre-contractual misrepresentations and breaches of the FTA.

(d) Counterclaims by Ralec against NZX Holding No 4 Limited (NZX4), the NZX subsidiary that operated the businesses in Melbourne, and against Mr Weldon, NZX's chief executive officer throughout the relevant period. Those claims allege breach of a tortious duty of care, breach of fiduciary duty and knowing involvement in NZX's breaches of the FTA.

[2] For the reasons set out below, I have found that NZX has made out a number of the alleged misrepresentations. I have also found, on the basis that NZX is not liable to make further payments under the SPA, that it cannot make out recoverable loss flowing from those misrepresentations.

[3] On Ralec's counterclaims, I have found that NZX breached its contractual obligation to assess what was required to adequately resource the businesses by having regard to the earn-out targets. However, Ralec cannot establish that, if adequately resourced, the businesses would have met the earn-out targets. On Ralec's alternative claim for loss of the chance of being paid the earn-outs, it cannot make out a real and substantial prospect of meeting the performance thresholds required.

[4] The counterclaims against NZX4 and Mr Weldon cannot be made out.

[5] Both sides bolstered their claims with additional causes of action. None of the further grounds for claim or counterclaim alter the outcomes.

[6] I address the matters required to determine the various claims and counterclaims in the sequence listed in the index above.

A brief history

[7] Mr Weldon was the chief executive officer and a director of NZX from around the time of its demutualisation and listing as a public issuer in 2002. He left that position in 2012, after the events directly relevant to these claims and the

commencement of these proceedings. Mr Weldon led initiatives for NZX to expand the nature of its business, away from its core functions of operating the stock exchange for New Zealand listed equities and debt securities, and regulating the conduct of market participants. In the period up to 2009, NZX had some substantial successes with such initiatives, as well as some less successful new ventures.

[8] In mid 2009, NZX was actively looking for new business opportunities in the provision of information relevant to production and trading of agricultural commodities, the facilitation of trading for such commodities and settlement of transactions once commitments were made. NZX adopted the mantra "IMI", meaning "information/markets/infrastructure". In assessing the prospects for such new businesses, Mr Weldon likened the opportunity to an "Agri-Bloomberg", and proposed the development of a business for global markets in agricultural data, news and intelligence similar to that which Bloomberg operates in and from the United States in securities and currencies. Mr Weldon considered that a successful global data and markets agri-business portal would be worth at least one per cent of the value of the Bloomberg businesses, thereby valuing the initiative at between NZ$750 million and NZ$1 billion.[1]

[9] Mr Weldon's vision was for an electronic online platform by which those seeking access to the information (both proprietary and collated from other sources), and to the markets that might be operated, would access the various components of such businesses on-line. This strategy was subsequently called the Agri-Portal. By mid 2009, NZX had acquired a number of news services and publications servicing the New Zealand agricultural sector.

[10] NZX appointed one of its executives, Rachael Cross, to the role of head of acquisitions. She was charged with seeking out business opportunities in Australia that might constitute parts of the proposed Agri-Portal.

[11] On 14 July 2009, in an email to Mr Weldon, Ms Cross described the Ralec businesses as a potential acquisition for NZX. The Ralec businesses were, up to completion of the SPA, operated as two companies called Clear Commodities

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1 Common Bundle (CB) 6/04761.

Limited and Clear Interactive Limited. A condition of the sale of assets was that those companies would change their names. Because of the extent to which the pre-acquisition businesses are referred to as "Clear" in the evidence, I will maintain the distinction, referring to them as Clear until completion of the SPA, and as Ralec thereafter.

[12] The Clear businesses comprised, first, Clear Interactive Limited, which employed a "tech team" with expertise in designing and writing software for applications such as the operation of an electronic market for buying and selling commodities. The personnel in the tech team had a track record for successfully developing such software systems, including for an online real estate market.

[13] The second business, Clear Commodities Limited, was an embryonic electronic grain exchange. It would enable Australian growers of wheat and other grains, or their agents, to identify the location, amount and grade of grain they had available for sale, to place offers for its sale, and for buyers to make bids. The features included settlement facilities to process payment for grain transacted, and to transfer title to it.

[14] In 2008, the Australian Wheat Board (AWB) had lost monopoly control over trading in bulk grain for export from Australia. The monopoly over domestic grain sales, and export sales of packed grains, had previously been removed over a number of years. The founders of Clear saw this change in the grain market as an opportunity to introduce new means of facilitating trades in grain. At its inception, the new business had input from people with substantial experience in the Australian grain market, but those contributors had parted company with Clear by mid 2009.

[15] Mr Weldon was immediately enthusiastic. He responded to Ms Cross's email, "I am 100 per cent there". Matters progressed relatively quickly. Mr Weldon met the two principals of Clear, Mr Grant Thomas and Mr Dominic Pym (the third and fifth defendants) in Melbourne on 17 July 2009, and promptly established a team within NZX to complete due diligence on the proposed acquisition. Messrs Thomas and Pym travelled to Wellington for due diligence meetings on 30 and 31 July 2009. Tranches of information to assist with the due diligence were provided in the last

week of July and early August 2009. NZX retained external experts to assess the fitness for purpose of the software that had been designed by Clear, and also on the prospects for the electronic grain exchange to succeed.

[16] Both sides were exceptionally keen to consummate a deal. It was a case of a very willing seller, and a very willing buyer. This probably contributed to both sides materially overstating their position in pre-contractual dealings with the other.

[17] For Clear, Messrs Thomas and Pym had nurtured an exciting new business opportunity, which they treated as having excellent prospects, but which required a substantial injection of capital beyond the resources that were available to them. Clear's shareholders had funded very substantial software development costs, plus the costs of researching the mechanics of the existing grain market. Their electronic grain exchange had been launched in the 2008/2009 grain season, but had failed to generate any significant revenue and incurred substantial losses. The businesses had accumulated losses of some $4.2 million by the time of this transaction.[2] They projected substantial increases in trading on the exchange. The explanation by Messrs Thomas and Pym in evidence for this was their assumption that NZX would commit substantial further funding to promote the embryonic grain exchange. However, that expectation was not reflected in their projection of the level of expenses necessarily incurred to produce the projected revenue.

[18] Mr Weldon's enthusiasm for using a successful grain exchange as the cornerstone for a much larger combination of agri-businesses extended to a representation that NZX was committed to spending up to $100 million on such ventures.

[19] A terms sheet was signed on 4 September 2009,[3] and final terms of the SPA were then negotiated. It was signed in Wellington on 2 October 2009, and later dated 5 October 2009. The transaction was completed on 30 October 2009.

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2 All monetary amounts are in Australian dollars, except where specifically stated in different currencies.

3 CB12/09403.

[20] The acquisition was of the assets of the businesses, including a modest allocation for goodwill. The initial consideration was $7 million, which was paid on completion. Thereafter, Clear would become entitled to the first of the earn-outs of a further $7 million if the grain exchange traded more than 1.5 million tonnes[4] of grain by 30 June 2010 or, alternatively, larger and somewhat more complicated earn-out targets set for the two ensuing years.

[21] The SPA provided for a separate earn-out to which Clear would be entitled if, by 31 October 2012, the businesses had completed the development of an operating Agri-Portal to NZX's satisfaction. What would be involved in that was detailed in a schedule to the SPA.

[22] Both the Clear companies completed the SPA as vendors. NZX's obligation under the SPA was to make payments to Clear Interactive as agent for the vendors, but the SPA also recognised Clear Interactive's obligation to account for the sale proceeds to defined categories of "consideration recipients". Those were, first, shareholders whose only interest was their equity in the shares held and, secondly, current staff shareholders. Different entitlements were recognised in schedules to the SPA for the different categories of consideration recipient, in relation to each of the potential earn-out payments.[5]

[23] Clear was required to give warranties as to the accuracy of the information provided to NZX during due diligence. The scope and application of those warranties is in issue in the proceedings. Messrs Thomas and Pym, and companies controlled by them that held their respective shareholdings in Clear, also guaranteed (on somewhat limited terms) certain matters relating to the performance of Clear's obligations under the SPA. If its primary claims were made out, NZX also sought judgment under those guarantees, including against the fourth and sixth defendant companies.

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4 Metric tons.

5 The status of the consideration recipients was relevant to NZX's fifth cause of action which sought to extend liability to them under s 11 of the Contractual Remedies Act 1979 (CRA). See [283]–[291] below.

[24] In covenants that were to apply after completion of the SPA, NZX was required to ensure that the businesses were resourced and financed[6] to an extent which, in NZX's reasonable opinion, was appropriate, having regard to the criteria that had to be met for the earn-out payments to be made. The scope and application of that commitment is at the heart of Ralec's counterclaims.

[25] Ralec also claimed that NZX misrepresented the extent of its commitment to provide additional resources for the businesses. These counterclaims also gave rise to the additional claims against Mr Weldon and NZX4 for breach of tortious or fiduciary duties, and as parties to NZX's breach of the FTA.

[26] The grain exchange performed very poorly. The volume of grain traded on the exchange in the 2009/2010 season was 204,052 tonnes, amounting to some 14 per cent of the projected 1.5 million tonnes. This meant that the business failed to generate more than a tiny fraction of the revenue that was anticipated.

[27] Mr Weldon's view, which I find was conveyed to Messrs Thomas and Pym when NZX was considering the acquisition, was that the exchange would need to conduct trades for around 15-20 per cent of Australian grain before the data collected in the course of facilitating those trades would have proprietary value. The records of the trading volumes produced by an NZX witness for the years since its acquisition showed that the trading on the exchange represented 0.75 per cent of the total Australian grain crop in the 2009/2010 season and 0.94 per cent in the 2010/2011 season, reaching approximately 1.5 per cent in each of the 2011/2012, 2012/2013 and 2013/2014 seasons.[7] Those figures were challenged in some respects by Ralec. I am satisfied that they were substantially correct, and that the estimated percentages deducted from total tonnages received by GrainCorp (a handler and storage provider) for reasons making the grain unavailable for listing on the grain exchange were realistic and conservative. Those statistics were certainly not incorrect to an extent that gave a misleading impression of the pattern of trading.

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6 Although the obligation is expressed as requiring support discretely in the forms of resource and finance, I will refer to both forms simply as "resources".

7 Storey BoE, schedule 2. Mr Storey estimated the percentages of grain that were actually transacted on the grain exchange, of the volumes with GrainCorp that were potentially available for listing on the grain exchange, at between 2.36 per cent and 7.07 per cent over that period.

[28] The volumes of grain traded were vastly below the trajectory towards a sufficient percentage of the Australian market that NZX perceived was necessary to give the trading data that was generated any material value as a market indicator. Because NZX treated data on the grain market as a cornerstone of the Agri-Portal, it claimed that the poor performance of the grain exchange led to a revision of its proposals for development work on the Agri-Portal.

[29] Following acquisition, the personal relationship between Messrs Weldon and Thomas deteriorated relatively quickly. Mr Weldon and senior management of NZX were concerned at Mr Thomas's performance, seeing that as contributing to the poor performance of the grain exchange. Mr Thomas was presented with an adverse performance review in April 2010, and resigned. He and Mr Weldon agreed terms for his severance. Subsequently, Mr Thomas sued NZX in Victoria for failing to honour its commitments on his severance. NZX conceded that claim.

[30] Mr Pym also had serious difficulties in getting on with Mr Weldon from early 2010. He perceived that it was he, rather than Mr Thomas, who was likely to be fired. However, Mr Pym continued in a somewhat reduced role until June 2011 when his employment was terminated.

[31] The businesses did not achieve the targets for the grain market earn-out, nor was the Agri-Portal developed to qualify the vendors for the separate Agri-Portal earn-out.

[32] NZX commenced the present proceedings in July 2011, and Ralec filed its counterclaims after unsuccessfully protesting the jurisdiction of the New Zealand High Court.

The Australian grain market in 2009

[33] To understand the context in which the dealings between the parties occurred, it is necessary to describe in a little detail the state of the Australian grain market in 2008 and 2009. The parties presented extensive evidence on this topic. NZX called Mr Ron Storey, who has been employed either part-time or full-time as a consultant for NZX in relation to its Australian businesses since 2009 when NZX acquired his

business, Australian Crop Forecasters (ACF). Prior to acquiring ACF in 2005, Mr Storey was a senior executive with the AWB for 18 years. Mr Storey had established AWB's commercial grain trading division in the early 1990s in response to deregulation of domestic grain trading.

[34] NZX also called Mr Philip Holmes who is a director of his own consulting business providing commodity marketing advisory services to Australian agri-businesses. Mr Holmes' relevant experience includes 11 years as general manager of marketing for the Queensland Grain Growers Association, and as a principal of FarMarCo Australia Pty Limited (FarMarCo), a price risk management and market consultancy firm. From 2009 until 2013, Mr Holmes was a director of Grain Trade Australia, an industry body that sets commercial rules, trading standards and industry codes for the Australian grain industry.

[35] Ralec called Mr Mitchell Morison, a Melbourne-based director of a private company providing services to horticultural and grain sectors in Australia. Mr Morison had relevant experience as a commercial manager with Cargill Australia Limited, a significant trader of grain in Australia. In that capacity, he had responsibility for a turnover of $1,100 million, and in excess of five million tonnes of traded grain and oilseed. He had previously been in the commodity management division of the AWB.

[36] The documents in evidence also included an independent report by FarMarCo, commissioned by NZX when it was researching the possible purchase of Clear.[8] Although intended to be part of NZX's due diligence research, the report was not received until after the SPA was signed.

[37] There were numerous differences of emphasis in the evidence from these witnesses on the state of the grain market, but it is unnecessary to make definitive findings on matters of background. They also expressed some very different opinions on the prospects for the grain exchange to achieve the earn-out targets specified in the SPA, and on the resources that they considered would have been necessary to do so. I will return to those different opinions in dealing with Ralec's

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8 CB20/15423.

claims on the prospects for achieving the earn-out targets, as an aspect of its counterclaims.[9]

[38] I intend no disrespect to any of those witnesses in dealing relatively summarily with the state of the market and focusing selectively on the aspects that I consider relevant to the contested issues on the pre-contractual representations by Ralec, and the resourcing of the businesses after acquisition by NZX.

[39] Wheat is the predominant grain crop in Australia, with significant but smaller crops of oil seeds and pulses also grown. Grains are grown in the southwest of Western Australia, and in parts of South Australia, New South Wales and Queensland. Climatic conditions, and in particular drought on the east coast of Australia, cause significant fluctuations in the size of the crop. Mr Holmes' distillation of official statistics cited an average for Australia's total grain production in the five seasons up to 2008/2009 at 34.42 million tonnes, with the highest volume of production being 45.6 million tonnes and the lowest being 19.77 million tonnes. The seasons since 2008/2009 have seen a slight increase in the average total grain production.[10] FarMarCo's indication of the scale of the wheat industry suggested that at an average port price of $200 per tonne, the annual revenue generated was approximately $4.5 billion.[11] There were reasonably substantial fluctuations in the volume of wheat exported.

[40] Until the late 1980s, the Australian grain industry was regulated to an extent that growers simply delivered grain to relevant state or federal statutory boards. Grain was pooled and growers shared the returns that were generated by the statutory boards. Government control over the domestic wheat market stopped in 1989 and thereafter growers, either on their own or with the assistance of brokers, could pursue their own marketing of grain for domestic consumption. The statutory control over sales of wheat exported in bulk remained until 2008.[12]

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9 See [534]–[554] and [597]–[628] below.

10 Holmes BoE, tables 2 and 3.

11 CB20/15455.

12 Export of wheat in bags and containers could occur outside the single desk system from the 1990s, although the AWB had a right of veto. Marketing arrangements for that sector of the market were freed up in 2007: CB20/15423 at 15445.

[41] Although there has been an increase in growers using storage facilities either on farms or locally, the predominant mode of storing harvested grain was with bulk handling companies (BHCs). These firms have very substantial grain storage facilities at aggregating points and at ports and bulk transporting facilities to transport growers' grain. In addition, as part of the warehousing facility, the BHCs grade and weigh the grain, and issue receipts to the growers for the grade and weight of grains stored at particular locations. Those receipts are treated in the industry somewhat like bills of lading for carriage of goods by sea, so that growers could pass title to their grain by transferring receipts for the grain held by the BHCs.

[42] There is a dominant BHC in each of the major growing areas: GrainCorp on the east coast, Co-operative Bulk Handling (CBH) in Western Australia, and ABB/Viterra in South Australia. The dominant position of the BHCs in controlling port terminals and associated facilities was recognised in the Wheat Export Marketing Act 2008, which required the BHCs to afford access for third parties to those facilities on competitive terms before they would qualify for export accreditation.

[43] In addition to the storage and handling businesses, the BHCs also operated trading divisions which bought and sold bulk grain, both for export and, to an extent, for domestic use.

[44] Trading in grain is also facilitated by brokers. Some brokers focus on advising growers on the best means of selling their grain, with those brokers having links with trader brokers and traders. Other brokers focus on providing services to traders who rely on the brokers' up-to-date knowledge of the state of the market to trade in grain.

[45] Both brokers and the trading arms of BHCs utilise business development managers (BDMs) who maintain personal contact with growers in each region (if they were servicing growers), or a mixture of growers and traders (if they were servicing those sectors of the market). The costs of the more traditional mode of doing business as brokers or traders included the infrastructure costs of maintaining the BDMs and those supporting them.

[46] In mid 2009, Clear concluded a grain integration agreement (GIA) with GrainCorp, the dominant BHC on the east coast. The GIA facilitated the listing of growers' grain on the exchange once it was entered in GrainCorp's system. Growers could elect whether or not to have grain that was being handled by GrainCorp listed and, once listed, could place offers to sell to any buyers accessing the grain exchange. GrainCorp required exclusivity of this service within its area of operations, so that Clear could not seek a similar arrangement with any other BHC on the east coast. GrainCorp's trading division could transact on the exchange, but was not obliged to do so.

[47] The grain industry had settled methods of allocating transport costs and the risk of shrinkage, with some regional differences. The established industry also relied heavily on personal relationships with brokers or advisers and BDMs.

[48] At its inception, the Clear grain exchange had input from Mr Bob McKay and Ms Emma Weston, who were founding shareholders. Both of them had held senior positions with the AWB and had extensive knowledge in the workings of the grain industry. Clear designed the business of its exchange to operate on terms that were distinct in several respects from the normal established practices. The significance of those distinctions is a matter to be considered in dealing with Ralec's counterclaims.

The evidence

[49] The evidence occupied 38 hearing days. The main protagonists, Messrs Weldon and two NZX directors, Messrs Paviour-Smith and Harmos, and Messrs Thomas and Pym for the Ralec parties, were all cross-examined at substantial length.[13]

[50] NZX called 12 witnesses and Ralec called 15. In addition, NZX consented to the admission of two formally verified briefs from Ralec witnesses who were not required for cross-examination. By the end of the hearing, I had been provided with a full outline of the history of the businesses, and the potential and actuality of their

[13] Mr Weldon's evidence occupied 4.25 days, Mr Thomas 3.75 days and Mr Pym 4.5 days.

operation. I also gained an insight into the working relationships between the main protagonists. It is unnecessary to describe the evidence of each witness. Attached at the end of the judgment is a summary of the names and positions of all the witnesses. To the extent it becomes relevant, I will describe findings on the evidence of relevant witnesses as they arise in the course of dealing with the issues.

[51] Both sides criticised the other for not calling potentially relevant witnesses. There were pre-trial issues about the terms of NZX's contact with existing or former employees of the businesses, which arguably discouraged contact with Ralec's legal team in inappropriate terms. There were also pre-trial issues as to the entitlement of Ralec to issue trans-Tasman subpoenas to witnesses, including former and current employees of the businesses, and the appropriateness of such witnesses appearing by AVL. As the evidence played out, I am satisfied that none of the concerns raised adversely affected the quality of the comprehensive evidence that I heard.

NZX'S CLAIMS

[52] NZX's first claim alleged pre-contractual misrepresentations under the CRA. A second cause of action pleaded misleading and deceptive conduct under the FTA against Ralec and against Messrs Thomas and Pym personally. Thirdly, NZX alleged breach by Ralec of contractual warranties as to the truth, completeness and accuracy of information provided in the due diligence process, and non-disclosure of material circumstances. NZX separately claimed against Messrs Thomas and Pym and their companies pursuant to their guarantees of certain of the vendors' liabilities under the SPA. Finally, NZX made an additional claim for damages from Messrs Thomas and Pym and their companies under s 11 of the CRA, as persons entitled to benefits under the SPA.

Alleged misrepresentations

[53] NZX pleaded that various components of the information provided by Clear during due diligence amounted to misrepresentations of five types. The alleged misrepresentations form the basis for each of NZX's causes of action.

[54] The first category alleged that Clear misrepresented the extent of support that the grain exchange had from grain industry participants, including buyers of grain and BHCs (the support representations).

[55] The second category alleged that Clear misrepresented the nature of its relationship with GrainCorp (the alliance representations). NZX alleged that Clear wrongly represented this relationship as being likely to result in one million tonnes of grain traded through the grain exchange in the then current (2009/2010) season.

[56] The third category alleged was as to the volume of grain that Clear anticipated trading on its exchange in the current year (the volume representations). NZX alleged that Clear represented that it was reasonable, realistic and attainable to forecast that it would trade 1.5 million tonnes of grain through its exchange in the 2009/2010 harvest.

[57] The fourth category alleged was as to the level of costs the business would incur in generating the projected revenue (the costs representations). The financial projection provided during due diligence reflected a modest profit, suggesting that the anticipated level of revenue could be achieved on the level of expenses that were also projected.

[58] The fifth category alleged was as to the absence of any disputes that had arisen in the course of the conduct of the business (the no disputes representations). Clear represented that there were no such disputes. However, NZX attributed relevance to disputes that had arisen between Mr McKay and Ms Weston, as original shareholders of the business, and those in charge of Clear at the time of the negotiations for sale.

[59] NZX's pleading cited numerous written statements and oral comments on behalf of Clear during meetings in Wellington at the end of July 2009, and in and from Melbourne thereafter, as contributing to the alleged misrepresentations. The fifth amended statement of claim (5ASOC) then distilled the essence of what NZX treated as the five different categories of misrepresentation. For instance, the alleged volume misrepresentations were summarised in the following terms:

> 106. The Volume Representations were present statements of fact that the forecast of 1.5 million tonnes to trade through Clear during the 2009/2010 harvest (that being a "conservative" estimate) was reasonable, realistic and attainable and followed logically from the state of the Clear business at the time the forecast was given.

[60] NZX pleaded that such representations amounted to misrepresentations because they were not reasonable, realistic and attainable and did not follow logically from the state of the Clear business at the time. Numerous particulars were pleaded as to why that was so.

[61] Ralec criticised the terms in which the alleged representations were pleaded as "conglomerates", in the sense that none of them were alleged to be single statements expressed in precise terms as used on a particular occasion. Rather, they were the impressions said to have been gained from numerous sources during the due diligence process, all conveyed in a variety of contexts. Having that diffuse character does not preclude such representations being actionable, but can add materially to the burden on NZX in proving their existence, their terms, an intention that they be relied on, and the reasonableness of NZX's reliance.

The pre-contractual dealings

[62] To assess the existence of the representations and understand the context in which they are alleged to have been made, it is necessary to describe the pre-contractual dealings in a little detail.

[63] After Ms Cross's initial meeting with Messrs Thomas and Pym on 14 July 2009, NZX moved promptly and Mr Weldon travelled to Melbourne on 17 July 2009 to meet Mr Thomas. Each formed a very positive impression of the other as a result of that meeting. Mr Weldon's impression was that Mr Thomas had a thorough appreciation of the Australian grain market, and that Clear's IT team had developed an IT platform that was "world class".

[64] For his part, Mr Thomas recalls emphasising to Mr Weldon that it would take around $5 million to properly market and commercialise the grain exchange. Mr Weldon has no recollection of this statement being made to him by Mr Thomas,

either at the 17 July 2009 meeting or during the due diligence process that followed.[14]

[65] The next business day, 20 July 2009, Messrs Thomas and Weldon exchanged emails on a timetable for a due diligence process, and NZX provided a first list of information that it wanted from Clear.

[66] On 25 July 2009, Mr Thomas forwarded by email to Ms Cross a 38 page written response to NZX's questions (written due diligence response or WDDR).[15] Thereafter, there were numerous email exchanges with NZX seeking further information and Clear (principally Mr Pym) providing answers by email.

[67] An email from Mr Thomas to Ms Cross providing more information on 28 July 2009 included comments:[16]

> - FY2010 is a benchmark year and we expect small profit or break even.
>
> - This will be the 1st full year of trading and as such we are endeavouring to be very conservative with our revenue forecasts.
>
> - We have prepared 12 month P&L forecasts and we will be more than happy to bring these with us and discuss with you when we are there. We do not anticipate any significant capex in the following 12 months and you will be able to see from our forecasts that our anticipated opex is reasonably stable based on current trading.

[68] Messrs Thomas and Pym, accompanied by their external advisers, Messrs Butler (accountant) and Rich (solicitor), travelled from Melbourne to Wellington for due diligence meetings on 30 and 31 July 2009. By that time, Mr Weldon had assembled an NZX due diligence team, which he described to Mr Thomas as comprising "… a lawyer, 3 strategy analysts, a finance person, an IT person, and a data person …".[17]

[69] Clear provided additional information on 3 August 2009. This included a range of documents that had been prepared between September 2008 and June 2009

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14 Weldon BoE at [4.10]–[4.14].
15 CB7/05137.
16 CB8/06334.
17 CB6/04253.

variously for discussions with GrainCorp, for sending to a provider of telecommunication services and to give to potential investors. NZX's due diligence team undertook analysis of the information provided to that time, and a number of them contributed to a board paper recommending that, subject to further due diligence, NZX should acquire Clear. The board of directors of NZX met on 6 August 2009 and gave its approval to proceed with the acquisition. The following day, Mr Weldon despatched a non-binding offer to purchase Clear. The suggested consideration was $15 million, made up of a mixture of cash and NZX shares, with parts deferred and dependent on the business meeting certain earn-out targets.[18]

[70] The NZX due diligence team travelled to Melbourne to conduct due diligence between 2 and 4 September 2009. Up to that point, Clear representatives had resisted provision of any detailed financial forecasts or projections, citing among other reasons that because the grain exchange was a start-up business, it was not possible to provide any reliable projections for any periods into the future.

[71] A projected profit and loss statement (projected P&L) for the financial year ending June 2010 was provided by Mr Butler to Mr Taylor during that visit.[19] It contained a monthly breakdown of two sources of income:

- handling fees earned on the Clear grain exchange; and

- "technology projects" which reflected charges to be made for work by the tech team on software development projects for third parties.

[72] The projected P&L also contained some 37 lines of projected expenses that the business would incur. As to the expenses, those preparing the projection had the actual experience of the operation of the company in the previous year, and for the first two months of the 2009/2010 financial year.

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18 CB10/07914.
19 CB29/22399.

[73] The projected P&L was accompanied by a page of "key assumptions", which contained 11 notes providing explanatory detail for some of the items in the projected P&L. The projection was for a net profit before tax of some $166,000.

[74] At the conclusion of the NZX due diligence team's trip to Melbourne, the parties completed a terms sheet, as the pre-cursor to a formal SPA.

[75] Mr Weldon reported on progress with due diligence and negotiations with Clear to a further NZX board meeting on 23 September 2009. The board approved a transaction to buy Clear on the basis of Mr Weldon's further paper. It contemplated paying $6 million up front, $7.6 million for the success of the grain market, and $7 million for delivery of the Agri-Portal by October 2012.[20] The minutes of the board's approval also record the prospect of paying Clear $1 for every $1 of revenue in excess of $3 million earned from grain trading, if the tonnes traded exceeded 1.5 million in the current harvest.

[76] On 1 and 2 October 2009, Messrs Thomas and Pym made a further trip to Wellington. During that visit, the final terms of the SPA were negotiated and it was executed. The signed document was left undated because of the need to annex a schedule defining the Agri-Portal. That was done and the document was subsequently dated 5 October 2009.

Assessing the alleged representations

[77] The written sources of information conveyed by Clear to NZX included the WDDR dated 24 July 2009, emails from Mr Thomas to Ms Cross on 27 and 28 July 2009, provision by Mr Thomas on 3 August 2009 of copies of documents that had been produced previously, and further documents provided during the NZX due diligence trip to Melbourne between 2 and 4 September 2009 (in particular, the projected P&L).

[78] In addition, NZX relied, at least as matters of context, on oral statements made at the various meetings. These included Ms Cross's initial discussion on

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[20] CB14/10705.

14 July 2009, the Clear representatives' visit to Wellington on 30 and 31 July 2009, the NZX due diligence team's trip to Melbourne between 2 and 4 September 2009 and various telephone discussions that occurred between the participants during that period.[21]

[79] Ralec's defence included denials that:

- many of the oral statements alleged to have been made were in fact made;
- information conveyed in writing was subject to disclaimers or had been taken out of context so that meanings attributed to the information by NZX cannot be sustained;
- statements made were honestly held opinions as to what might occur in the future; and
- in any event NZX did not rely on the information conveyed because it made its own independent enquiries and had available to it inconsistent information and views on the future prospects for the grain exchange.

[80] In Ralec's closing submissions, Mr North QC raised individual challenges to particular components of the pleaded representation. He argued that each could be discounted on one or more of the grounds cited for Ralec, and more generally that any alleged "conglomerate" effect could not be made out if the alleged representations were not actionable when assessed in isolation.

[81] The dealings occurred between an extremely keen vendor and purchaser of the assets comprising embryonic businesses in a novel field, where written and oral communications flowed in quite substantial volume over some two months. Accordingly, the appropriate course is to assess the combined impact of oral and written statements on relevant topics, making appropriate allowance for the context in which particular items of information and opinions were conveyed, and for the qualifications, warnings and disclaimers to the extent that they suggested the

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21 5ASOC at [91]–[97].

statements should not be relied on. To the extent that Ralec's defence included denials that alleged oral statements had been made, it is sufficient to assess the competing evidence of their existence, in the wider context of what information was conveyed, and in what circumstances.

[82] Because of the extent of overlap between the alleged representations about support, alliance and volume, I defer my findings on the extent to which they are made out, until the end of my review of the evidence about these three categories.

Support representations

[83] The first type of alleged representations related to the extent of support that Clear claimed its grain exchange enjoyed from potential users in the Australian grain industry. The summary of numerous pleaded misrepresentations was that they constituted statements of fact that Clear had the support of grain industry participants, including almost all buyers and the BHCs.[22] Each of the statements considered below was pleaded as contributing to the support misrepresentations.

[84] The WDDR included, in response to a request for a monthly breakdown of the volumes of grain that had been traded since its launch in November 2008, the following comment:[23]

> There is no doubt that the timing of the Clear grain exchange launch on the cusp of harvest compromised its initial success and support. However, despite the late launch, the founders have been pleased with the support nationally, with the lion's share of trades occurring in WA and SA.

The WDDR then provided the detail of the volumes of grain that had been listed on the Clear exchange, and the volumes that had been traded.

[85] In response to a question as to competitive threats to the service provided by Clear, the WDDR stated:[24]

> There are no serious competitive threats that we are aware of.

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22 5ASOC at [100].
23 CB7/05148.
24 CB7/05164.

> The most significant threat to liquidity seems to be the traditional way of doing business in the industry using telephones and faxes which is supported by agents, brokers and consultants that provide an inferior service (it is more personal – but that impacts scale) and sometimes they charge less for it (not always). We do not see these as major direct threats however growers already trust them and may be habitual in their grain marketing.

[86] Because of the context of other content addressing positive aspects of Clear's relationship with GrainCorp, and Clear's projections of the level of trading that might occur, NZX alleged that these statements in the WDDR amounted to a representation that Clear enjoyed strong support from the grain industry nationally in Australia. That representation was arguably bolstered by statements subsequently provided to NZX, including copies of pre-existing documents that were provided to NZX by Mr Thomas on 3 August 2009.

[87] The earliest of the pre-existing documents was a confidential information memorandum that had been prepared in September 2008 (the 08 IM). That memorandum, running to 37 pages, contained broadly-worded disclaimers that:

- it was distributed in confidence;
- Clear did not warrant that any information or opinions were accurate, reliable, complete or current;
- any statements as to the past or current performance did not represent future performance; and
- it did not constitute a disclosure document or prospectus for the purposes of the Australian Corporations Act 2001.

[88] The latter statements were likely intended to avoid any liability for breaches of Australian securities law. The descriptions of the business suggest that Clear was in its very early stages.

[89] Under a heading "Customer Acceptance" the 08 IM stated:[25]

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[25] CB9/07114.

> A principal risk identified by CLEAR is the actual level of customer take-up. CLEAR management has actively targeted key growers and grower brokers shoring up their commitment and support for CLEAR.

[90] There was no argument as to what this statement ought reasonably to have conveyed to an interested reader. It is at least open to the interpretation that Clear was doing the "shoring up", as well as "actively target[ing]" growers and grower brokers. Given the age of the comment, the context in which it appeared, and the somewhat equivocal meaning that reasonably arises, I do not treat this as adding to a representation as to the extent of support the business enjoyed from the grain industry.

[91] The next of the pre-existing documents was an information memorandum update, dated February 2009 (the 09 IM). This was intended to be read in conjunction with the 08 IM, and stipulated at the outset that all the disclaimers in the 08 IM, in particular as to the limited responsibility for the content and that it was not a prospectus, remained unchanged. An italicised introductory statement was:[26]

> CLEAR is no longer just the "future" of grain marketing, CLEAR is here "now" – facilitating over $10m of grain trading in Feb 2009.

[92] Under a heading "Key Partnerships", the 09 IM stated:[27]

> As a technology company and new market participant, CLEAR has been well supported by local and national industry bodies, financial institutions, nearly all Australian grain buyers and our key business partners, …
>
> The support CLEAR has received from the grains industry, grower co-operatives, state affiliates, industry thought-leaders and grain buyers alike has been a critical ingredient in delivering on a promise of a truly independent, national, forward-thinking and scalable online grain exchange in such a rapid timeframe. …

[93] The 09 IM also included statements about the support Clear was enjoying from all major BHCs, which it engaged to ensure smooth delivery of electronic ticket information following growers nominating Clear for their grain.[28]

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26 CB9/07135.
27 CB9/07140.
28 CB9/07141.

[94] The 08 IM and the 09 IM were presented to NZX for consideration at the same time, and a reasonable reader in that context might treat both as reflecting the developing story of the grain exchange business. However, the 08 IM was too old and too distanced in its context to add materially to representations made during due diligence. The 09 IM (even although it was to be read in conjunction with the 08 IM) was sufficiently closer in time and context to the due diligence disclosures for the content identified by NZX to add to the representations made during due diligence about the support Clear had from the grain industry. The passages I have considered were consistent with and bolstered the representations made in the WDDR that Clear enjoyed a strong level of support from the grain industry, including buyers.

[95] Another of the pre-existing documents was a paper prepared jointly by Clear and GrainCorp executives in May 2009 for consideration of a proposed alliance between the two firms by the GrainCorp board. Although principally relied on by NZX as a source of representations about the alliance between Clear and GrainCorp, that board paper also had content consistent with other assurances about the level of support that Clear enjoyed from the grain industry more generally. The board paper stated:[29]

> Clear has been well supported by Australian and international grains industry participants …

And:

> There is no doubt that the timing of the Clear Grain Exchange launch on the cusp of harvest compromised its initial success and support. However, despite the late launch, the founders have been pleased with the support nationally ….

[96] The original audience for that paper was the board of GrainCorp, who can reasonably be assumed to be knowledgeable and discerning when considering a new initiative in the grain industry. Overstatement by Clear of its position might well have been counter-productive, and providing the board paper to NZX in the course of due diligence between three and four months after it had been presented to the

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[29] CB9/07047, 07048.

GrainCorp board made it legitimate for NZX to see it as a source of information they could have regard to in the due diligence process.

[97] The passages identified on the extent of support that Clear was enjoying in the industry would be unlikely to constitute actionable representations standing on their own. However, because they are consistent with others, they add to the totality of representations to the effect that Clear enjoyed widespread support from throughout the grain industry.

[98] The final pre-existing document was an overview of the Clear companies dated 2 June 2009. It had been produced at that time for a provider of telecommunication services to Clear, identified in the document as Primus Telecommunications. The document specified its purpose at the outset:[30]

> The purpose of this document is to provide a business overview of the CLEAR Group of Companies to support the business case being presented to Primus management, including an indication of expected web traffic for large-scale consumer websites owned and/or operated by CLEAR. All commercial information and forward looking indicative traffic estimates and hosting requirements are provided to Primus as commercial in confidence and are non-committal. The intention is to provide Primus with comfort in a long-term relationship with CLEAR over the coming years so that Primus may be able to better forecast future income estimates to support the provision of planned excess traffic credits.

[99] That document included the following comments:[31]

> CLEAR Grain has been well supported by Australian and international grains industry participants, with every major Australian grain handler and almost every Australian and international grain trader on board (over 100 leading grain trading companies, including several of the largest private and publicly listed companies in the world).
>
> There is no doubt that the timing of the launch on the cusp of the 2008 harvest compromised initial success and impacted traffic to the website. However, despite the late launch, the founders have been pleased with the support nationally. …
>
> …
>
> … At the time of writing alliance negotiations are still underway with the other parties. A favourable outcome is expected to lead to more than 10 million metric tonnes being traded on CLEAR within the next 2-3 years.

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30 CB9/07185.
31 CB9/07186.

> This is more than 200 times the current volume levels and we would expect website traffic and hosting requirements to reflect that magnitude of increase and scale.

[100] The meaning that can reasonably be taken from passages in the document prepared for Primus that were cited by NZX must be tempered by its purpose, which was to alert the service provider to the very substantial growth prospects, as those running Clear considered it appropriate to portray them. If the document was assessed in isolation, then reliance would be inappropriate. Here, it was provided by Mr Thomas as a further document that had been written in the relatively recent past. The quoted passages could legitimately be seen as corroborating, or reinforcing the representations that NZX claims to have received during due diligence. These passages can therefore contribute to a representation that Clear enjoyed strong support from both selling and buying interests in the grain industry. That additional impact is made out, even although the statements would be unlikely to constitute actionable representations if considered on their own.

[101] Materially on the extent of industry support that Clear enjoyed, the June 2009 document prepared for Primus confirmed that Clear was pleased with the level of support it enjoyed nationally. So far as the prospects for the buy side of the exchange were concerned, the statement that "almost every Australian and international grain trader [was] on board …" conveys an impression that there was a widespread intention for major traders in the grain industry to participate on the exchange.

[102] The statements made about the level of support Clear was enjoying were closely connected to statements about Clear's most significant contractual arrangement with another industry participant, namely the GIA.

Alliance representations

[103] NZX pleaded that representations about Clear's relationship with GrainCorp comprised a present statement of fact that:

- GrainCorp fully supported the alliance, and would actively promote and encourage its customers to use the Clear exchange;

- GrainCorp would itself trade on the exchange during the 2009/2010 harvest;

- GrainCorp had advised Clear that GrainCorp expected to trade one million tonnes through the exchange; and

- representations to this effect were reasonable, realistic and attainable.[32]

[104] The WDDR made a number of references to the effect of the GIA. These are cited by NZX as a component of the alleged representations about the nature of that "alliance". The WDDR included:[33]

> It is expected that the recently announced integration agreement with GrainCorp will provide access to up to 6m metric tonnes of grain on the east coast of Australia this harvest. GrainCorp are targeting volumes of lm tonnes to trade via CLEAR this harvest (quite an improvement on our first harvest).
>
> …
>
> The new integration agreement with GrainCorp provides real-time access to warehouse information for all grain stored in GrainCorp sites on the east coast of Australia. A grower will be able to see their grain in CLEAR at the same time they can see it in GrainCorp's warehousing system.

[105] Later in the WDDR, there was a further reference to the GIA as follows:[34]

> **The integration agreement with GrainCorp** … prevents GrainCorp from developing a competing solution or indeed supporting any other competitor or engaging in transactions outsides [sic] of CLEAR (essentially to develop liquidity, but also a tactical competitive advantage).

[106] A copy of the GIA was provided with the WDDR. Clear pointed out that a provision in the GIA acknowledged that whilst GrainCorp was to register as a buyer on the Clear exchange, it was not obliged to trade.

[107] Mr Pym recorded a number of the telephone discussions between him, Mr Thomas and NZX representatives, and prepared a less than complete transcript of one call that occurred on 19 August 2009. There appeared to be no dispute as to the

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32 5ASOC at [102].
33 CB7/05149.
34 CB7/05163.

accuracy of that transcript, which attributed to Mr Thomas an observation that GrainCorp was "the BHC that loves us".[35] Mr Weldon and NZX representative Ms Newsome both gave evidence of their recollections of the 19 August 2009 telephone conversation. There was no evidence of any of the NZX participants making a specific note of Mr Thomas describing GrainCorp as the BHC that "loved" Clear, but their recollection was nonetheless that the relationship between Clear and GrainCorp was described in very positive terms.[36]

[108] Later in the same call, the transcript records a discussion about the need for a suitable definition for the concept of "unique tonnes" which the parties intended to use to identify trades that were genuine, revenue-earning transactions on the exchange. In illustrating the difference between primary and secondary transactions, one of the Clear representatives is recorded as saying:[37]

> Let's say GrainCorp might buy some grain from 100 growers and they might then on-sell that grain and CLR wants to understand what it means by "unique tonnes".

[109] There was no qualification to the impression given in the WDDR that GrainCorp was positive in its approach to the GIA, and that its implementation would, in GrainCorp's view, lead to trading of up to one million tonnes in the 2009/2010 season. That positive impression of GrainCorp's approach to dealing with Clear was reinforced by the comments in the 19 August 2009 telephone discussion, particularly that GrainCorp "loved" Clear. That positive representation could reasonably colour NZX's analysis of the terms of the GIA and what NZX could reasonably attribute to Clear's projections of the volume of trading it anticipated.

[110] However, I am not satisfied that any contribution to an actionable representation could arise from the example given of the prospect that GrainCorp might buy grain from 100 growers and then resell it. The transcript suggests it was stated as a hypothetical example, which could not reasonably be interpreted as indicating buying activity that GrainCorp anticipated.

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35 CB11/08508.
36 Weldon BoE at [5.29], Newsome BoE at [4.12].
37 CB11/08509.

Volume representations

[111] NZX alleged that Clear represented as a present statement of fact that the forecast of 1.5 million tonnes to trade through the Clear exchange during the 2009/2010 harvest was reasonable, realistic and attainable.[38]

[112] The alleged volume representations include statements by Clear that:

- it expected to hold 10 per cent of the tradable grain in the Australian market by the end of the 2009/2010 season;

- revenue streams for the Clear business were likely to commence predominantly from November 2009; and

- the 2009/2010 year would be a benchmark one for the business where they expected to break even or make a small profit.

[113] NZX alleged that Messrs Thomas and Pym commented that Clear addressed revenue forecasts on a conservative basis.[39] Those statements, as with the support and alliance representations, were pleaded as context for the primary representation in relation to volume, namely that the Clear exchange would trade 1.5 million tonnes of grain, generating revenues of $3.125 million in the year to 30 June 2010.

[114] The most explicit written reference to projected volume of trading on the grain exchange was in the projected P&L presented by Mr Butler to Mr Taylor during the due diligence meetings in Melbourne on 2 September 2009. That included Clear handling fees for the core months of the grain season, November to February inclusive, of $625,000 per month. On the shoulder months of October and March, the projection included handling fees of $312,500 per month, with no additional revenue from handling fees in the remaining six months.

[115] The page of "key assumptions" accompanying the projected P&L included a note stating that "revenue is based on Grant Thomas's email …". That email had

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38 5ASOC at [106].
39 See [67] above.

been sent by Mr Thomas to Mr Butler on 27 July 2009, in response to a request for revenue forecasts. The relevant part read:[40]

> **Grain Exchange: $3,125,000**
>
> *This figure is based on trading l,250,000mt on the system @ $2.50 per mt. This figure was calculated on the back of the GrainCorp integration agreement which means all warehoused grain within GNC will be listed on the CLEAR system. We still need to stimulate or initiate trading with growers putting Offers and buyers putting bids. GNC have budgetted for 1,000,000mt (they warehouse over 10Mmt). The remaining 250,000mt will come from WA and SA.*

[116] In cross-examination, Mr Butler accepted that the arithmetic calculations in Mr Thomas's email did not add up.[41] After allowing for the revenue share to be allocated to GrainCorp, at the rate of $0.50 per tonne on the first 750,000 tonnes and $1 per tonne on the next 250,000 tonnes, the revenue generated for Clear from one million tonnes traded through GrainCorp would be $1.875 million. Trading in non-GrainCorp grain therefore needed to be 500,000 tonnes, not 250,000 to make up the additional $1.25 million. Mr Butler accepted the arithmetic but was reluctant to attribute particular relevance to it. He was at pains to emphasise that he accepted information from the board at face value.

[117] Clear had been reluctant to provide financial forecasts. The WDDR recorded Clear's preference not to provide financial statements, suggesting that the financial data for the 2009 financial year would be of little use.[42] Ultimately, the financial statements for the previous year to 30 June 2009 were annexed to the SPA. For the grain exchange business, that showed that there had been a loss of some $4.256 million. Clear continued to resist a request that they provide a five year forecast.

[118] When Mr Butler responded to additional due diligence questions posed on 27 July 2009 after NZX's receipt of the WDDR, he contemplated that a one year forecast for the year to June 2010 would be prepared and discussed at the meetings in Wellington on 30 and 31 July 2009. Mr Butler did prepare a forecast and referred

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40 CB8/06306.
41 NoE at 3302–3303.
42 CB7/05156.

it to Mr Thomas, but that document was not provided to NZX during those meetings.[43]

[119] During August 2009, NZX repeated requests, relevantly in the following terms:[44]

> Please provide: monthly capital P&L, cashflow and bank reconciliations and balance sheets for the last 12 months for each of the Clear companies[.] Financial forecasts for the 12 months ahead[.] Please be prepared to take us through and justify your 12 month financial projections.

[120] Responding before the due diligence meetings in Melbourne in early September 2009, Mr Butler confirmed that 12 month projections had been prepared, and that time would be allocated to discuss them. On 1 September he forwarded the projected P&L to Mr Thomas, indicating it had been prepared in response to the due diligence requests. On 2 September 2009, Mr Butler met with Messrs Taylor and Alrayes of the NZX due diligence team, to go through the projected P&L.

[121] In the course of his evidence, Mr Taylor produced a copy of the projected P&L that contained his handwritten notes, which he confirmed were made at the time of his discussion with Mr Butler. Next to the projected income from the grain exchange of $3,125,000, Mr Taylor had noted "1.5mt → 2". His evidence was that the note reflected Mr Butler's explanation that the projected revenue corresponded to a forecast of 1.5 million tonnes of grain at approximately $2 per tonne. That rate per tonne took account of the rebate that would be payable on one million tonnes to be traded by GrainCorp and 500,000 tonnes traded by others who would not be transacting GrainCorp grain and were not entitled to a rebate on the usual charge of $2.50 per tonne.

[122] On the revenue line in the projected P&L for Clear handling fees, Mr Taylor had also endorsed alongside the figure of $3,125,000, the words "net of revenue share". He recalled that this reflected an explanation by Mr Butler that the amount of revenue specified was net of the rebate Clear would have to pay to GrainCorp on

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43 NoE at 3286/27–30.
44 CB12/09116.

GrainCorp grain that was traded on the Clear exchange. Mr Butler denied providing any such explanation.

[123] Mr Butler was adamant that the projection was provided with explicit disclaimers that NZX could not place any reliance on its content. He claims he said that when presenting it to Messrs Taylor and Alrayes. He expected that would be understood, given that the Clear grain exchange was in its start-up phase and the uncertainties in respect of its business were perfectly clear. Mr Taylor did not recall any form of disclaimer or warning from Mr Butler that the content of the projection could not be relied on.

[124] The WDDR described the nature of the grain exchange, how it worked and the anticipated trading that would occur.[45] To assess the relevance of the volume of trading implicit in the revenue in the projected P&L, it is appropriate to reflect on other statements on this topic that were alleged to have been made by Clear in the course of due diligence.

[125] Numerous internal NZX documents from early August 2009 make reference to Clear's projections of trading 1.5 million tonnes in the 2009/2010 season. The context suggests that NZX was advised of that projection during Messrs Thomas and Pym's meetings in Wellington on 30 and 31 July 2009. It is not entirely clear how many of those documents were records of what various NZX staff had heard first-hand, and how many relied on comments relayed to them by others. From early August, drafts of the board paper prepared for the board meeting on 6 August 2009 included the statement:[46]

> CLEAR expects GrainCorp to have 1 million tonnes traded through CLEAR's trading system, and an additional 0.5 million tonnes from other bulk handlers. …

[126] On 5 August 2009, Emma Hunt (an NZX employee who was not as critically involved as some of the others), commented in an email addressing a possible structure for the consideration to be paid for the businesses:[47]

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45 See [104] above.
46 CB10/07310.
47 CB10/07828.

> Maybe the metric to use is related to their own estimates for how many tonnes grain they think they will get traded through Clear. They have said between 1 and 1.5m tonnes for the year I think. …

[127] Mr Weldon and Ms Newsome both specifically recalled that the projection of 1.5 million tonnes was conveyed by Messrs Thomas and Pym during the meetings on 30 and 31 July 2009. Ms Newsome was sure that it had been described as a conservative projection.[48]

[128] Messrs Thomas and Pym denied providing any such projection during their meetings in Wellington. In closing, Mr North argued that the recollections of NZX witnesses were unreliable because it was inherently unlikely that both Messrs Thomas and Pym would have used exactly the same words, as attributed to them by the NZX witnesses.

[129] In negotiating the earn-out provisions in the SPA, NZX proposed an earn-out target of 1.5 million tonnes in the 2009/2010 season on the basis that it was Clear's own projection. There was further comment about the appropriateness of 1.5 million tonnes as the target in an email Ms Cross sent to others at NZX on 10 August 2009. That included the following:[49]

> I'm less happy about removing the requirement to get 1.5million tonnes trading through CLEAR – this is based on what CLEAR said was their conservative estimate of the amount of grain that would be trading through the platform this [sic] for the 2009/10 season – this coupled with their constant comments about the importance of this harvest to set the scene/future of CLEAR Grain means I don't think this is an unreasonable request of ours (esp also since we really don't have any other CLEAR business numbers to tie any performance review to). Also there is a real incentive for them to meet and exceed their own business estimates for the trading to be put through the trading platform this season. Grant specifically said that if they only got 500,000 tonnes traded through the platform this 09/10 season then they would be in trouble – I think we should at least hold them to the requirement to double this amount this season (so 1mil tonnes at the least as a requirement). I [sic] not sure we'd want to remove this requirement as it really is pretty key to our investment that this succeeds.

[130] Then in an email on 13 August 2009 to Mr Weldon, Ms Kirkham and Ms Newsome, Ms Cross observed:[50]

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48 Weldon BoE at [5.20]; Newsome BoE at [3.25], [3.27].
49 CB11/08075.
50 CB11/08199.

> Now to the probability of Clear hitting 1.5 mil tonnes – I think this is high 80-90% probability.

[131] In an internal email to Mr Weldon and others of the due diligence team on 20 August 2009, Ms Newsome included a projection of 1.5 million tonnes "… based on their own statements".[51] She also observed:

> We believe that 1.5 million tonnes is reasonable, and achievable.

[132] NZX's stance with Clear during the negotiation of terms for the SPA was consistently that NZX proposed 1.5 million tonnes trading in the year to June 2010 because that had been Clear's own projection of the level of trading. The consistent reliance on that representation in NZX documents throughout the period supports the clear evidence from Mr Weldon and others on the representation having been made.

[133] Messrs Thomas and Pym's denials of having made any such representation is not necessarily supported by their attempts to negotiate down the earn-out target for the year to June 2010. Those attempts can be explained by their understandable wish to make the earn-out target as easy to attain as possible, not because of any concern that earlier statements by them as to their projections of the volume of trading had been misunderstood, or indeed wrongly attributed to them. There was no evidence that they protested during these negotiations that they had not made the projection at all.

[134] The evidence of Messrs Taylor and Butler clashed on the terms of Clear's revenue projection in the projected P&L. I prefer Mr Taylor. He is a New Zealand qualified chartered accountant and barrister and solicitor who, at the time of his evidence, had worked in London as a vice president in Deutsche Bank AG's treasury finance department since December 2014. His recollection of Mr Butler's comments when presenting the projected P&L was consistent with the somewhat cryptic notes that he handwrote on the document at the time. Further, that explanation for the revenue projections was consistent with more general comments that I am satisfied were made on behalf of Clear at earlier stages of the due diligence process.

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[51] CB11/08449.

[135] Mr Taylor recalled that Mr Butler had been careful to explain that Mr Butler's firm (Wellingtons) had simply adopted information provided to them by Clear, and that his firm was not independently verifying the reasonableness of the information. Mr Taylor's evidence was that the NZX representatives acknowledged at the time that it was Clear's forecast, rather than Wellingtons'.[52]

[136] Both Messrs Thomas and Pym described Mr Butler as fulfilling an outsourced chief financial officer role for Clear. They had no in-house accounting expertise at his level, and his firm undertook all significant accounting functions, such as preparation of management accounts, and financial statements. It appears that Mr Butler (or in his absence another representative from his firm) contributed to at least parts of all, or the significant majority, of Clear board meetings.

[137] For his own part, Mr Butler was reluctant to acknowledge any responsibility for any accounting data produced for the Clear businesses. He endeavoured to minimise any potentially contentious aspect of his involvement in the due diligence process to an extent that raised doubts as to his credibility.

[138] The version of the projected P&L provided to NZX had a word processing footer acknowledging Mr Butler's authorship and "Clear/NZX Sale Doc-2009.08.04-Final Forecast FY2010". (Another date at the foot of the projected P&L was "02/09/2009".)

[139] Mr Butler's evidence was that during his discussions with Mr Taylor, he made an email enquiry of Mr Thomas, which included the following:[53]

> In respect to the forecasts they will have some discussion with you around basis of forecasts of $3.15 million for handling fee income. I said you will have a better grasp on the forecast including timing;

[140] Mr Butler accepted that the reference to "$3.15 million" was an error and should have read "$3.125 million", referring to the assumption in the projection. Although his email cannot stand as a reliable reflection of the terms in which the forecast was presented to NZX, it is more consistent with the projection of Clear's

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52 Butler BoE at [2.41].
53 CB12/09323.

profit and loss being presented as Mr Taylor described it, rather than in the highly qualified terms in which Mr Butler claims he dealt with it.

[141] Even for a start-up business such as the grain exchange, any prospective purchaser would be keenly interested in the current operators' projection for the business in future financial periods. NZX's request for such a projection was to be expected. Irrespective of whatever level of independent assessment was undertaken by NZX, the views of the incumbent operators of such a business as to what they considered would be achievable would always be material information. It is unrealistic for Ralec to contend that the projected P&L was provided on terms disclaiming all responsibility for the reasonableness of the projection. Preparation of the projected P&L appears to have occurred over a period of weeks. The circumstances of repeated requests for it and the meeting at which Mr Butler presented it are all consistent with its content having status as a representation of the operators' opinion as to the likely performance of the business in the ensuing financial period.

[142] Reflecting on the evidence and argument as to the existence of the first three types of representation:

- I am satisfied that the support and alliance representations as alleged were made on behalf of Clear in the course of relevant dialogue during the due diligence process. Those representations were to the effect that the Clear exchange enjoyed widespread support from grain industry participants, including almost all buyers and the BHCs. Further, that Clear's relationship with GrainCorp was such that GrainCorp fully supported the alliance, would promote the use of the Clear exchange by its customers and that GrainCorp itself anticipated trading on the exchange in the 2009/2010 season.

- I am also satisfied that the representation as to the volume of 1.5 million tonnes of grain to trade through Clear in the 2009/2010 season was made during the period of due diligence as being a reasonable, realistic and attainable volume.

Costs representations

[143] NZX alleged that Clear represented its forecast tonnage and revenues could be achieved on the basis of its existing cost structure, including the extent of costs and expenses set out in the projected P&L.

[144] NZX alleged that numerous oral and written statements in the course of due diligence constituted representations as to the level of costs that the Clear business had incurred, and was projected to incur in its current financial year. The alleged statements included that recurring monthly expenditure had been reduced from $400,000 per month to $250,000 per month, and that the current cost structure for Clear would support the anticipated revenue streams for the ensuing 12 months. NZX relied on separate comments to the effect that Clear was not anticipating any significant capital expenditure, and that its anticipated operating expenditure was reasonably stable for the following 12 months. Further, that the expenses component of the projected P&L, which put total expenses at some $3.565 million, was a reliable projection of the costs of generating the projected revenue.

[145] The projection of Clear's costs in the projected P&L was consistent with earlier indications. The WDDR stated that total operating expenses for the year to June 2009 were approximately $4.2 million, and that recurring monthly expenditure had been reduced from $400,000 to $250,000 per month.[54] Mr Thomas advised Ms Cross some days later that Clear did not anticipate any significant capital expenditure in the following 12 months, and that its anticipated operating expenditure was reasonably stable, based on current trading.[55] The sequence of oral and written statements on this topic are sufficiently consistent and precise in their terms to constitute representations by the current operators as to their considered opinions of the likely costs of operating the business in the period to June 2010.

[146] Ralec did not dispute the written statements that were made about the level of projected costs. Its argument was rather that NZX was selective in choosing to rely on part only of those statements. Both Messrs Thomas and Pym were adamant that, from the outset, they stated to Mr Weldon, and to others, that for the business to

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54 CB7/05156.
55 CB8/06342.

perform to its potential, NZX would have to spend substantial additional amounts. Implicitly, this meant increasing the operating costs.

[147] To the extent that Messrs Thomas and Pym referred to spending up to $5 million, it was unclear as to whether that was $5 million more than the projected level of total expenses (some $3.56 million), or increasing that level of expense to a total of $5 million. When pressed, Mr Thomas stated it was the latter.[56] However, that was qualified by the exclusion from that amount of further spending on the technology.[57]

[148] I find that Messrs Thomas and Pym's comments about spending of $5 million were an aspirational view of what would be needed to get Clear performing up to their most optimistic projections. Their comments were not conveyed in terms that $5 million was necessarily needed to achieve the level of trading set out in the projected P&L. In an October 2011 affidavit supporting a protest to New Zealand jurisdiction, Mr Thomas put it in terms that $5 million would need to be spent "… to achieve market adoption and acceptance".[58]

[149] In his evidence, Mr Pym sought to confine "operating costs" (as he used that term in such assurances) to static recurring items such as rents of various sorts. He argued that such assurances should have been taken as excluding variable costs such as salaries and other employee-related expenses. That attempted re-definition of the well-settled concept of operating expenses was not persuasive.

[150] I am not satisfied that there were additional statements made during the due diligence period that qualified the representations as to costs, which were consistent with the expenses component of the projected P&L. That was not countermanded by references in other contexts to increased spending up to $5 million to achieve higher levels of performance. The costs representation is accordingly made out.

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56 NoE at 2131/31–2132/33.
57 NoE at 2133/1–6.
58 Thomas affidavit, AF73, at [55].

No disputes representation

[151] The last of the alleged representations was that Clear stated that there were no disputes or claims of any substance against it since it had launched, that it had received a letter from a disgruntled shareholder which had been addressed promptly through an exchange of letters, and that there had been no actual, threatened or pending legal actions against Clear.[59]

[152] NZX's request for information, to which the WDDR responded, included questions about current or prior disputes. The questions and Clear's answers were as follows:

> **(e) Please list/provide details of any current disputes/claims against CLEAR.**
>
> None of any substance. CLEAR has been engaged in some commercial disputes with regards to provision of services (such as excess traffic usage charge from Primus.)
>
> **(f) Please list/provide details of any disputes/claims against CLEAR since the company was launched.**
>
> None of any substance. CLEAR has received a letter from a disgruntled shareholder. This was addressed promptly through exchange of letters.

[153] This clearly constitutes a representation that Clear had not been involved in any disputes of any substance, and accordingly the no disputes representation is made out.

Did any of the representations constitute misrepresentations?

[154] The first cause of action invokes s 6 of the CRA, relevant parts of which provide:

> **6 Damages for misrepresentation**
>
> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—

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59 5ASOC at [92(l)].

> (a) he shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
>
> …

[155] The CRA does not define what constitutes a misrepresentation. The courts have consistently held that, for a representation to be actionable, it must be a statement of past or present fact which is false or misleading.[60] Where an alleged representation constitutes an opinion as to what is projected to occur in the future, it could constitute a misrepresentation if the representor did not hold the opinion, or a reasonable person having the knowledge of the representor could not have honestly held that opinion.[61] An opinion may also imply that there are facts justifying the opinion.[62]

Support, alliance, volume and costs representations

[156] The true nature of Clear's relationship with GrainCorp is important to the alleged misrepresentations about that alliance, the projected volume of trading, and the level of support for Clear more generally. It is therefore appropriate to focus first on that relationship.

[157] Ralec denied that there was any misrepresentation as to the prospects of GrainCorp trading on the Clear exchange. NZX was provided with the GIA and was accordingly deemed to have notice of the limit on GrainCorp's obligations under it. These included the explicit provision that GrainCorp was not obliged to trade on the Clear exchange.

[158] NZX's complaint was that, despite the absence of a contractual obligation to trade, it was reasonably misled into believing that GrainCorp was favourably disposed to using the Clear exchange to acquire grain, in addition to encouraging the growers whose grain it handled to use the exchange.

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60 *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 537; *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC). See generally Burrows, Finn and Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at [11.2.1].

61 Burrows, Finn and Todd, above n 60, at [11.2.1(b)].

62 *New Zealand Motor Bodies Ltd v Emslie*, above n 60, at 593–594.

[159] In 2009/2010, there was a stark division of views within GrainCorp's relevant personnel about the company trading on the Clear exchange. The division responsible for the storage and handling of grain was supportive of Clear. There had been positive co-operation in aligning IT programmes that would facilitate the listing of grain on Clear. The programmes identified the grower/owner, and would subsequently facilitate a sale of the grain through the Clear exchange, or alternatively a grower's direction via the electronic exchange to remove the grain from the quantities listed on the exchange.

[160] However, the separate division of GrainCorp responsible for trading grain treated Clear as a threat to its established manner of doing business, and in particular to its sources of revenue. The manager of the trading division, Mr Sam Tainsh, had unequivocally rejected any prospect of GrainCorp trading personnel using the Clear exchange in the 2009/2010 season. That unqualified opposition to Clear was known to Messrs Thomas and Pym by April 2009, and confirmed in July 2009.[63]

[161] There is a material difference between the absence of a commitment for GrainCorp to trade on the Clear exchange (leaving open the prospect that some trading might occur), and the certain knowledge that GrainCorp would not trade. From all of the information available to NZX during due diligence, it ought to have been apparent that there were numerous risks to be overcome before GrainCorp would trade. Growers had to agree to list their grain on Clear, and then make offers for quantities and grades at locations and prices that were equal to, or better than, the prices GrainCorp could achieve in accumulating grain through other sources. Therefore NZX could not treat any volume of trading by GrainCorp as assured.

[162] Mr Pym's evidence was that he and Mr Thomas were targeting Glencore (another significant grain trader in Australia) as the buyer that would trade one million tonnes.[64] None of the written communications during due diligence identified Glencore, rather than GrainCorp, as the anticipated buyer. The NZX witnesses consistently denied that they were informed that the revenue projection assumed trading by Glencore, rather than by GrainCorp.

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63 For example, CB4/03019 (7 April 2009 meeting notes); CB11/08494; Pym evidence, NoE at 2667.

64 Pym BoE at [34], [556].

[163] Ms Kirkham was pressed as to the meaning conveyed by a handwritten note in a notebook she maintained of meetings during the due diligence period. The note was:[65]

> GCorp; x a buyer.

[164] The immediate context, as interpreted by Ms Kirkham, from the notes surrounding this extract was that it addressed the importance of confidentiality and the ownership of information (presumably about trading on the exchange). Alongside the comment was another note to the effect that BHCs provided information to a government agency monitoring the industry quarterly in arrears. Ms Kirkham did not recall whether the note reflected advice from Clear that GrainCorp would not participate as a buyer.

[165] Mr North argued in closing submissions that Ms Kirkham's note provided sufficient corroboration for Mr Pym's claim that NZX was put on notice during due diligence that GrainCorp would not be a buyer. I am satisfied that Ms Kirkham did her best when questioned about the note to reconstruct its meaning and that it does not provide meaningful support for Mr Pym's claim.[66] The absence of any written reference to the proposition that GrainCorp would positively not trade, the consistent denials by NZX witnesses that they were so advised, and NZX's post-settlement stance in attempting to understand why GrainCorp was not trading, cumulatively satisfy me that NZX was not advised as Mr Pym claimed.

[166] Messrs Thomas and Pym had relayed to NZX the opinion they had received from GrainCorp that, of the grain handled by GrainCorp that could be listed on the Clear exchange, GrainCorp thought about one million tonnes would be traded on the exchange. The terms of Clear's statement in the WDDR on this point were arguably equivocal:[67]

> … GrainCorp are targeting volumes of 1m tonnes *to trade* via CLEAR this harvest …

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65 CB39/29800.
66 NoE at 1184–1186.
67 See [104] above (emphasis added).

[167] From all the surrounding context however, I am satisfied that statement was reasonably interpreted as meaning an intention by GrainCorp that it would itself trade one million tonnes.

[168] To the extent that Ralec's case at trial depended on GrainCorp holding an opinion that other traders would be the buyers of one million tonnes of grain, that depended on hearsay. There was no evidence as to how those at GrainCorp who apparently conveyed that opinion justified their optimism that other traders would use the exchange, when those responsible for trading at GrainCorp were so adamantly opposed to it. In its trading function, GrainCorp treated Glencore as a competitor, and at least for a period after settlement, Messrs Thomas and Pym were conscious of a commercial stand-off between those two organisations. That renders unlikely any pre-settlement projection by GrainCorp in discussions with Clear that it anticipated Glencore trading one million tonnes of growers' grain listed via GrainCorp. I am satisfied that the representations were put to NZX in terms reasonably interpreted as GrainCorp being the trader of the one million tonnes of grain.

[169] A critical feature of each of the support, alliance and volume representations was the revenue in the projected P&L, which was reasonably interpreted by NZX as involving trading of one million tonnes by GrainCorp. As Messrs Thomas and Pym knew, because of Mr Tainsh's opposition, there was no realistic prospect of any material volume of trading by GrainCorp in the 2009/2010 season. In January 2010, Mr Pym described the relationship between Clear and GrainCorp as "a schmozzle".[68] It also transpired that Messrs Thomas and Pym had been disappointed at GrainCorp's conduct in the previous harvest.[69]

[170] It follows that the state of the alliance with GrainCorp was misrepresented. If this misrepresentation had not been maintained, the source of trading revenue of more than $3 million would have required much greater justification with very limited options in prospect.

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68 TR22; Pym evidence, NoE at 2718.

69 TR69 – "…screwed by GrainCorp last year …".

[171] Messrs Thomas and Pym contended that any representation that Clear would trade 1.5 million tonnes was subject to their assumption that NZX would provide additional resources for marketing the exchange, so as to promote additional business. Both Messrs Thomas and Pym were insistent that they had conveyed to Mr Weldon and others at NZX throughout the due diligence period their view that Clear would need to spend $5 million to break through the barriers that prevented it being established as a market with a viable volume of trading. I have already reviewed the competing positions on this issue.[70] I am satisfied that Clear did not have a reasonable basis for believing that NZX would commit up to $5 million in order to make Clear's representation that 1.5 million tonnes would be traded an achievable target.

[172] As to other potential trading business, by the time the SPA was signed in early October 2009, the prospect of any similar arrangements to those in the GIA with BHCs in Western Australia or South Australia had faded. Clear had relegated such initiatives as tasks for the following season.

[173] As to the level of support enjoyed from the rest of the grain industry, I have found Clear represented that it had been well supported by Australian and international grain industry participants.[71] That representation could reasonably be relied on as a positive indication that a significant number of buyers would be likely to place bids on the Clear exchange, and is bolstered by the views expressed by Clear directors that they were pleased with the level of support. Messrs Thomas and Pym rationalised the level of support as reflecting the increase in trading from its initial level of activity in the 2008/2009 season. However, that increase was at such insignificant levels that it could not credibly justify a claim to being pleased with the level of support.

[174] I am satisfied that Clear could not justify the claims it made to being well supported by local and international bodies, and "nearly all Australian grain buyers". The reality was that the majority of the significant buyers were not using the Clear exchange, except perhaps on a trial or an exceptional basis. There was resistance to

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70 See [146]–[150] above.
71 See [94]–[101] above.

the pricing structure under which the buyer was required to meet the transaction charge imposed by Clear of $2.50 per tonne. There was also opposition to the requirement to pay the grower within five days of completing the purchase. Compared with the norm in the industry at that time of up to 30 or even 35 days, this change imposed material additional working capital obligations on buyers. These reasons for buyers being opposed to using the exchange were known to Messrs Thomas and Pym.

[175] The representations as to the volume of trading and costs that would be incurred in the year to June 2010 related predominantly to future activity. To constitute misrepresentations, NZX must establish that they amounted to statements that those volumes and costs were reasonable, realistic and attainable, when in fact they were not.

[176] The consultant retained by Clear with expertise in the grain market, Ms Scales, provided "targets" for the exchange at the end of June 2009, for the financial year to 30 June 2010.[72] Her projection at that time was for a total volume to be traded on the exchange of one million tonnes generating revenue of $2.125 million. Ms Scales' projection included 750,000 tonnes for trading of grain on the east coast, which would be grain handled by GrainCorp. The net revenue she projected from those sales was at an average of $2 per tonne, reflecting the terms of the rebate arrangement that was a term of the GIA that was then being negotiated with GrainCorp. Ms Scales also projected that trades on the grain exchange from South Australia and Western Australia would be a further 250,000 tonnes, generating revenues at $2.50 per tonne.

[177] There was no satisfactory explanation as to how Mr Thomas increased that projection by 50 per cent for the purposes of the input he provided to Mr Butler for the projected P&L. Neither of Mr Thomas nor Mr Pym had any background in the grain industry, and Ms Scales had been retained to provide that expertise.

[178] By the time the projected P&L was provided by Mr Butler to Mr Taylor in early September, in terms that were consistent with their earlier oral indications,

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72 CB5/03884.

Clear knew that the trading division of GrainCorp would not use the Clear exchange in that season, and that the head of that division, Mr Tainsh was firmly opposed to using Clear. The prospects of obtaining trades through other BHCs on the east coast were excluded because of the exclusivity of the GIA.

[179] Further, by early September 2009, Messrs Thomas and Pym must have appreciated that there were no realistic prospects of the dominant BHCs in Western Australia (CBH) or South Australia (ABB) entering into contractual arrangements with Clear that would facilitate trading on the Clear exchange by those BHCs on terms similar to the GIA in the 2009/2010 season.

[180] I have considered the prospects during the period of the due diligence discussions that Glencore would be the buyer of a significant portion of one million tonnes of the grain listed via GrainCorp. Mr Pym's evidence was that his dialogue with James Maw, the manager at Glencore, had begun in May 2009 and Glencore was the purchaser of small quantities of grain via the grain exchange in the following season.

[181] One of Ralec's complaints about NZX's management of the grain exchange post-completion was that, from early 2010, Mr Weldon frustrated the completion of an agreement for Glencore to trade substantial volumes on the grain exchange in return for rebated fees. (Later in the judgment I consider the competing positions on the responsibility for an agreement not being concluded with Glencore, as an aspect of Ralec's counterclaims.)[73] I find that Messrs Thomas and Pym did not convey to NZX during due diligence any expectation that substantial volumes would be traded on the grain exchange by Glencore, rather than by GrainCorp. During that period, the focus was on encouraging trading by GrainCorp.

[182] As to the costs representations, Messrs Thomas and Pym accepted in their evidence that the projected volume of 1.5 million tonnes in the year to 30 June 2010 could not be achieved on the level of costs included in the projected P&L. This was because of their understanding that NZX would be prepared to commit substantial further resources to marketing the grain exchange, and their own analysis at the time

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[73] See [366]–[375] below.

the projection was provided relied on that assumption. This understanding is inconsistent with representations in the projected P&L and elsewhere that the projected revenue could be generated on the level of costs as detailed in that document.

[183] I find that the representations as I have defined them on support, alliance, volume of trading and level of costs to be incurred did constitute misrepresentations.

No disputes representations

[184] The reference to a "disgruntled shareholder" in the WDDR was to a series of differences between Clear management, and two original shareholders, Mr McKay and Ms Weston. Their shares in Clear had been held in the name of a company they controlled, Thundacats Pty Limited. Both were former senior employees of the AWB and were founders of a sizeable independent grain broking business, AgFarm Pty Limited. Mr McKay was involved in the original planning for an electronic grain exchange, and he and Ms Weston were the only ones of the founders of Clear with experience in the Australian grain market. Around May 2008, Thundacats held 20 per cent of the shares in Clear, Mr McKay was employed as general manager of the Clear grain exchange, and Mr McKay and Ms Weston were both directors.

[185] However, from about August 2008 a material difference of opinion arose between Mr McKay and Ms Weston on the one hand, and the others developing the Clear business model on the other. Mr McKay envisaged that growers registering to use the Clear exchange would do so via a broker (such as his own business), whereas others were keen to allow growers the opportunity to trade directly without registering with Clear via a broker (described as "DIY"). Mr McKay's view did not prevail and Clear continued with proposals to enable individual growers to register on the Clear exchange, and participate in lodging offers to sell their grain without the involvement of a broker.

[186] In October 2008, Mr McKay proposed that he would cease employment as Clear's general manager, but that he and Ms Weston would remain as directors. The remaining directors rejected that proposal and pursued the resignation of both Mr McKay and Ms Weston as directors, and his resignation as general manager.

That duly occurred but, after their exclusion, Mr McKay, Ms Weston and Thundacats raised a number of challenges to the on-going governance of Clear.

[187] In December 2008, Addisons (the Sydney law firm acting for Mr McKay and Ms Weston) wrote to Clear alleging misleading and deceptive conduct by the company in its dealings with them, breaches of directors' duties (in particular paying directors excessive salaries and operating the company without appropriately qualified personnel with detailed experience in the grain industry), and oppressive conduct in issuing shares with a diluting effect on their holding.

[188] Demands made in that letter were rejected on behalf of Clear on 23 December 2008. In mid January 2009, Mr Thomas met Ms Weston to discuss the disputes, including allegations by Mr Thomas that AgFarm was deliberately undermining Clear's operations by failing to provide support that had previously been assured. Further correspondence between lawyers acting for the parties was exchanged in February 2009. On 9 April 2009, Clear announced a rights issue to all its shareholders, with the subscription price being $0.003 per share. That price was substantially lower than for shares issued during 2008.[74] The subscription price valued the Clear business at that point at approximately $1.8 million.

[189] On 17 April 2009, Mr McKay responded. He protested that the rights issue was a means of diluting Thundacats' shareholding, that it amounted to an oppression of minority shareholders, and involved breaches by the directors of their duties. At the end of April 2009, Mr Thomas refuted those criticisms. In early May 2009, Mr McKay pursued similar criticisms and reserved Thundacats' rights. The present solicitors for Ralec responded on 20 May 2009 rejecting the claims, and indicating that Clear would defend any claims made against it. That is where matters stood when the WDDR was provided in July 2009.

[190] NZX alleged that the statement in the WDDR about disputes was inadequate and misleading. Claims made by Mr McKay and Ms Weston remained extant at the

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[74] Thundacats cited the issue of shares to a company employee, Mr Evan Karantonis, at $0.037 per share.

time of the WDDR and up to completion of the SPA, and should have been disclosed as a material dispute that a party conducting due diligence would wish to assess.

[191] On 16 October 2009, subsequent to the signing of the SPA and shortly before completion, Addisons wrote a further letter of complaint to Ralec on behalf of Mr McKay and Ms Weston. The issue this time was that when the directors proceeded with the rights issue in April 2009, and while the offer remained open in May 2009, the directors were already aware of the prospect of a sale of the businesses, but failed to disclose that prospect. Addisons' letter threatened to seek court orders to prevent the transaction, and sought copies of relevant documents and an undertaking not to transfer the intellectual property rights to which Mr McKay and Ms Weston laid claims.[75] The letter made reference to earlier disputes, but not in terms that suggested they were still being pursued.

[192] Ralec promptly copied Addisons' October 2009 letter to NZX, seeking confirmation that the prospects of any transaction with NZX had only arisen after the share issue in April 2009 had been settled. NZX complied with that request. As well as defending the adequacy of the response in the WDDR, Ralec argued that this disclosure adequately supplemented the original disclosure.

[193] However, NZX distinguished the subject matter of the October 2009 complaint from the earlier complaints advanced by Mr McKay and Ms Weston. Prompt disclosure of the October 2009 letter arguably did not relieve Ralec of the obligation to have made fuller disclosure of the previous disputes.

[194] Mr Rich of Wisewoulds (Melbourne solicitors for Ralec) gave evidence about this aspect of the WDDR which he had provided. He was extensively cross-examined by Mr Latimour. He defended the adequacy of the response, on the basis that there was no merit in Thundacats' complaints and that, although threats had been made, no formal claims had been made, or proceedings commenced, against Ralec or its directors.

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75 CB17/12816.

[195] NZX's concern was that the no disputes representation misrepresented the gravamen of Mr McKay's and Ms Weston's criticisms by dismissing them as being of no substance. Arguably, NZX would have reviewed the prospects for the grain exchange more sceptically if they had been told that two founding shareholders, who were the only ones with experience in the grain market, had been excluded from the company following a disagreement as to how the business should be run – this having occurred in circumstances where they were the shareholders who had subsequently threatened claims against the company.

[196] A component of Ralec's response to this allegation was that the disclosure it had made during due diligence was sufficient for NZX to identify in any event who the threatened shareholder disputes had been with. I am not satisfied that the hints as to Mr McKay and Ms Weston being the "disgruntled shareholders" were anywhere near sufficient to justify the claim that they had, in any event, been identified as such.

[197] Prompt disclosure of the discrete complaint raised in October 2009 also could not be an answer to NZX's complaint of inadequate disclosure of the previous disputes.

[198] The essential purpose of an enquiry as to the existence of disputes is to ascertain whether the conduct of the business has caused disputes and, if on-going disputes exist, to isolate liability for them, assess the risk of disruption and understand the subject matter. Fuller disclosure here would not have made a material difference to NZX on these considerations. What NZX can now claim would have made a difference is knowledge of the clear division of views that had developed about the manner in which Clear should conduct its business. The fundamental difference on that topic was a matter of background to, but not the immediate grounds for, the various threats of claims made on behalf of Thundacats against Clear.

[199] I am not satisfied that the limited disclosure provided in due diligence was materially inadequate so as to amount to a misrepresentation. The reality is that Thundacats had not pursued any formal claim and, although it may ultimately not

have been correct, Mr Rich's view at the time that the claims were without merit has not been successfully challenged.

Inducement

[200] Section 6 of the CRA requires that the misrepresentation has induced the representee to enter into the contract. Inducement is not a purely subjective inquiry as to whether NZX was in fact induced by the misrepresentation. It involves a broader, objective consideration as to whether a reasonable contracting party in the position of the representee would have been induced: their reliance must have been reasonable.[76] A complementary element of this inquiry is whether the representor made the representation in circumstances that reasonably suggest an intention that it be relied upon.[77]

[201] Ralec disputed that NZX could make out that it had been induced in a relevant manner by any misrepresentations that were made out. Ralec argued that:

- NZX undertook its own independent enquiries (some of which produced information inconsistent with representations made on behalf of Clear);
- it had retained independent experts to assess the businesses; and
- NZX did rely, or ought reasonably to have relied, on those sources of information so there were reasonable grounds for it to reject the accuracy of information now alleged to comprise misrepresentations.

[202] In addition, Ralec argued that it provided the information now complained of with disclaimers that sufficiently warned NZX that the information could not be relied on.

[203] There was evidence that NZX was sceptical about some of the information provided by Messrs Thomas and Pym. Mr Alrayes, a financial analyst on NZX's due

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[76] *West v Quayside Trustee Ltd (in rec and in liq)* [2012] NZCA 232, [2012] NZCCLR 16 at [30]; *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879.

[77] *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145.

diligence team, produced a version of projected financial performance for Clear relatively early in the due diligence process. Mr North criticised NZX's failure to call Mr Alrayes as a witness, and also tested Mr Taylor thoroughly on the origins of Mr Alrayes' figures. Mr North's hypothesis was that Mr Alrayes was able to build up a projection that was substantially similar to Clear's projected P&L, before getting any such detailed projections from Clear. Arguably it followed that NZX had not relied on the projection provided by Clear. Mr North also cited a 3 September 2009 email from Mr Taylor to other members of the NZX due diligence team, which was sceptical about the reliability of the numbers used in the projected P&L.[78] Mr Taylor stated that the numbers would need to be tested. On a reconsideration of all Mr Taylor's answers, I am satisfied that they do not support Mr North's hypothesis. Mr Taylor's recollection was that Mr Alrayes did take into account, in his financial modelling, the information received from Clear at the time he did that work.

[204] NZX did retain independent experts on the technical capabilities of the software that had been developed for the grain exchange, and obtained two reports on the state of the Australian grain industry and the attitudes of growers to marketing their products.

[205] NZX did have significantly more pessimistic assessments of the prospects for the grain exchange from others, than the projections received from Clear. In 2008, NZX had purchased an Australian agricultural advisory business, Profarmer Pty Limited. It had retained the services of the alter ego of that business, Mr Koch, who warned the due diligence team that meaningful growth with the grain exchange may take five to 10 years. Mr Storey described the embryonic grain exchange as a "slow burner", in light of matters such as the entrenched nature of growers' attitudes towards the means of selling their grain.

[206] Ralec raised two additional grounds for disputing that any misrepresentations induced NZX's entry into the SPA. First, Ralec drew a distinction between the totality of information gathered by Mr Weldon and the due diligence team, some of which raised doubts about the viability of the businesses, and the summary of views

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[78] CB12/09343.

passed on by the due diligence team to the NZX board which made the decision to enter into the SPA. Ralec argued that some negative indications were omitted from what was conveyed to the NZX board.

[207] There is nothing in this distinction as to the level at which information was assessed. NZX is fixed with the totality of information available to it, in assessing the prospects for completing the purchase. A requisite level of inducement is to be considered on the basis of all information available to all involved at NZX so, in any case, NZX could not establish Ralec's liability on the basis that the NZX board, as the notional decision-maker, was not in possession of some of the negative indications conveyed to NZX during due diligence.

[208] Secondly, Ralec argued that because Mr Weldon perceived the grain exchange as a strategic component of the larger Agri-Bloomberg initiative, he was determined that NZX should acquire the businesses for strategic reasons, irrespective of how it might perform in the short term.

[209] I do not consider that a detailed breakdown of the proportionate weight to be given to various sources of inducement for NZX entry into the SPA is necessary. I accept that NZX did have available two less positive, and inconsistent, indications as to the prospects for the grain exchange. Further, I accept that Mr Weldon's enthusiasm for the purchase was influenced by strategic plans not directly dependent on Clear's representations.

[210] As to the support and alliance misrepresentations, a new mode of marketing grain, such as Clear was, would require the co-operation of at least a portion of those who were then in the business of facilitating or conducting the sales of grain for growers. The nature and extent of that support would therefore be relevant to any potential purchaser of the Clear business. The extent to which the dominant BHC on the east coast supported growers' use of the Clear exchange was clearly a material consideration for any purchaser of the exchange. NZX relied on what Clear told it on this topic, to an extent that it was a material inducement. NZX's reliance was reasonable.

[211] In addition, a viable market also needed an adequate volume of buyers to bid for the grain being offered by growers. I have found that Clear's representations about the level of support it enjoyed in the grain industry and the benefits of the GIA misrepresented the extent of support for Clear. This included the misrepresentation that GrainCorp was likely to participate on the Clear exchange as a buyer of up to one million tonnes. There was similar reliance by NZX on that misrepresentation, which also operated as a material inducement.

[212] NZX certainly did not accept uncritically the projection of volume of trading (and hence the revenue) or the level of costs represented in the projected P&L. By the time the purchase was settled, NZX was working on its own, more conservative, projections of the level of trading that might occur in the year to June 2010. It was also anticipating that the operation of the Clear businesses would cost more than the expenses specified in the projected P&L. Notwithstanding those differences, I accept that the projections provided by Clear were a material factor in assessing the range of outcomes that might be achieved, and that in turn contributed to the inducements for NZX to enter the SPA on the terms that it did.

[213] Mr Weldon's aim of building larger businesses of which the Clear assets would become a part did not eliminate NZX's reliance on the information from Clear as an inducement to enter into the SPA. I am not satisfied that Mr Weldon's strategic plan was such that NZX would have purchased Clear in any event – that is, even if Clear did not represent that the grain exchange might gain a sufficient share of grain trading to establish proprietary value in the data within the two or three year earn-out periods.

[214] I find that NZX did take information from all sources into account. To the extent that more pessimistic views were discounted, that occurred in part, at least, in reliance on what I have found to be misrepresentations by Clear in the course of due diligence. Accordingly, liability for misrepresentations under s 6 of the CRA is made out.

Second cause of action: Fair Trading Act

[215] NZX claimed that each of the alleged representations under the first cause of action also constituted misleading and deceptive conduct so as to trigger liability under the FTA.

[216] As a preliminary point, Ralec contended that the terms of NZX's pleading, in distinguishing between the no disputes representation and the other categories of representation, meant that the FTA cause of action could only apply to the no disputes representation. I have rejected that interpretation as untenable.

Jurisdiction

[217] Ralec denied that Clear's conduct in making the representations was governed by the FTA, because it took place in Australia beyond the reach of the New Zealand statute. There is some justification for the claim that Clear's conduct was "all Australian":

- its businesses had been developed and were entirely located in Australia;
- the personnel involved were all Australian;
- they had been invited to deal with a New Zealand purchaser by an Australian-based agent of NZX;
- with limited exceptions, they made all the statements they did about the business in Australia; and
- they had opposed being sued in the New Zealand High Court, albeit unsuccessfully.

[218] NZX invoked the FTA in reliance on the fact that all of the representations in issue were either made in New Zealand during Messrs Thomas and Pym's visits to Wellington on 30 and 31 July 2009 and 1 and 2 October 2009, or were conveyed by email and telephone directly to recipients in Wellington, or were conveyed in

Australia but anticipating that their communications would be relayed to decision-makers in Wellington.

[219] It is not relevant that Ralec has itself invoked the FTA in one of the causes of action in its counterclaim. Conceptually at least, one party to an international transaction could be caught by the FTA, but the other not.

[220] Nor can the contractual provision that the SPA was to be governed by and construed in accordance with the laws of New Zealand[79] extend the application of the FTA if the terms of the statute do not extend to capture Clear's relevant conduct. The reality is that Ralec would be governed by equivalent provisions in the Australian Trade Practices Act 1974 in any proceedings in Australia. The desirability of the same rules applying on both sides of the Tasman in dealings between the two countries may be an influence justifying a broad interpretation of the scope of the New Zealand FTA, but (again) cannot of itself justify an assertion of jurisdiction, if not provided for in the terms of the statute.

[221] On the premise that the relevant conduct occurred outside New Zealand, Ralec argued that NZX would have to establish that Clear was carrying on business in New Zealand, so as to bring that conduct within s 3 of the FTA. That section provides:

> **3 Application of Act to conduct outside New Zealand**
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.
>
> …

[222] Ralec argued that the limited connections with New Zealand throughout the transaction did not amount to Clear "carrying on business" in this country.

[223] NZX sidestepped that argument by arguing instead that the relevant conduct had occurred in New Zealand.

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79 SPA at cl 18.11.

[224] In a practical sense, dealings between contracting parties only have effect when they are received by the recipient. That must be the case for representations, when assessing liability for false or misleading conduct. Certainly, that approach has been applied in considering where conduct is deemed to have occurred between parties in New Zealand and other jurisdictions, for the purposes of assessing the scope of the jurisdiction under the FTA.

[225] In *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, the Court of Appeal considered the location of dealings between parties in various jurisdictions in the context of an appeal from the dismissal of a protest to New Zealand jurisdiction.[80] In that context, the Court had only to be satisfied that the plaintiff commencing proceedings in New Zealand had made out a good arguable case for jurisdiction to exist. The Court found that the FTA does apply to foreign parties to the extent their misleading conduct occurs in New Zealand. Australian authority was cited on the equivalent provisions in the Australian Trade Practices Act where communications sent to Australia from overseas by the parent companies of Australian-based subsidiaries were sufficient to support a finding that the parent companies had engaged in relevant conduct in Australia.[81]

[226] In *Wing Hung*, the Court of Appeal upheld a finding of a good arguable case for a cause of action under the FTA where the representations alleged were communicated by emails sent to and received by a New Zealand resident in New Zealand. The representations had allegedly been acted on in New Zealand, with the claim being that reliance on them had resulted in loss or damage occurring in New Zealand. The representation related to the supply of services in New Zealand to a New Zealand-based company.[82]

[227] NZX also relied on an earlier High Court decision in *Douglas Pharmaceuticals Ltd v Nutripharm New Zealand Ltd*, which involved the converse of the present situation.[83] In that case, the FTA was invoked by plaintiffs

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80 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754.
81 At [105], citing *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243, (2002) 118 FCR 1.
82 At [106].
83 *Douglas Pharmaceuticals Ltd v Nutripharm New Zealand Ltd* HC Auckland CP515/97, 23 December 1997.

complaining of misleading or deceptive labelling on products that were to be exported from New Zealand, so that any deception would occur when the product was marketed in Taiwan. In a judgment dealing with interim relief, Randerson J observed:[84]

> … I am of the view that the FTA is primarily intended to control misleading or deceptive conduct which occurs wholly or partly within New Zealand even if the person or persons deceived are beyond New Zealand. If misleading or deceptive conduct or a material part thereof has occurred within New Zealand, then in my view the FTA has application even if other parts of the conduct ultimately occur beyond our shores.

[228] Mr North's closing submissions relied on the proposition that Clear's relevant conduct occurred outside New Zealand. He disputed that NZX could establish Clear had been carrying on business in New Zealand for the purposes of s 3 of the FTA. In that context, he cited the decision in *Containerlift Services Ltd v Maxwell Rotors Ltd (No 2)*, for the proposition that the FTA "… control[s] the activities of people within New Zealand".[85] The context of that observation is material. In an application by a defendant to strike out a cause of action under the FTA, Salmon J had quoted a passage from Randerson J's decision in *Douglas Pharmaceuticals* (including that quoted above) in respect of which Salmon J observed:[86]

> Looked at in that way the law does not have extraterritorial effect. It is controlling the activities of people within New Zealand. Any proceeding to enforce that law would have to be brought within New Zealand. There is no reason why those proceedings should not be brought in New Zealand by someone resident out of New Zealand who is affected by the actions of someone within New Zealand which breach the provisions of the Fair Trading Act.

[229] I do not treat those observations as restricting the FTA to conduct by defendants when they are physically present in New Zealand. If for other purposes steps initiated in Australia have legal effect in New Zealand, then it is consistent with the purposes of the FTA that such conduct should be treated as conduct in New Zealand. It follows that s 3 of the FTA is not engaged, so it is unnecessary for NZX to establish that Clear was carrying on business in New Zealand.

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84 At 11.
85 *Containerlift Services Ltd v Maxwell Rotors Ltd* (2003) 10 TCLR 817 (HC).
86 At [29].

Was Clear "in trade" as contemplated by s 9?

[230] However, NZX must still make out that Clear was "in trade" for the purposes of s 9 of the FTA. Clear's conduct has arisen in a one-off sale of capital assets. If there was a requirement for any degree of on-going conduct, or repetition of the circumstances in which alleged conduct arose, then Clear's conduct might not be "in trade". However, that notion has been considered and rejected.[87] The purpose of the FTA is achieved if s 9 is broadly interpreted. As the Supreme Court has observed:[88]

> [Section 9] is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected.

[231] I find that the representations made by Clear occurred in circumstances where it was "in trade" for the purposes of s 9.

Were the representations misleading or deceptive?

[232] In some situations, different analyses may be called for when considering, on the one hand, whether representations amount to misrepresentations for the purposes of liability under the CRA, and on the other hand in determining whether those representations amount to misleading or deceptive conduct for the purposes of s 9 of the FTA. However, any distinction would be narrow because the Court of Appeal has interpreted s 9 as requiring a misrepresentation.[89]

[233] There is no need to consider the prospect of such a distinction here. My findings in relation to the alleged misrepresentations on all categories but the "no disputes representation" apply by parity of reasoning to findings as to whether they constituted misleading or deceptive conduct. I revert later in the judgment to an assessment of whether an award of damages under s 43 is warranted.[90]

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87 For example, *Undrill v Senior* HC Blenheim CP9/94, 20 August 1997.
88 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
89 *Premium Real Estate Ltd v Stevens* [2008] NZCA 82, [2009] 1 NZLR 148 at [51].
90 See [519] below.

Claims against third to sixth parties

[234] On its FTA cause of action, NZX also claimed against Messrs Thomas and Pym as the third and fifth defendants, and their respective companies that held shares in the Clear companies as fourth and sixth defendants, in each case for the whole of the reliance loss pleaded of $13.76 million.

[235] The claims against Messrs Thomas and Pym personally were advanced on the basis of authority that directors and employees acting on behalf of a company may be deemed to have acted in trade personally, and where appropriate can be fixed with personal liability. The approach relied on is exemplified in *Gilmour v Decisionmakers (Waikato) Ltd* as follows:[91]

> … where a person is the manager or director and where the breach of the Fair Trading Act is theirs, they can be considered the "alter ego" of a company and will be personally liable. A director who participates directly in his or her company's business will not ordinarily be able to avoid liability under s 9 of the Act and such representations must be regarded as in trade for the purpose of the liability under s 9.

[236] The indicia NZX cited for its proposition that Messrs Thomas and Pym were the alter ego of Clear in negotiating and concluding the sale included:

- they personally made the relevant representations and were closely involved in every aspect of the transaction;
- they were both directors and substantial shareholders of the Clear companies, with Mr Thomas being the managing director;
- they were both entitled to a significant percentage of the consideration payments under the SPA;
- they both signed the SPA for Clear;

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91 *Gilmour v Decisionmakers (Waikato) Ltd* [2012] NZHC 298 at [87].

- there is no evidence that they obtained shareholder approval for the major transaction, nor, as directors, did they write to shareholders to recommend that it was in the shareholders' best interests;

- there is no evidence that the board met to discuss these directors' decision to proceed; and

- there are no other Clear directors who had any contact with NZX pre-completion, so both directorial and managerial responsibilities for the transaction were entirely theirs.

[237] This was very clearly a case where the whole of Clear's pre-contractual conduct was personified in Messrs Thomas and Pym. They did involve their external accountant and their lawyers, but it was inarguably a negotiation conducted by them, in circumstances where they had very substantial personal interests at stake. Messrs Thomas and Pym did not both participate jointly in presenting all of the information to NZX that comprised the misleading and deceptive conduct. However, I find that they worked closely together as a team, with Mr Thomas assuming prime responsibility for negotiating matters of principle, and Mr Pym providing the detail of information conveyed to NZX. The whole sale process was a joint enterprise from their perspective, and I am satisfied that each was fully aware of, and in agreement with, the content of what the other was conveying to NZX.

[238] I am therefore satisfied that, to the extent liability is made out against Ralec under the FTA cause of action, it is a case in which that liability ought to extend to Messrs Thomas and Pym.

[239] The same cannot be said of the closely held companies utilised by each of them to hold their respective shareholdings in the Ralec companies. There is no evidence of substantive involvement by those companies, with their involvement being limited to their passive status as the holders of shares on behalf of, respectively, Messrs Thomas and Pym.

Third cause of action: breach of warranties

[240] In its third cause of action, NZX alleged that:

- the pleaded representations were not true, complete and accurate in all material respects, in breach of cl 1.1 of the sixth schedule to the SPA; and

- there was non-disclosure on the matters to which the representations related, in breach of the material circumstances warranty in cl 1.2 of the sixth schedule.

[241] On the basis of those alleged breaches, NZX claimed a common law right to damages.

Interpretation of the warranties

[242] Clause 10 of the SPA provided, in part, as follows:

> 10.1 **Warranties:** In consideration of the Purchaser entering into this Agreement, the Vendors:
>
> (a) give the Warranties to the Purchaser at the date of execution of this Agreement by the Purchaser; and
>
> (b) agree that each of the Warranties shall be deemed to be given again by the Vendors on each day after the date of execution of this Agreement up to, and on, the Completion Date.

[243] The terms of the warranties were spelt out in the sixth schedule to the SPA. They included:

> 1.1 **Information:** All information given by or on behalf of any Vendor (whether by any director, agent, professional adviser or other person) to the Purchaser or any director, agent, professional adviser or other representative of the Purchaser in respect of the Businesses or the Assets was, when given, and is now, true, complete and accurate in all material respects.
>
> 1.2 **Material circumstances:** No Vendor is aware of any material circumstance which has not been disclosed in writing to the Purchaser and which might reasonably be expected materially and adversely to affect the financial position or profitability of the Businesses or the value of the Assets or which might otherwise be material to a purchaser of the Businesses or the Assets.

[244] The effect of these provisions is that, as at the time information was provided during the negotiations and up to completion of the SPA, all information provided by or on behalf of Clear was warranted to be true, complete and accurate. Clear was required to ensure that information provided at earlier stages of due diligence remained accurate and complete up to the date of completion of the SPA.

[245] Ralec contended for a narrow interpretation of the scope of the warranties, so that the "information" to which warranty 1.1 applied would be confined to information in respect of the businesses or the assets themselves, thereby excluding information about the environment in which the businesses were operating. On this approach, information about the level of support Clear enjoyed from the grain industry, and the anticipated manner in which GrainCorp would apply the GIA, would not qualify as "information … in respect of the businesses …".

[246] Similarly, Ralec argued that the "material circumstances" referred to in warranty 1.2 covered only circumstances that might reasonably be expected to materially adversely affect the financial position or profitability of the businesses, and related only to their current financial position. Clear had fully and factually disclosed its current position by providing the profit and loss statements for the businesses to 30 June 2009.

[247] I consider both of these proposed interpretations to be unrealistically narrow. I find that "information … in respect of the businesses or the assets …" included all information that was material to the conduct of the businesses or the value of their assets. The purpose of the warranty is to provide an assurance to the recipient of the information conveyed during due diligence, which was given and received in a context where the existing operator of the businesses was providing information to inform the prospective purchaser of matters potentially relevant to the value of the businesses and the assets. In that context, it would be artificial to exclude information which is not directly about the businesses or the assets, but which is relevant to an assessment of them.

[248] I find that "information" was used in a sense that was broad enough to include projections about the future conduct of the businesses. The obligation for

such information to be true, complete and accurate required that what was provided had to be a reasonable view for the person providing the information, on the basis of all existing information known to him or her at the time.

[249] As to the scope of "material circumstances … which might … be material to a purchaser of the businesses or the assets …", the purpose of the warranty naturally extends to circumstances material to its future value and prospects. This is particularly so for start-up businesses, where the future prospects were recognised as being as significant, if not more significant, to an assessment of value than the current performance of the businesses.

Breach of warranties

[250] Each of the representations which I have found to be misrepresentations in the first cause of action come within the scope of "information" for the purposes of warranty 1.1. To the extent that misrepresentations are made out, it follows that the information provided was not true, complete and accurate in all material respects. The materiality of the errors was readily made out.

[251] As to NZX's complaint about the misleading nature of the statement in the WDDR about the existence of disputes, the failure of Clear to identify the dispute with Mr McKay and Ms Weston might arguably constitute a material circumstance that was not disclosed for the purposes of warranty 1.2. I have found that the limited scope of Clear's answer to the question about disputes did not constitute a misrepresentation. Different considerations apply to NZX's claim that Clear's limited answer constituted non-disclosure of a material circumstance. That circumstance was the on-going differences of view between the existing board and founding shareholders and directors of the companies. They criticised the manner in which business initiatives were being pursued from the perspective of their extensive experience in the Australian grain industry.

[252] After the event, NZX predictably claimed that awareness of Mr McKay's and Ms Weston's concerns and criticisms would have been material to their assessment of the businesses. From Clear's perspective, the various criticisms levelled at the current board by Mr McKay and Ms Weston were no more than understandable

differences of opinion, and dissatisfaction by two founding contributors to the companies who had been excluded against their will. Clear relied on legal advice that they could answer a specific question raised about disputes in the negative. Once that position pertained, the wider circumstances of the differences with Mr McKay and Ms Weston could reasonably be treated as immaterial.

[253] NZX cannot make out that the non-disclosure of the differences with Mr McKay and Ms Weston could reasonably be expected to materially adversely affect the financial position or profitability of the businesses or the value of the assets. The issue is whether Clear ought objectively to have appreciated that an explanation of the circumstances of those differences might otherwise have been material to NZX as purchaser of the assets. Despite the importance attributed to these differences by NZX in Mr Latimour's cross-examination of Mr Rich, I am not satisfied that the requisite materiality was made out. The non-disclosure is accordingly not a breach of the material circumstances warranty.

Limits on scope of the warranties, and time limit on claims for breach

[254] Ralec also defended NZX's claims under the warranties by relying on provisions in the SPA that limited their application as to amount and timing. Clause 10.3 of the SPA limited claims in respect of the warranties to those where individual claims exceeded $20,000 and where in aggregate claims were pursued for in excess of $100,000. I do not accept that that limitation constrains NZX's claims on the bases on which they have been pursued.

[255] There was a further provision in the SPA capping Clear's liability under the warranties at $20 million. NZX accepted that that cap applied to the liability under the warranties.

[256] Further, there was a timing constraint which required notice of any claim to be given by the purchaser "… in good faith and in reasonable detail within 24 months after completion" (that is, from 30 October 2009).

[257] Ralec argued that establishing timely and adequate notice was a contractual pre-requisite. Accordingly, the absence of a pleading by NZX identifying how and

when it had given requisite notice deprived this cause of action of that necessary element, so it must inevitably fail. I do not accept that this constitutes a fatal omission from the pleading. Matters raised in limitation of a liability should be dealt with on their merits. The timing and nature of giving notice is not an element of the cause of action for breach of warranties. In other circumstances, the recipient of a claim under a contractual warranty might not take the point that notice of a claim had been inadequately given or was out of time.

[258] NZX's proceeding, commenced in July 2011, was brought within the 24 month period after completion. The filing of a statement of claim pleading breach of warranties and claiming damages as a result ought ordinarily to constitute notice in reasonable detail of the claim brought under the warranty. I accept that it did so here.

[259] If the filing of NZX's original statement of claim was sufficient to constitute timely notice in reasonable detail, Ralec's fallback position was that subsequent amendments to the terms of the claims made in amended statements of claim, served more than two years after completion of the SPA, amounted to new claims of which timely notice had not been given.

[260] Ralec raised this absence of timely notice in an unsuccessful interlocutory application to strike out all or parts of the cause of action for breach of warranty. I acknowledged in that judgment that the extent of difference between claims notified in the first two iterations of the statement of claim, and claims only pleaded thereafter, would involve a factual inquiry that could not be determined prior to trial.[92]

[261] In my interlocutory judgment I posed the test for determining whether a pleading appearing in amended form after the second amended statement of claim (2ASOC) (the last pleading before expiry of the two year time limit) had been sufficiently foreshadowed in pleadings before then, in the following terms:[93]

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92 *NZX Ltd v Ralec Commodities Pty Ltd* [2015] NZHC 3041 at [56]–[62].

93 At [59], citing on this proposition *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

> … whether the amended pleading is something substantially different from what was previously pleaded. Does it constitute a new case varying so substantially from the previous pleading that it would involve investigation of factual or legal matters or both that were different from what had already been raised?

[262] Ralec's closing submissions included some five and a half pages of narrowly defined contrasts between NZX's pleading on the representations in the 2ASOC, and the terms of 5ASOC on which the claims proceeded to trial.[94] For instance, the final terms of the support representation were criticised as citing different statements from the WDDR than those referred to in earlier pleadings. Further, different parts of the pre-existing documents that were forwarded by Mr Thomas on 3 August 2009 were relied on in the final pleading, when compared to passages cited in the 2ASOC.

[263] I am not satisfied that differences at this level of detail can constitute something substantially different from what was previously pleaded. The earlier pleadings put Ralec on notice of complaints that it had made representations of various types, in the course of the due diligence documents and oral discussions, which amounted to misrepresentations. Differences in the specific passages from such documents cannot constitute something substantially different, or involve investigation of factual or legal matters that are different from what had already been raised.

[264] On the no disputes representation, Ralec complained that pleading in the 2ASOC cited only one paragraph in the WDDR about the absence of relevant disputes, whereas more recent pleadings have cited two separate paragraphs. That again is too fine a distinction to raise any prospect of something "substantially different".

[265] In light of all the evidence, I agree with NZX's characterisation that the essence of the claims as pursued at trial were sufficiently signalled by the allegations in the original pleading and in the first amended statement of claim.

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94 Ralec closing submissions at [720]–[730].

Inducement/reliance

[266] NZX pursued its third cause of action for breach of warranties on the premise that because warranties have status as terms of the contract, it was not required to prove that it was induced to enter into the SPA by reliance on any particular warranty. Its closing submissions cited the *Law of Contract in New Zealand* on the point. That text included the observation:[95]

> It must be borne in mind, however, that as stated earlier, the [Contractual Remedies] Act does not abolish the distinction between term and representation for all purposes, and there may be some situations (no doubt rare) where it will still matter whether a statement is classified as one or the other. … The most important of these for present purposes is that *if a statement has been formally embodied as a term of the contract itself it should be unnecessary to prove that it induced the contract: its breach is actionable simply because it is a term*, even if the innocent party signed the contract without having read it and was therefore unaware of its existence.

[267] NZX also relied on the observation of Adams J in *Turner v Anquetil*:[96]

> Moreover, while reliance on the representation may be relevant in determining whether there was or was not a warranty on the facts of the case, once the warranty is found to have been given the person seeking to enforce it is under no obligation to prove reliance. Questions of inducement and materiality are of no importance once a warranty is proved.

[268] I accept that, for the purposes of this cause of action, the status of misrepresentations as breaches of warranty mean that there have been breaches of the SPA, triggering an entitlement for NZX to claim common law damages.

[269] However, Ralec denied that any breach of warranty made out was actionable because NZX could not establish that the subject matter of the warranty had been a material factor in influencing NZX's decision to commit to the SPA on the terms that it did. That is a matter of contractual interpretation.

[270] Mr North invited an analogy with the decision in *Lion-Beer, Spirits & Wines (NZ) Ltd v Pernod Ricard New Zealand Ltd*.[97] In that litigation, the vendor of a business warranted that it was not aware of any circumstances that were not

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95 Burrows, Finn and Todd, above n 60, at [11.2.5] (emphasis added, footnotes omitted).
96 *Turner v Anquetil* [1953] NZLR 952 (SC).
97 *Lion-Beer, Spirits & Wines (NZ) Ltd v Pernod Ricard New Zealand Ltd* [2013] NZCA 625.

disclosed to the purchaser which, if they had been disclosed, might reasonably be expected to lead the purchaser to assess the assets at a materially lower value. The non-disclosure in *Lion* was of a commercially sensitive arrangement between Pernod and a large supermarket chain, agreeing that overall margins on the supplier's products would be held at a certain level. The supplier agreed to periodically pay to the supermarkets any difference between the margins achieved and the agreed level of margins. Among the reasons for rejecting the warranty claim, the Court of Appeal found that disclosure of this guaranteed margin agreement could not reasonably have caused the purchaser of the business to reduce its assessment of the value of the assets.

[271] Mr North argued that NZX was in the same position, because any inaccuracy in the information provided, or non-disclosure that had been made out, ought not to have materially influenced NZX's overall assessment of the value of the assets being acquired.

[272] The test for materiality in *Lion* is not the same as the terms of warranties 1.1 and 1.2 in the sixth schedule to the SPA. The material circumstances warranty in cl 1.2[98] is somewhat more extensive. It warrants the vendor has not failed to disclose anything which might reasonably be expected to materially and adversely affect the financial position or profitability of the businesses or the value of the assets, or which might otherwise be material to a purchaser. In relation to claims under the CRA, I found that Clear's misrepresentations as to its projected volume of trading were a material factor in NZX's assessment of the businesses. NZX relied on the information provided by Clear and it was a material inducement for entry into the SPA. It follows that the breaches of warranty were material. To the extent that misrepresentations were made out under the first cause of action, I am satisfied that they meet that test and therefore constitute a breach of warranty.

Fourth cause of action: key shareholder guarantees

[273] NZX pleaded a fourth cause of action against the third to sixth defendants, which comprised a claim under guarantees given in the SPA. Mr Thomas and his

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98 As set out at [243] above.

company jointly provided a guarantee limited to $2 million. Mr Pym and his company gave a joint guarantee limited to the same amount. The guarantees were only to apply "… in respect of claims made by the purchaser within 18 months of the date of this agreement".[99]

[274] The scope of the guarantees was defined in the fifteenth schedule to the SPA. It included a continuing obligation by the guarantors, as principal obligors, for the due and punctual compliance by the vendors with each of the vendors' obligations, including for all amounts payable by the vendors under or in connection with the SPA. The guarantee included an indemnity by the guarantors in favour of the purchaser for any amount for which the purchaser became liable, whether that arose by reason of any obligation of the purchaser becoming void, or any vendor failing to pay any amount payable, or to perform any obligation, under the SPA.

[275] NZX pleaded that Clear had breached the agreement and caused loss to NZX, which was loss it was entitled to claim under their guarantees.

[276] Ralec attacked this cause of action as untenable in its interlocutory application to strike out. In my 3 December 2015 judgment, I declined to strike out the cause of action because there were potentially relevant matters of fact that could not then be resolved. However, I did acknowledge numerous potential weaknesses with the cause of action.[100]

[277] In closing submissions, NZX did not elaborate on the bases for this claim. Ralec's closing submissions included a robust repetition of the grounds argued pre-trial for denying any tenable basis for a claim under the relevant guarantees.

[278] Ralec argued that claims should be limited to those of which notice had been given within 18 months of completing the SPA. That required notice of the claim to have been given by 5 April 2011. The only relevant communication before that date was a letter dated 9 December 2010. My provisional view in the December 2015 judgment was that a distinction could be drawn between serving notice of an

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99 SPA, cls 17.1 and 17.2.

100 *NZX Ltd v Ralec Commodities Pty Ltd*, above n 92, at [56]–[62].

intention to make a claim and making a claim, with the relevant NZX letter having the first character but not also the second.[101]

[279] In light of all the evidence at trial, I confirm that view. The December 2010 letter contained a reservation of rights in general terms in respect of information that had been provided and which was alleged to have been "materially misleading and inaccurate". Given the defined subset of vendors' obligations guaranteed by the guarantors, and the purposes of the time limit on the existence of their guarantee (including the ability to assess and respond to notice of any claim), the terms of the December 2010 letter were inadequate to sufficiently put the guarantors on notice.

[280] In the event that I am wrong on the inadequacy of timely notice, a further ground for opposing claims under the guarantees was that the present claims for damages for misrepresentations fell outside the scope of the obligations that were guaranteed. The first element of the guarantee was of the due and punctual compliance by the vendors with each of the vendors' obligations. That expression was defined as relating to the business contracts referred to in cl 9.1 of the SPA. Clause 9.1 addressed the existing business contracts and provided, as a purchaser's obligation after completion, the requirement to perform all of the obligations of the vendors arising under the business contracts, recognising that the cost of some of those obligations would be payable by the vendors. Arguably therefore, the first component of the guarantee amounted to an obligation for the vendors to reimburse any amounts of this category that had been funded by NZX.

[281] The remainder of the scope of the guarantee constituted an indemnity in favour of the purchaser for either liabilities or losses incurred by the purchaser that arose directly or indirectly by reason of a vendor failing to pay any amount payable, or to perform any obligation, under the SPA.

[282] I find that the scope of obligations that were the subject of the guarantee would exclude damages payable as a result of other claims made in these proceedings. Neither category of liability would constitute an amount payable, or an obligation required to be performed under the SPA. I am accordingly not satisfied

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101 At [67].

that any recoverable damages NZX can make out on its earlier causes of action would be the subject of a personal liability under the guarantees given by the third to sixth defendants.

Fifth cause of action: extended liability under s 11 CRA

[283] NZX's fifth cause of action claimed that any liability made out against Ralec could be extended to the consideration recipients[102] by invoking the provisions of s 11 of the CRA. This claim depended on the premise that the terms of the SPA included an equitable assignment of the benefits accruing to the Clear companies as vendors, to the consideration recipients. Arguably, Clear's commitment to account to the consideration recipients constituted an equitable assignment of the benefit of the contract. The operative provisions of s 11 of the CRA provide as follows:

> **11 Assignees**
>
> (1) Subject to this section, if a contract, or the benefit or burden of a contract, is assigned, the remedies of damages and cancellation shall, except to the extent that it is otherwise provided in the assigned contract, be enforceable by or against the assignee.
>
> (2) Except to the extent that it is otherwise agreed by the assignee or provided in the assigned contract, the assignee shall not be liable in damages, whether by way of set-off, counterclaim, or otherwise, in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the assignment.
>
> …

[284] Ralec pursued an application to strike out this cause of action on the basis that no tenable cause of action was disclosed. I dealt with that in my 3 December 2015 judgment.[103] The background to s 11, and limited judicial comment on it, were addressed in that judgment and I will not repeat them here. I rely on that part of my 3 December 2015 judgment.[104]

[285] I was not prepared to strike out the cause of action. However, I expressed reservations as to whether NZX would be able to characterise the terms of the consideration recipients' entitlements in the SPA as amounting to an equitable

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102 Status explained at [22] above.
103 *NZX Ltd v Ralec Commodities Pty Ltd*, above n 92.
104 At [12]–[29].

assignment of the benefits under it. I am now satisfied that that proposition cannot be made out.

[286] Both Clear companies completed the SPA as the vendors, and it included the following provision as to payment:

> **3.2 Payment:**
>
> (a) The Purchaser shall pay the Purchase Price to Clear Interactive as agent for the Vendors, and:
>
> (i) such payment to Clear Interactive shall constitute full discharge of its obligations to pay the Purchase Price to the Vendors; and
>
> (ii) it shall not be bound to enquire as to the division of the Purchase Price among the Vendors.
>
> (b) Clear Interactive shall, in such manner as it sees fit, pay each Consideration Payment (to the extent that it becomes payable) to the Consideration Recipients entitled to that Consideration Payment as listed in the First Schedule or the Second Schedule, as applicable.

[287] In order to recognise an equitable assignment, everything that needs to be done by the assignor to transfer rights in relation to the chose in action must have been done so that the assignment is "complete".[105] I am not satisfied that an equitable assignment has occurred in this case.

[288] NZX speculated that the consideration recipients had to be funding the claim because, on NZX's analysis, the Ralec companies were insolvent. Apart from Messrs Thomas and Pym, none of the consideration recipients have taken any overt part in pursuit of Ralec's counterclaims. I accept they may have been deliberately hiding behind the conduct of the litigation in Ralec's name, so that lack of overt participation in the proceedings where successful counterclaims could be for their benefit is not relevant.

[289] Ralec has remained the party legally entitled to enforce the vendors' benefits under the SPA, as well as having to defend allegations of breach of the contract. The range of contingencies that might arise between any order for NZX to pay damages for breach of the SPA, and the consideration recipients being entitled to

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[105] Property Law Act 2007, s 50(7).

proportionate parts of such damages, is too broad for them to be treated as the beneficiaries of a completed equitable assignment.

[290] I do not accept Ralec's argument that the discretion it is given under cl 3.2(b) as to the manner in which it pays consideration recipients is decisive. However, as matters have developed, and given the scale of the litigation on both claims and counterclaims, Ralec's position as a matter of law as the party to the contract is inconsistent with an equitable assignment of the vendors' benefits having been "complete".

[291] NZX had sought to join the remainder of the consideration recipients as defendants to its claim under s 11 of the CRA. I declined leave for that to happen. Against that contingency, NZX commenced a separate set of proceedings (the Hightower proceedings) pleading the same claim against the consideration recipients who were not already parties to the present litigation. My December 2015 judgment stayed the Hightower proceedings on certain terms. None of the new defendants in that proceeding have taken any steps to align themselves with Ralec's defence of this cause of action. By parity of reasoning, the cause of action in the Hightower proceedings could not succeed.

Summary as to liability on NZX's claims

[292] I have found that Ralec is liable for actionable misrepresentations, triggering an entitlement to damages under the CRA. The same outcome on liability applies to the claims under the FTA. I have found, by parity of reasoning, that Ralec has breached the terms of warranties provided by it in the SPA, and that, subject to the ultimate limit of $20 million, no other aspects of the provisions limiting liability for breach of warranties apply. The attempted extension of liability to guarantors, or to the consideration recipients, cannot succeed.

[293] I defer an analysis on whether NZX can make out recoverable loss until I have made determinations as to liability on Ralec's counterclaims.

RALEC'S COUNTERCLAIMS

[294] Ralec pleaded six causes of action. In addition to counterclaiming against NZX, it has joined as counterclaim defendants NZX Holding No 4 Limited (NZX4), the company operating the businesses in Melbourne, and Mr Weldon as CEO and a director of NZX.

[295] The primary cause of action on the counterclaims was for NZX's breaches of its post-completion obligations assumed under the SPA to fund and resource the businesses. The second cause of action was pleaded against NZX4 and Mr Weldon. It alleged that they owed a tortious duty of care in their relevant dealings with Clear as vendors, and as parties with an on-going interest in the operation of the businesses in Melbourne. It is alleged that there were relevant breaches of such a duty.

[296] The third cause of action was for NZX's alleged misleading and deceptive conduct in breach of the FTA. The fourth cause of action was for NZX's alleged pre-contractual misrepresentations under the CRA. The conduct and misrepresentations alleged to be misleading in those causes of action related to NZX's commitment to resource the businesses and to develop the Agri-Portal.

[297] The fifth cause of action alleged a breach of fiduciary duty that both NZX and NZX4 owed to Ralec to protect its interests in receiving earn-out payments such as by adequately resourcing the businesses.

[298] The sixth cause of action claimed that both NZX4 and Mr Weldon engaged in misleading and deceptive conduct, or aided and abetted or were knowingly involved in NZX's misleading and deceptive conduct. Ralec relied on s 45 of the FTA, or that they were joint tortfeasors, to make out NZX4 and Mr Weldon's involvement. Damages were sought on this basis pursuant to ss 43(1)(b) and (d) of the FTA.

Earn-out targets

[299] Approximately two thirds of the maximum consideration potentially payable to the vendors depended on the performance of the businesses after they were acquired by NZX, and on the development of the Agri-Portal. Accordingly, it is

understandable that the parties would include in the SPA an acknowledgement of NZX's obligations as to how it would conduct the businesses throughout the earn-out periods.

[300] A separate schedule set out the definitions of the various components of the purchase price, the contingencies on which they depended and how they were to be calculated and paid. This ran to some seven and a half pages.[106] In addition to the initial payment to be paid on completion, the parties agreed on the conditions for three further payments.

[301] First, the Grain Market Software Instalment (GMSI) payment, which was to reflect the validation of the grain market software functioning properly. This would be payable if the grain exchange traded more than 1.5 million "unique tonnes" between the completion date and 30 June 2010. The concept of unique tonnes was further defined in its own schedule in the SPA. It was intended to ensure that only bona fide trading on the exchange counted towards the targets. It excluded, for example, transactions where the buyer and seller were the same person, or where a trade had not occurred through the Clear order matching process.

[302] If the grain exchange did not meet that first target, the vendors could still qualify for the GMSI payment if the exchange traded more than three million unique tonnes between 1 July 2010 and 30 June 2011, or 4.5 million unique tonnes between 1 July 2011 and 30 June 2012. To qualify for these targets, the businesses needed also to have entered into an agreement with another BHC that it would list the grain that it handled on the exchange.

[303] The GMSI payment was $7 million and there were provisions for the components of it to be paid in cash or by issuing NZX shares.

[304] The second additional payment was the Grain Market Software Bonus (GMSB) payment, which would be triggered if the GMSI payment became payable. In that event, the vendors would qualify for an additional bonus payment if the net revenue from trading exceeded $3 million in the period from the completion date to

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106 Third schedule, CB15/11982.

30 June 2010. The bonus payable would be $1 for each $1 earned in trading revenue in excess of $3 million, and $2 for each $1 earned in trading revenue in excess of $5 million in the relevant period. The projected P&L included revenue of $3.125 million which, if achieved, would have triggered this second earn-out entitlement.

[305] The third additional payment was the Agri-Portal Purchase Payment (APPP). It was to be payable for successful development of the Agri-Portal. The Agri-Portal was defined in a separate five page schedule.[107] The definition comprised:

- a short form definition of the Agri-Portal;
- operational features required in the Agri-Portal; and
- the business outcomes that would define delivery of the successful Agri-Portal.

[306] The entitlement to the APPP was provided for in the following terms:[108]

> **6.1 Entitlement:**
>
> (a) The Purchaser acknowledges that the Vendors have developed the intellectual property and software to further and fully develop the Agri-Portal.
>
> (b) Accordingly, if, on or before the date that is three years after the Completion Date, the Agri-Portal, which is based on the Grain Market Software, has been completed and put into operation to the satisfaction of the Purchaser, the Agri-Portal Purchase Payment shall be payable by the Purchaser as an increase to the Purchase Price for the Businesses and the Assets.

[307] The APPP was to be $6 million payable to Messrs Thomas and Pym. There was an additional payment of up to $1 million that could be payable, subject to certain conditions, by the issue of NZX shares to seven named employees. Each employee was to be paid $100,000. The remainder was to be paid to other employees as agreed by the parties or allocated between Messrs Thomas and Pym.

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107 Fifth schedule, CB15/11992.
108 CB15/11986.

First cause of action: post-completion conduct of the businesses

[308] NZX's post-completion commitment was recorded in the following terms:[109]

> **9.6 Conduct of business:** The Purchaser shall after Completion:
>
> (a) ensure that the Businesses are based primarily in Melbourne for at least three years after Completion;
>
> (b) select, as it considers appropriate, certain of the senior employees to participate in the Purchaser's executive, strategy and other leadership teams, including those persons agreed between the Vendors and the Purchaser prior to the Completion Date; and
>
> (c) ensure that the Businesses are resourced and financed to an extent which in the reasonable opinion of the Purchaser is appropriate, having regard to the criteria which must be met in order for the Consideration Payments to be made,
>
> and the Vendors and the Guarantors shall use their commercially reasonable endeavours to ensure that the ongoing team dedicated to the Businesses has adequate and appropriate capability.

[309] Ralec claimed that NZX and/or NZX4 had breached each of the obligations in cl 9.6(a), (b) and (c). The last of these was the most significant, and will be considered first.

Clause 9.6(c) – interpretation

[310] Ralec argued that cl 9.6(c) obliged NZX to form an opinion on the resources and financial support needed for the businesses to reach a level reasonably projected as sufficient to enable the businesses to meet the earn-out targets. Ralec argued that the obligation had three components:

> (a) first, to form a reasonable opinion about the extent of appropriate resources required for the businesses, having regard to the earn-out criteria;
>
> (b) second, to ensure that the businesses were resourced to that extent; and

[109] CB15/11969.

(c) third, to carry out such obligations within a time frame that enabled the earn-out criteria to be met.

[311] NZX argued that the clause obliged it to do no more than make prudent business decisions in running the businesses. NZX's approach to the scope of this obligation involved the following propositions:

(a) The obligation could be discharged by adopting any reasonable opinion as to the appropriate level of resourcing. That was to be assessed objectively. Breach could not be established unless Ralec made out that the extent of resourcing committed to the businesses was below the range of all reasonable opinions of what would be appropriate. This meant that no reasonable person operating the businesses in NZX's position could have considered the resourcing it provided to have been appropriate.

(b) The obligation to "have regard to" the earn-out targets did not impose an obligation for NZX to ensure that they were met. Nor was it the exclusive consideration when assessing the reasonableness of resources. NZX could take into account other matters relevant to the exercise of reasonable business judgements.

(c) A breach of the obligation could not be made out merely by establishing that a different business strategy may have produced a better result. There was no obligation as to which among a range of business strategies NZX decided to pursue. Resourcing decisions could legitimately be influenced by other relevant considerations.

(d) The obligation was to adequately resource the businesses. This had to be assessed in light of the resourcing commitments that were actually made. There was no separate contractual obligation to form an opinion about the extent of resources required, or thereafter to revisit such opinions. Whether the obligation was met involved an assessment of what was done in the circumstances confronting the

> owner of the businesses, not by analysing NZX's rationale for doing so. The requirement to form a reasonable opinion operated to qualify the extent of the resourcing obligations. It introduced an objective measure of the adequacy of the resourcing.

[312] My task in interpreting cl 9.6(c) is to determine what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The language used by the parties appropriately interpreted is the only source of their intended meaning. I begin by looking at the ordinary meaning of the obligation in its contractual context. I am also entitled to examine the matrix of fact which can include "anything which would have affected the way in which the language of the document would be understood by a reasonable man".[110] It can also include the commercial context, and the facts and circumstances that were known to the parties and were likely to be operating on their minds and their pre-contractual negotiations.[111]

[313] Clause 9.6 is located in the section of the SPA that provided covenants that were to apply after completion. Ralec had an on-going interest in the success of the businesses after completion, and the commitments made by NZX in cl 9.6 are for Ralec's benefit.

[314] As to the contractual context, NZX was dependent on the continued employment of the skilled personnel who had developed the software, and at least some of those who were developing the grain exchange business. A number of the staff had an interest in achieving the earn-out targets because they would receive consideration for doing so. Other covenants in cl 9.6 obliged NZX to base the businesses primarily in Melbourne for at least three years, and to retain certain senior employees of the businesses, including a group that Clear and NZX were to agree upon prior to completion.[112] The SPA contemplated that the tech team and senior personnel were to continue developing the embryonic businesses, subject to new directions from NZX and the availability of resources.

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110 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 913.

111 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

112 NZX employed 21 people who had worked for the vendors.

[315] The pre-contractual negotiations between the parties included NZX's assurances as to the significant extent of resources it could apply to the project. However, Clear must have recognised there were risks that the earn-out targets would not be met. It is safe to infer that they assumed those risks and assessed them in light of Mr Weldon's objectively demonstrated positive attitude towards the development of the businesses, and NZX's assurances of the capital it was prepared to commit to developing the grain exchange and the Agri-Portal.

[316] During negotiation of the initial terms sheet, Messrs Thomas and Pym proposed including a provision that committed NZX to providing a defined amount of working capital to the businesses for the first three years post-completion. That was not included in the final terms sheet, nor were any further obligations on resourcing beyond cl 9.6(c) included in the SPA. The closing submissions for Ralec included a detailed analysis of terms proposed at various stages of negotiations, and comments that were recorded about the potential terms. This confirms the obvious point that Clear was concerned about securing an assurance that NZX would adequately resource the businesses. However, the pre-contractual dealings do not provide any legitimate assistance in interpreting the nature of NZX's obligations. The matters raised in Ralec's submissions strayed into its subjective intentions which are not relevant.

[317] On the wording of the clause, I note that the obligation was mandatory ("the purchaser shall …") and it required NZX to ensure that the businesses acquired from Clear were resourced and financed to a reasonable extent. Resources can reasonably be taken to extend to personnel, equipment and other assets required for developing the businesses. The obligation to ensure the businesses were "financed" addressed the need to provide working capital. The required extent of resourcing was that which was appropriate in NZX's reasonable opinion, having regard to the criteria which must be met in order to reach the earn-out targets.

[318] There are two components in the description of this commitment that require some analysis. First, how NZX's reasonable opinion is to be assessed. Secondly, what was required of NZX in order to "have regard" to the criteria.

"reasonable opinion"

[319] The parties adopted very different interpretations of NZX's requirement to form a reasonable opinion as to how it resourced the businesses. NZX cited a number of United Kingdom decisions arising in various commercial contexts, where steps in the course of a contractual relationship were to be taken according to the reasonable opinion of the party undertaking that step. For instance:

(a) In *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd*, the lessee was prevented from assigning the lease without the prior permission from the lessor. Permission was "… not to be unreasonably withheld".[113]

(b) In *Mercuria Energy Trading PTE Ltd v Citibank*, Citibank was permitted to bring forward the date on which it could require the counterparty in certain repo transactions to repurchase the metal that was the subject of the transactions if "… the storage facility … in which the metal is stored is no longer licensed or able to safely or satisfactorily (in the reasonable opinion of Citi) store the Metal".[114]

(c) In *Barclays Bank PLC v Unicredit Bank AG*, a clause entitled the creditor bank to terminate an arrangement early but it required the consent of the guarantor of the relevant obligations. This was to be determined by the guarantor in a "commercially reasonable manner".[115]

[320] The law on the scope of a landlord's entitlement to withhold consent to an assignment is a regularly litigated issue in property law. As such, it had attracted its own rules and rationale that are not readily applicable in the circumstances of this case.

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113 *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 2 Ch 513 (CA).
114 *Mercuria Energy Trading PTE Ltd v Citibank* [2015] EWHC 1481 at [18].
115 *Barclays Bank PLC v Unicredit Bank AG* [2014] EWCA Civ 302.

[321] The English Court of Appeal in *Barclays Bank* acknowledged the attempts of counsel to categorise the circumstances in which contractual discretions are to be assessed. However, the Court doubted the utility of doing so when confronted with a specific discretion and the constraint on it in a particular contract.[116] In both *Mercuria* and *Barclays Bank*, the Court interpreted the obligation for a contracting party to make a discretionary decision provided for in the contract on reasonable grounds, as imposing no more than a *Wednesbury* test of reasonableness.[117] In each of those contracts, the decisions could be made by the party acting in its own interests. The obligation to make such decisions reasonably, or on reasonable grounds, was treated as a limited constraint on the deciding party's freedom to act unreasonably or arbitrarily.

[322] For instance, in *Barclays Bank*, the bank had a reasonable expectation of generating fees from the provision of the guarantee throughout the originally intended term of the financial arrangement. Barclays made its consent to early termination conditional on being paid the net present value of the fees it would have received under the original arrangement. That stance was held by the Court to be a reasonable one.

[323] NZX urged the adoption of the same *Wednesbury* standard in assessing the reasonableness of the opinion it was required to form on the extent of resourcing it must provide to the businesses. Mr North argued against the adoption of an administrative law approach to reasonableness. He submitted that such a limited constraint on NZX's discretion could not be what the parties intended by the words they used and the context in which the provision was agreed to.

[324] I consider that the context in which NZX was required to form a reasonable opinion is distinguishable from the context in the United Kingdom decisions NZX relied on. In those cases, the obligation to form a reasonable opinion operated as a constraint on a discretion that was included in the contract for the benefit of the deciding party. In contrast, NZX's obligation to resource the businesses to a certain level was assumed under the SPA, for the benefit of Ralec. NZX's post-completion

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116 *Barclays Bank PLC v Unicredit Bank AG*, above n 115, at [14], [18] and [20].
117 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

obligations assumed for Ralec's benefit included providing a certain level of resources to the businesses. That was a fetter on what would otherwise have been NZX's liberty to conduct the businesses as it saw fit, once it became the owner of them. In doing so, NZX had to form a reasonable opinion as to the level of resourcing. That constraint on NZX's discretion was to protect Ralec, as the non-deciding party.

[325] That context requires something more than the administrative law threshold. This means that reasonableness is not made out merely by showing that the decision was not perverse, or was among the range of choices that could rationally have been made. The reasonableness of the resourcing decision is to be objectively gauged having regard to what would be needed for the businesses to reach the earn-out targets.

"have regard to"

[326] The second issue of interpretation is the meaning to be attributed to the obligation to "have regard to", and where such an obligation fits in the hierarchy of the considerations from something that is mandatory or controlling, to something that is entirely discretionary. On this aspect of the clause, NZX's obligation to have regard to the earn-out targets required it to take those targets into account when assessing the scope of its reasonable obligation. NZX contended that this obligation did not preclude NZX taking into account other matters relevant to the normal exercise of its business judgement.

[327] Ralec's closing submissions urged that the obligation to *have regard* to the specified criteria must have meaningful impact in defining the scope of the obligation. Although not put explicitly, I took Mr North's position to be that NZX's reasonable opinion had to be arrived at by applying the level of resources it considered were necessary in order to enable the businesses a reasonable opportunity to achieve the earn-out targets. It is implicit in Mr North's interpretation that "have regard to" was a mandatory or controlling consideration in the formation of NZX's reasonable opinion.

[328] Numerous New Zealand cases have considered what is required of a decision-maker in various statutory contexts where decisions are to be made having regard to specified criteria.[118] The settled approach in considering the exercise of statutory powers is that the defined criteria must be considered, but that the weight to be given to any particular criterion is for the decision-maker to decide.[119] That approach is sufficiently well-settled in the administrative law context for the courts to assume that is the nature of the obligation Parliament is imposing on a decision-maker when enacting legislation with obligations to "have regard to" specified criteria.

[329] I am not satisfied that the meaning of an obligation to have regard to certain criteria that is attributed to Parliament can similarly be attributed to the parties to this commercial contract, in the context in which cl 9.6(c) appears. If the consideration was relegated to one that NZX was obliged to consider, but was then free to give no weight to at all, then cl 9.6(c) would afford little assurance to Ralec as to the level of resources NZX would commit to the businesses. In assessing the parties' objectively reasonable intention, there would be no point in including a clause that did not require NZX to consider the resources needed to reach the earn-out targets, and have some level of regard to the view it formed about it. The parties must have intended some obligation to consider and give some weight to the resources necessary to reach those targets. This situation differs from the administrative law context where the Parliamentary intention might be limited to listing a number of considerations that a decision-maker may or may not need to consider in specific cases. In the present context, only one consideration is specified.

[330] I acknowledge that a standard similar to that adopted in administrative law has been upheld in commercial contexts in England. In *JML Direct Ltd v Freesat UK Ltd*, a contractual dispute arose between Freesat, the operator of a multi-channel satellite television service, and JML, the provider of television shopping channels.[120] Freesat invited providers of shopping channels to participate in the launch of a new

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118 For example, *Te Runanga O Raukawa Inc v Treaty of Waitangi Fisheries Commission* CA178/97, 14 October 1997 at 8; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 566 and *Singh v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592, [2016] NZAR 93.

119 *Te Runanga O Raukawa Inc v Treaty of Waitangi Fisheries Commission*, above n 118, at 8.

120 *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34.

service. JML applied to have two of its shopping channels included on Freesat's platform from the date of its launch. The numbers allocated to each channel were likely to affect the number of viewers. JML's channels were placed tenth and eleventh, which meant that neither appeared on the first page of Freesat's index of shopping channels. The contract provided that channel numbers were to be allocated based on a number of criteria, which Freesat had to "take into account" when deciding allocations. JML alleged that Freesat allocated the channel numbers in breach of their contract.

[331] The English Court of Appeal interpreted the obligation to "take into account" as meaning no more than "have regard to", finding that the parties did not intend to limit Freesat's discretion to attach such weight as it thought appropriate to each of the factors. Moore-Bick LJ adopted the observations of Lord Hoffman, in a case involving a challenge to a planning authority's decision, that a clear distinction is always made between the question of whether something is a material consideration, and the weight which should be given to it.[121] Moore-Bick LJ acknowledged the different context but nonetheless treated the distinction drawn by Lord Hoffman as one of principle:[122]

> … It is in my view equally valid in a case of this kind where a contract requires one party to take into account particular factors when making what is essentially an evaluative judgment.

[332] A contract (presumably on standard terms) between a provider of broadcasting services and one of a number of competing broadcasters of shopping channels is distinguishable from the SPA in this case. There, each of the competing broadcasters would be on notice that the broadcaster was free to make evaluative judgements attributing weight to the identified criteria as it saw fit. Commercial context would suggest that only a perverse or irrational application of those considerations to the allocation of channels would trigger a breach of the broadcaster's obligations.

[333] The requirement to "have regard to" defined factors has also been interpreted in the context of complex insurance contracts. In *Federal Mogul Asbestos Personal*

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121 *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 (HL).
122 At [22].

Injury Trust v Federal Mogul Ltd, the Court was required to interpret provisions that empowered reinsurers to control the negotiation of claims made by insured interests.[123] A relevant provision contemplated the exercise of contractual rights "… having regard to the legitimate interests of the parties to this policy and of the reinsurers thereof …". Eder J adopted an interpretation that the obligation to have regard to something did require the decision-maker to consider it, but the decision-maker was free to ascribe such weight to it, including no weight, as the decision-maker thought fit, so long as he was not acting irrationally.[124]

[334] This context, involving a contract regulating the processes for settlement of claims under insurance policies, is materially different to the present case. Certainly as between insurers and reinsurers, efficiency and a range of other reasons dictate that one or the other (depending on levels of exposure and other considerations) should control the claims settling processes. The context here involves Ralec (as the party not making the decision) having a greater interest in decisions affecting its interests than would reasonably be contemplated in the claims settling processes between insurers and reinsurers.

[335] To reiterate therefore, I interpret cl 9.6(c) as requiring NZX to ensure that the businesses were resourced to an extent that was appropriate, having regard to what would be required to ensure a reasonable opportunity of the earn-out targets being met. The extent of appropriate resources was to be decided by NZX forming a reasonable opinion on that assessment. In forming that opinion, NZX had to take into account, and give some weight to, what level of resources would be necessary for the businesses to reach the earn-out targets. However, that analysis could be tempered by other reasonable and relevant considerations.

Conclusion on interpretation

[336] NZX's obligation under cl 9.6(c) did not extend to resourcing the businesses to whatever extent was necessary to trigger the earn-out entitlements. Such an unqualified obligation as to future conduct is unlikely to have been intended by the parties from a business perspective, when it was uncertain as to what the obligation

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123 *Federal Mogul Asbestos Personal Injury Trust v Federal Mogul Ltd* [2014] EWHC 2002.
124 *A*t [119](v) and [120].

would require. As aspects of the case demonstrate, the future for the embryonic grain exchange at the time of completion was very difficult to predict. If the parties intended to require NZX to commit whatever resources were needed to achieve the targets, then the wording of cl 9.6(c) would be in very different terms that effectively guaranteed the payment of the earn-out targets.

[337] Ralec has not claimed that the clause was a mandatory obligation for NZX to resource the businesses until the targets were reached within the specified timeframes. Rather, Mr North submitted that NZX was obliged to project what resources would reasonably be required to enable the businesses to achieve the earn-out targets based on a realistic business plan. He acknowledged that NZX's obligation would be met if it had gone through this process, even if the reasonable projections of how the businesses would perform were subsequently not met. Mr North emphasised that the obligation was for NZX to prospectively assess what would reasonably be required for a target to be met, being mindful of the time limits, and that this included an obligation to periodically revisit the decision on the appropriate extent of resources.

[338] The terms of the clause imposed a positive obligation on NZX to resource the businesses, and to decide on the level of resourcing that was appropriate. In doing so, NZX was required to have regard to, or take into account, the levels of activity needed to stimulate a sufficient volume of trading to reach the earn-out targets. At a minimum, NZX was not free to ignore the level of resourcing required to afford the businesses the opportunity to reach the earn-out targets. Instead, it had to commit to a reasonable projection of the resources necessary to do so. The earn-out targets were a relevant consideration that had to be taken into account in assessing the resources to be provided.

Did NZX breach clause 9.6(c)?

[339] There is no evidence that NZX's board ever considered the extent of resources that might be required to enable the businesses to reach the earn-out targets. I find that the two then directors who gave evidence, Messrs Harmos (then Chairman) and Paviour-Smith (Chair of the Board's Audit and Risk Committee), did

not bring the terms of the cl 9.6(c) obligation to mind and had not had the specific terms drawn to their attention. I accept Mr Paviour-Smith's evidence that he was aware in general terms of the cl 9.6(c) obligation when making resourcing decisions as its effect was described to him by others.[125] Mr Harmos's appreciation of the obligations was somewhat less focused. He was aware of the obligation to make further payments should certain events occur post-completion. His appreciation of NZX's obligation to fund and resource the businesses appeared not to be related to the obligation in cl 9.6(c).[126]

[340] Whether such decisions were a matter of NZX governance, or alternatively within management responsibilities, was not explicitly addressed in the evidence. It was implicit from Mr North's cross-examination that Ralec's expectation was that compliance with the cl 9.6(c) obligation was to be considered and decided at board level. I am not satisfied that such an expectation is warranted. My overall impression from the evidence of Messrs Harmos, Paviour-Smith and Weldon is that Mr Weldon operated with a relatively broad discretion as CEO, to make relatively high level management decisions. I am also satisfied that decisions on the appropriate resources to be committed to the grain exchange, as one among a number of discrete businesses operated by NZX subsidiaries, were essentially management decisions. Depending on the circumstances, a view by the CEO that a level of resourcing was required to meet one aspect of NZX's obligations, where that commitment could be inconsistent with other aspects of NZX's operations, could be elevated by referral to the board. However, the board was not automatically the starting point for decisions on resourcing the grain exchange and work on the Agri-Portal.

[341] There are no contemporaneous documents that suggest Mr Weldon, or others involved in making resourcing decisions for the businesses, made any assessments of appropriate resourcing for them by having conscious regard to the prospects for the grain exchange to reach the earn-out targets. Nor was there evidence that NZX addressed the extent of resources needed to enable the Agri-Portal to meet the standard to trigger the APPP.

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125 NoE at 71/14–27.
126 NoE at 369/1–9, 371/13–17.

[342] NZX did commit substantial resources to assessing how best to integrate the Melbourne businesses and expand the trading on the grain exchange. These initiatives began before completion of the SPA. On 2 October 2009, Ms Kirkham sent to Messrs Thomas and Pym a 42 page draft document addressing initiatives to be undertaken in the first 90 days (the F-90 project).[127] It was described as "very much a draft", which NZX personnel were keen to discuss with Messrs Thomas and Pym. It addressed how NZX foresaw the integration of Clear personnel in Melbourne with NZX personnel in Wellington, the lines of communication and levels of responsibility, how to "nail" the grain market for the exchange and how work might be undertaken on the global agri-platform.

[343] In December 2009, NZX organised a conference to brainstorm how best to develop a number of NZX businesses, including the grain exchange and the Agri-Portal. That took place over 16, 17 and 18 December 2009, at a site away from NZX's office in Wellington.

[344] In late January 2010, NZX personnel produced a draft document entitled "Clear – Feb Focus".[128] That document acknowledged that volumes traded on the grain exchange were significantly lower than the worst case volume expectations. The GrainCorp relationship had not produced anywhere near what had been anticipated. If volumes did not increase to meaningful levels in the 2009/2010 harvest, or at least show momentum in a positive direction, a very negative impression would be left for the Clear brand. The purpose of the document was therefore to suggest a range of initiatives to provide focused attention on all possible means of improving volumes traded on the grain exchange.

[345] NZX committed significant resources to that initiative during February 2010. Although differences in opinion were appearing, I find that Messrs Thomas and Pym were grateful at the time for the resources committed to further initiatives for increasing the volume of trading on the exchange.

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127 CB15/11560.
128 CB21/16450.

[346] However, in making these assessments or resourcing decisions, NZX did not have explicit regard to the earn-out targets. There was no evidence that any decisions impacting on the volume of trading on the exchange were made because they gave the exchange a better chance of achieving the earn-out targets. A practical explanation for this is that growth in trading volume was the focus of substantial work between November 2009 and February 2010. Achievement of the earn-out targets was an incidental consequence of success in these initiatives. From about February 2010, performance was so poor that it was irrelevant or counter-productive to relate further work on improving volumes of trading to the unattainable targets for June 2010.

[347] Arguably, NZX could reasonably have made the same resourcing decisions if it did have regard to what was required to achieve the earn-out targets, balancing that consideration against others, such as how the businesses were performing relative to pre-completion projections.

[348] NZX argued that its operation of the grain exchange was within the range of options reasonably open to it, in the business conditions as they evolved. NZX argued that all of the work it did, and the resources it committed to analysing how to improve the Clear businesses, had implicit in them a search for a strategy to give the grain exchange the best reasonable chance of increasing the volume of trading. That was coincidentally also the means of giving it the best chance of achieving the earn-out targets. This amounted to an implicit argument that NZX had substantially complied with the cl 9.6(c) obligation, even if it could not demonstrate specific analysis of the prospects of achieving the earn-out targets, as a matter of form. The "F-90" and "Feb Focus" projects were relevant examples.

[349] However, these explanations are not sufficient to relieve NZX of its mandatory obligation to have regard to what was required to afford an opportunity to meet the earn-out targets. That failure constituted a breach of the obligation under cl 9.6(c).

Alleged breach of cl 9.6(a) and (b), and cl 18.10

[350] Ralec also claimed that NZX breached the other post-completion obligations assumed under cl 9.6 of the SPA. The first of those, in cl 9.6(a), was to ensure that the businesses were based in Melbourne for at least three years after completion. Ralec argued that this obligation was breached by the effective control of the businesses being moved from personnel in Melbourne to senior NZX executives at its head office in Wellington. This complaint is one aspect of broader concerns that Messrs Thomas and Pym ought to have been left in effective control of the businesses, but were promptly relegated and made subject to direction from Mr Weldon and others in Wellington.

[351] I interpret cl 9.6(a) as being directed at the physical location of the conduct of the businesses, which did remain in Melbourne. The complaint is somewhat more subtle and would require an implied obligation to leave the effective control of the businesses in Melbourne. Such an implication is not warranted.

[352] The second post-completion obligation, provided for in cl 9.6(b), required the retention of senior employees of the businesses who were to be offered continuity of employment. The parties agreed on the list of personnel to whom this obligation would relate. All of them initially took up employment with NZX. A number left within a reasonably short period, including Mr Thomas in April 2010. The obligation on NZX is not to be interpreted as committing to the on-going employment where it considered that any employee it had inherited from the pre-completion business was not suited for the role designated to them in the post-completion business. I accordingly do not find that NZX was in breach of this obligation.

[353] Ralec also pleaded that NZX's conduct of the grain exchange was in breach of a separate further assurance included at cl 18.10 of the SPA in the following terms:

> Each party shall promptly do everything reasonably required to give effect to this Agreement according to its spirit and intent.

[354] Ralec alleged that, as an aspect of fulfilling NZX's SPA obligations, cl 18.10 obliged NZX to provide responses to its reasonable requests for business information in relation to NZX's performance of its post-completion obligations under the SPA. In November 2010, Mr Thomas requested such information, which request was refused by Mr Weldon in December 2010. Subsequently in June 2011, Mr Thomas wrote to Mr Harmos in his capacity as chairman of the NZX board, making a further request for information in relation to NZX's discharge of its SPA obligations. That request was also refused.

[355] I am not persuaded that NZX was required by cl 18.10 to respond to Mr Thomas's two requests. The critical obligation was that under cl 9.6(c). However desirable some dialogue may have been, compliance with cl 18.10 did not require any level of dialogue with, or reporting to, Ralec.

[356] If that approach is wrong, and cl 18.10 did oblige NZX to periodically report to Ralec as to how it was discharging the cl 9.6(c) obligation, then I am not satisfied that any breach of it by NZX advances Ralec's claims to have suffered loss as a result of breaches of the SPA by NZX.

Ralec's criticisms of NZX's conduct of the businesses

[357] Ralec made a number of other criticisms of how NZX operated the businesses post-completion. These criticisms were advanced for two purposes. First, allegedly poor decisions and refusals to pursue other initiatives were cited as examples of breaches of the cl 9.6(c) obligation because, arguably, those decisions could not be made if the cl 9.6(c) obligation was complied with. Secondly, these criticisms were relied on as contributing to Ralec's arguments that it could make out loss because, if the decisions had been different, then improved volumes of trading on the grain exchange would have resulted. This could have meant the exchange either passed one or more of the earn-out targets, or got to a position where it had a reasonable and substantial chance of doing so.

[358] It is sufficient to review these criticisms together, reflecting on the relevant claims by Ralec they relate to. I have to be mindful of the distinction between two types of criticism. First, resourcing decisions that impacted on the capacity of the

businesses to expand. These were potentially in breach of the obligation to make decisions on resourcing that complied with the cl 9.6(c) obligation. Secondly, criticisms of management or governance decisions as to how the businesses should be conducted. These arose inevitably in the conduct of the businesses and might be irrelevant or coincidental to the more specific resourcing decisions in respect of which NZX had a contractual obligation.

[359] Perhaps understandably, there was a good deal of subjectivity in Messrs Thomas and Pym's criticisms of the way NZX managed the grain exchange. It was apparent, for example, in their criticisms of their exclusion from negotiations with GrainCorp and Glencore, and what they treated as the consequent mismanagement of those relationships by others. It was also apparent in their versions of the constructive dismissal of Mr Thomas and demotion of Mr Pym. They encountered short-term frustrations, such as the delay in NZX arranging for an Australian bank account and the provision of company credit cards for employees. Messrs Thomas and Pym blamed NZX for frustrating their pursuit of new initiatives by insisting that they present a business case to senior management in Wellington setting out the rationale for any additional expenditure, and the benefit to be gained from it. They claimed that NZX did not provide a precedent of what such a proposal ought to entail.

[360] One aspect of these criticisms related to the extent to which NZX diverted the tech team's capacity to work on other NZX technology projects. That relates principally to the failure to build the Agri-Portal.[129] However, it was also seen by Messrs Thomas and Pym as detracting from the ability of the tech team to address errors that arose in the operation of the grain exchange software ("bug fix"), and to work on enhancements that could facilitate additional services for users of the grain exchange. A component of this criticism was NZX's alleged unwillingness to replace members of the tech team as they left the company, with other appropriately skilled employees. On Messrs Thomas and Pym's view, NZX failed to maintain a positive working environment for the highly skilled tech team.

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[129] I deal separately with Ralec's claims that NZX failed to ensure completion of the Agri-Portal: see [629]–[641] below.

[361] Ralec pleaded selectively that some of the alleged deficiencies in NZX's management of the businesses were done intentionally to frustrate growth in the amount of grain traded on the exchange. For instance, Ralec alleged that NZX delayed any authority for an agreement with Glencore so as to intentionally delay an increase in trading. More generally, Ralec argued that strategic decisions were implemented in a manner designed to prevent Clear achieving the earn-out targets.[130]

[362] I am not satisfied that any of NZX's relevant resourcing decisions were influenced by a deliberate intention to frustrate the growth of the exchange, so as to reduce the prospect of the earn-out targets being reached. NZX had paid $7 million for what it quickly discovered was a seriously under-performing business. Mr Weldon had recommended the acquisition enthusiastically to the NZX board, so preservation of his reputation required that he do everything possible to make it a success.

[363] One component of Ralec's allegations was that Mr Weldon was personally interested in preventing growth in the businesses as it conflicted with his position as a holder of a significant number of NZX shares, some of which he was intending to sell. There were a number of strands to this criticism, for example that Mr Weldon delayed Mr Pym's termination until he had achieved a sale of these shares, and that he sold the shares in circumstances where he apprehended a negative impact on NZX's share price from the pending threat of claims from Ralec and/or Messrs Thomas and Pym.

[364] Mr Weldon's explanation in his brief of evidence for his position as a shareholder of NZX was that he had acquired shares over the period of his employment as part of an equity-based long-term incentive plan. By 2011, he had a beneficial interest in over eight million NZX shares. In May 2011 he requested permission to sell part of this holding. His reasons for doing so were in part to fund the purchase of further shares under the employee benefit scheme, and partly to fund the purchase of real estate. The chairman of the board and head of market

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130 Second amended counterclaim (2ACC) at [17.17], [17.28].

supervision at NZX gave their consent to Mr Weldon's request and he sold 2.5 million shares in late June 2011.[131]

[365] There was no evidence that any of the contingencies cited by Ralec would have had a negative impact on NZX's share price once the market was informed of them. It is inherently unlikely that the prospect of an employment dispute with either or both of Messrs Thomas and Pym would have adverse consequences that materially impacted on the value of NZX's undertaking, or its share price. A complete success for Ralec on its claims relating to the earn-out payments would be likely to have a negative impact on the share price, but there was no evidence suggesting Mr Weldon was conscious of, and motivated by, that possibility in May and June 2011. He was not tested on the credibility of his explanation of his other reasons for trading. The implication from Mr Weldon's explanation is that he sold sufficient shares to realise funds for the purposes he identified. If he had been motivated to avoid a loss on his investment because he anticipated adverse consequences of Ralec initiatives, he might be expected to have sold more than some 30 per cent of his shareholding.

[366] One specific instance where Ralec alleged that NZX intentionally harmed the business was that NZX intentionally delayed the authorisation of an agreement with Glencore. Ralec claimed this would have significantly increased the amount of grain traded on the grain exchange.[132] Ralec called evidence from the then general manager of Glencore, Mr James Maw, who is currently the managing director of Glencore's United Kingdom entity. Mr Maw was the trading manager for Glencore Grain Pty Limited, based in Melbourne, from August 2008. He estimated that Glencore acquired between 1.5 and 5 million tonnes of grain per annum in the primary Australian market between 2008 and 2012.

[367] Mr Maw personally and, from his perspective, Glencore were supporters of Clear and the concept of its grain exchange. Messrs Maw and Pym had maintained an informal dialogue during 2009. Mr Maw was encouraging, but the dialogue through that period was inconclusive. Mr Pym considered that he and Mr Maw had

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131 Weldon BoE at [23.5]–[23.9].
132 2ACC at [17.17].

reached an agreement in principle on what would have been a qualified commitment by Glencore to use the grain exchange in return for rebated fees based on volume. At that point, Mr Pym had the support of Mr Weldon to pursue an agreement with Glencore, subject to Mr Weldon being satisfied that the terms of any rebate arrangements made financial sense for NZX. Mr Weldon was wary of granting rebates on terms that produced unsustainably low levels of revenue, because he saw such business conducted on a loss-leading basis as likely to stop once a proper fee that would recover the costs of the service was imposed.[133]

[368] Mr Maw's evidence was that in early 2010 Glencore would have agreed to an arrangement where it was paid a rebate of $2 per tonne on the $2.50 handling fee once it had traded one million tonnes.[134] Mr Weldon's proposal in early 2010 was for Glencore to pay the full handling fee on the first 500,000 tonnes, and thereafter to be paid a rebate of $2 per tonne.

[369] Mr Maw's rationale was that alternative means of acquiring grain in the Australian market cost Glencore approximately $0.50 per tonne, and that he was keen to encourage the grain exchange as a further alternative means of transacting, provided that transactions could be completed at an equivalent cost. After Mr O'Shannassy assumed responsibility for the grain exchange in mid-2010, revised proposals, as analysed by Mr Maw, appeared to have a greater cost than $0.50 per tonne and Glencore lost interest because of that. As put to Mr Maw in cross-examination, because of different cash flow arrangements the financial effect of the later proposals could have been equivalent to a net cost of $0.50 per tonne on the earlier terms.

[370] Glencore was a relatively new participant in the Australian grain market in early 2010, so the proposal was timely from Mr Maw's perspective as it created an opportunity to pursue acquisition strategies different from the conventional ones. By later in 2010, in the absence of an arrangement with the grain exchange, Glencore had committed to the on-going costs of other means of acquiring grain. I incline to

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133 NoE at 1120, 1121.
134 Maw BoE at [19]–[21], [24].

the view that this change in Glencore's circumstances was influential in Mr Maw losing interest in an arrangement with the grain exchange.

[371] In cross-examination, Mr Maw accepted that he and Mr Pym had not agreed on finite terms for a rebate in their discussions in early 2010. They were also still to reach agreement on when any rebate would be paid, and whether Glencore would be obliged to publish bids on the grain exchange on the same terms as those it was offering through other acquisition channels.[135]

[372] Messrs Thomas and Pym blame Mr Weldon's intervention as the cause of an agreement not being concluded. They complain that he denied them authority to conclude the arrangement more formally with Glencore on the terms that Mr Pym believed had been agreed in principle.

[373] Mr Weldon denied vetoing the proposal. The email traffic on the topic is equivocal. NZX cited the transcript of a 7 April 2010 telephone discussion in which Mr Thomas commented that those responsible for the business in Melbourne had "wheel spun" a deal with Glencore (that is, put it on hold) until a then disrupted relationship between GrainCorp and Glencore had improved. Mr Thomas's concern was that GrainCorp might be upset at any suggestion of Clear also making a deal with Glencore, when there was commercial tension between those two firms. There was no suggestion in that conversation that Mr Weldon was withholding authority for Messrs Thomas and Pym to conclude an agreement with Glencore.

[374] In a further recorded telephone conversation on 12 April 2010, and in an email on 19 April 2010, Mr Pym expressed similar sentiments to Mr Weldon, suggesting that for tactical reasons it was preferable to settle arrangements with GrainCorp, before completing an agreement with Glencore, the existence of which might antagonise GrainCorp.[136]

[375] I do not accept that NZX's handling of a prospective agreement with Glencore amounted to a separate breach of its cl 9.6(c) obligation. There is no basis

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135 NoE at 3244/17–29, 3248/25–32, 3250/25–3251/11.
136 TR83 at 94, CB24/18721.

for a finding that Mr Weldon was intent on harming the prospects of entering into an agreement, when he authorised negotiations to continue. The way in which Mr Weldon dealt with Messrs Thomas and Pym fell within the range of reasonable options open to NZX on that part of the grain exchange business.

[376] The remainder of the complaints where NZX is criticised for poor business judgement, but not for intentionally harming Ralec's prospects, do not of themselves constitute breaches of the cl 9.6(c) obligation individually.

[377] Taking into account the generic criticisms that all decisions were made without any regard for the prospects for the businesses to achieve the earn-out targets, and the individual criticisms, I find that the governance directions given on each aspect of the businesses were among the range of options that was available to NZX in prudently operating the businesses. A number of the decisions to which these criticisms related may well have breached an obligation that required NZX to ensure the business was resourced so as to guarantee the earn-out targets would be triggered. However, none of them breached the more modest obligation, as I have interpreted it, to have regard, in resourcing the business, to what was needed to afford the businesses a reasonable opportunity to achieve the earn-out targets. They were decisions that would have met the obligation, but for the fact that they were all made without regard to the cl 9.6(c) obligation.

[378] Notwithstanding that analysis, I do find that NZX's failure to address its obligations within senior management in any explicit way amounted to a breach of its obligation under cl 9.6(c). In all that occurred, there is not a single explicit acknowledgement of the obligation, how it might be achieved, or the circumstances that precluded its earlier achievement but which might subsequently enable a later version of the target to be met.

Repudiation?

[379] Ralec pleaded that NZX repudiated the SPA by its conduct.[137] The allegations were to the effect that the NZX board, as the appropriate decision-maker,

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137 2ACC at [22]–[26].

was not aware of the obligations under cl 9.6(c), was not adequately informed as to the costs of operating the businesses, and that NZX (directly or via NZX4) persistently refused to perform its SPA obligations. A component of this pleading was that NZX never intended to carry out its obligations so as to thwart the earn-out targets being met, and that NZX delayed implementing initiatives that would increase the volume of trading until the earn-out period had expired or was close to expiring.

[380] I consider that the absence of positive consideration of the cl 9.6(c) obligation by the board does not constitute a breach, when discharge of that obligation could adequately be performed by senior management.[138] The board's omission can therefore not amount to a repudiation.

[381] Nor does NZX management's failure to have conscious regard to the cl 9.6(c) obligation justify a finding that NZX repudiated the SPA. As submitted for NZX, repudiation is not to be lightly found or inferred. NZX took numerous steps to develop the grain exchange, applying criteria that were influenced by its own broader business priorities. The contrast between those decisions, and those which Ralec now contends ought to have been made, cannot constitute a repudiation of the SPA. NZX's conduct is substantially less than an unequivocal intention not to perform the contract.[139]

[382] NZX has sought to justify its post-completion conduct as complying with its interpretation of the cl 9.6(c) obligation. That interpretation is a lesser obligation than I have interpreted the contract to require. If NZX has any credible basis for arguing that it thought it did enough to discharge its own view of its cl 9.6(c) obligation, then its conduct cannot amount to a repudiation. Although I have rejected NZX's interpretation, there was a credible basis for its arguments. Further, the terms of NZX's own claims in these proceedings are inconsistent with repudiation. They seek to enforce the contract, claiming damages for Ralec's alleged breaches of it. Therefore, NZX cannot be said to have repudiated the contract.

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138 See [339]–[345] above.

139 Compare with *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 at [58]–[63].

Second cause of action: breach of duty of care

[383] The second cause of action in Ralec's counterclaim alleged that NZX4 and/or Mr Weldon owed Ralec a tortious duty of care. It alleged that Mr Weldon (as CEO of NZX) and NZX4 (as the company responsible for running the Clear businesses) owed a duty of care to Ralec in the manner in which they executed the SPA. The duty allegedly required NZX4 and Mr Weldon to take reasonable care in running the businesses in order to enhance the prospects of the businesses meeting the earn-out targets. The alleged inadequacies in the way they conducted the grain exchange were claimed to be breaches of that duty of care. The resulting loss was the failure to meet the earn-out targets which meant Ralec did not receive the additional consideration payment.

[384] NZX4 and Mr Weldon denied that any such duty of care could exist. They submitted that Ralec was essentially trying to enforce contractual obligations against non-parties to the contract.

[385] The well-settled tests for ascertaining whether a novel tortious duty of care exists were set out in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*.[140] The tests were restated by the Court of Appeal in *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*.[141] The ultimate question is whether, in light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. The test was summarised in *Rolls Royce* in the following terms:

> [58] … The focus is on two broad fields of inquiry but these provide only a framework rather than a straitjacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case. At this second stage, the court's inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society. …

[386] *Rolls Royce* involved a claim by Carter Holt Harvey for alleged deficiencies in a co-generation plant that was designed and constructed for its use by Rolls

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140 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA).

141 *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

Royce. Rolls Royce was a sub-contractor to Genesis Energy Limited (contracting in the days of its predecessor, Electricity Corporation of New Zealand). There was no contract between Rolls Royce and Carter Holt Harvey. The main duty alleged was one to take reasonable care to ensure that the plant was constructed in accordance with specifications contained in the contract (between Rolls Royce and Genesis) to which Carter Holt Harvey was not a party. The Court of Appeal observed:

> [66] … To recap, the main duty alleged in this case is a duty to take reasonable care to ensure that the plant was constructed in accordance with contractual specifications contained in a contract to which Carter Holt was not a party. There is no duty in tort to take reasonable care to perform a contract. At most, there is a duty to take reasonable care in or while performing the contract, which is quite a different concept. …

[387] The proximity analysis requires more than a simple question of foreseeability. It involves consideration of the degree of analogy with cases in which duties have already been established.[142] Ralec did not cite any authority in which a comparable duty of care had been held to exist in any closely analogous circumstances. The cases that were cited in Ralec's closing submissions were relied on for various reasons, such as the relative vulnerability of a plaintiff, the foreseeability of harm and the prospect of a duty to take reasonable care to avoid damage to the economic interests of another. None of the cases involved a relationship equivalent to that between either NZX4 or Mr Weldon, and Ralec.

[388] I am satisfied that the circumstances of this case are not such as to give rise to a tortious duty of care owed by either NZX4 or Mr Weldon. The scope of any duty of care would be co-existent with the contractual obligation assumed under the SPA by NZX. NZX4's conduct in operating the businesses in Melbourne was in its capacity as a wholly-owned subsidiary of NZX. There were no indicia of independent reliance placed on it by Ralec to give rise to any prospect of a duty of care. NZX4 was directed in all respects by NZX, and was solely answerable to it.

[389] As for Mr Weldon, all of his conduct (as well as any relevant omissions) in influencing the post-acquisition conduct of the businesses occurred within the scope of his responsibilities as CEO of NZX. Those responsibilities would include his

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142 *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 141, at [59].

contribution to ensuring that NZX performed its contractual obligations, but there were no circumstances that triggered an independent duty of care in tort on his part to Ralec. Post-acquisition performance would focus on compliance with the contractual obligations, and they were assumed solely by NZX.

[390] Accordingly, I am satisfied that there is no scope for imposing a duty of care on either NZX4 or Mr Weldon.

[391] Had a duty of care been established, I would find that the standard of conduct by NZX4 and Mr Weldon had not caused loss to Ralec, so that necessary element of a negligence action would not, in any event, have been made out. That outcome results by parity of reasoning from my analysis that Ralec cannot make out recoverable loss for breach of the contractual obligation by NZX.[143]

Third and fourth causes of action: misleading and deceptive conduct, pre-contractual misrepresentations

[392] In its third cause of action Ralec claimed under the FTA that a series of written and oral statements made between 5 August and 5 October 2009 on various aspects of NZX's intentions for operating the businesses were false and misleading or deceptive. The same series of statements are relied on in Ralec's fourth cause of action claiming damages under s 6 of the CRA for reliance on the statements as pre-contractual misrepresentations that induced Ralec to enter into the SPA.

[393] NZX did not dispute that its relevant conduct was "in trade" for the purposes of the FTA, or that the FTA applied to its conduct.

[394] Ralec's closing submissions extended the range of documents cited in relation to these representations to a "game plan" document sent by NZX to Ralec on 23 July 2009, that is prior to the beginning of the period in which the pleaded written representations are alleged to have occurred.[144] Given NZX's objection to a non-pleaded written representation being referred to, I have disregarded the component of

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143 See [529]–[642] below.

144 Oral representations, for example about the priority to be given to completing an Agri-Portal, the support that would be provided to the Clear team and that Messrs Thomas and Pym would be left in charge of the business, were pleaded as being made "… between mid-July 2009 and 5 October 2009" (2ACC at [39.3.2], [40.4.2], [42.2] and [44.2]).

Ralec's argument that relied on the 23 July 2009 document.[145] For both causes of action, the pleaded representations were divided into three groups. These related to NZX's commitment to spend $100 million, to immediately begin work on the Agri-Portal and the extent of support it would provide the businesses.

First representations: NZX committed to spending $100 million

[395] Group one of the alleged representations is to the effect that NZX was committed to a strategy for developing a larger group of agri-businesses, and to investing a further $100 million in that strategy.[146] The detail in the pleaded representation was that further investment would include $40 million in platform development, including developing and architecting the platform, and $60 million in data acquisitions "to deepen the data, analysis, intelligence and media offering for the platform;".[147] The representations were alleged to be false because NZX did not, at the time they were made, have the financial capacity to carry out the representations nor did NZX intend to carry them out, and following completion of the agreement did not, in fact, invest anywhere near the amounts specified.[148]

[396] On 7 August 2009, Mr Weldon wrote to Messrs Thomas and Pym following an NZX board meeting the previous day, to convey a non-binding initial offer to purchase the Clear assets. He indicated that NZX would pay $15 million for the Clear assets, with part of the payment being by way of NZX shares. Mr Weldon's letter included the following:[149]

> … The inclusion of [NZX shares as part of the consideration] would give you exposure to the upside created through the execution of the global Agri-Portal strategy. …
>
> The NZX board yesterday committed to a substantial investment in the Agri-Portal in the medium term, on top of the purchase of the CLEAR assets. This commitment, and our combined expertise and energy, will ensure the successful execution of the Agri-Portal.

[397] Mr Weldon referred in the letter to an attachment that he described as follows:

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145 CB6/04759, Ralec's submissions at [699], [700] – compare with NZX submissions at [19.27].
146 Code-named at the time the "Alcazar strategy".
147 2ACC at [38].
148 2ACC at [51].
149 CB10/07914.

> Examples of the possible value that could be created from a global Agri-Portal is as attached.

[398] The attachment was a four page document headed "Markets + Data + News + Solutions: Global Agri Portal" and the document was endorsed "Confidential for Internal Use Only".[150]

[399] Below the heading "Investment", the document stated as follows:

> It is expected that the further investment required would be around AU$100m - consisting of: AU$40 m in platform development including developing new markets and architecting the platform, and data acquisitions of AU$60m to deepen the data, analysis, intelligence and media offering for the platform. The NZX Board has committed to the strategy and this level of investment.

[400] The document contained a diagrammatic representation of the attributes that the Alcazar project might produce. That was substantially similar to a diagram of the Agri-Portal subsequently included in the extensive definition of it in a schedule to the SPA. The document also set out projections of possible business outcomes if the strategy was to be developed as Mr Weldon then contemplated.

[401] In the week or so preceding the dispatch of the letter, Mr Weldon had visited Melbourne to have initial discussions with Mr Thomas. Mr Weldon had been very positive about the prospects of adding the Clear businesses to a larger initiative providing data, markets and infrastructure for agricultural products. An introductory comment in his 7 August 2009 letter was that "… NZX is very excited by the opportunity to work with you and create substantial new value".[151] To give context to the scale of the new Agri-Portal venture, Mr Weldon's letter included the comment that NZX's current market capitalisation was around NZ$230 million.

[402] The parties attributed different meanings to the statement regarding a commitment of around $100 million. Ralec argued that the statement was to be interpreted literally as indicating that such spending commitments had been made.

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150 CB10/07916.
151 CB10/07914.

[403] NZX disputed that the statement could reasonably be taken as a commitment to spend $100 million. It was an expression of intention as to what might occur in the future, with no suggestion of the assumption of legal obligations to third parties. Arguably, no reasonable representee in Ralec's position could treat the reference to "a commitment" as being an existing one when any responsible business in NZX's position would only commit any significant portion of a $100 million sum after detailed pre-commitment analyses of the viability of specific business propositions. It was apparent that no such prospects existed at the time. For a listed issuer with a market capitalisation of NZ$230 million, further investments of $100 million would amount to very significant transactions.

[404] On the literal terms Mr North attributed to the statement, it would amount to a misrepresentation, and would also constitute a misleading or deceptive statement. That is because NZX had not taken any steps to secure funding for investments of around $100 million. Nor had it identified and analysed other transactions of the type contemplated, to which such amounts might be allocated. The board had not signed off on any further expenditure.

[405] Mr North's closing submissions cited a parallel with the alleged overstatement of the word "committed" by NZX in its "Clear and NZX - Gameplan" document provided to Ralec on 23 July 2009. That had included the statement "… NZX is committed to building out a global 'Agri-Bloomberg' i.e., a Markets + Data + News Agri-business portal".[152] The 23 July 2009 document was not pleaded as contributing to the misrepresentations. However, Mr North suggested it demonstrated that Mr Weldon and others in the due diligence team were prepared to overstate NZX's position, for the purposes of encouraging Ralec to enter into the agreement.

[406] Mr North established in cross-examining Messrs Harmos and Paviour-Smith that the board had not made a commitment of any sort to an "Agri-Bloomberg" at the time that document was written in late July 2009. When pushed, Mr Paviour-Smith

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152 CB6/04759 at 04761.

said that "committed" was not the right kind of word to use at that point in time and that it was "a bit sloppy".[153]

[407] I accept Mr Harmos's evidence that characterised the game plan document as an invitation to treat.[154] I am not persuaded that NZX's 23 July 2009 reference to being committed to the Agri-Bloomberg initiative can influence the meaning reasonably given to the reference in the document attached to Mr Weldon's 7 August 2009 letter to a commitment to funding of $100 million. That commitment was described as being "… in the medium term", and the prospects were provisional and approximate:[155]

> … it is expected that the further investment required would be around AU$100 million …

[408] The way the comments were expressed suggested the board approval did not relate to any specific transactions. The context was Mr Weldon's considerable enthusiasm that the Clear businesses could be the start of much larger things, with the additional businesses still to be identified. The representees could reasonably be expected to ask themselves what would happen if NZX did not subsequently identify further investments on terms that were acceptable to it.

[409] The evidence for NZX was consistently to the effect that the board, in considering the proposal, gave something less than a finite commitment to proceed with all aspects of the Alcazar strategy. For instance, Ms Cross sent an email to the NZX due diligence team after the board meeting had finished, headed "Alcazar – Board meeting feedback", in which she advised:[156]

> The concept of Alcazar was approved-ish … the board like it as an ultimate objective but want us to first get AUS/NZ locked in (and saw CLEAR as a good way of doing this); …

[410] Although there were differences in emphasis, Messrs Harmos and Paviour-Smith treated the outcome of the August 2009 board debate as endorsing the Alcazar strategy. This included the prospect that additional initiatives might involve

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153 NoE at 209/30–32.
154 NoE at 412/33–413/13.
155 CB10/07916.
156 CB10/07903.

investment of up to $100 million. However, there was no present commitment to spending at any level. That was the board's intention at the time, in light of what it had been told up to that point about the prospects for such businesses.

[411] Assessing Mr Weldon's comments in his 7 August 2009 letter in the context of the dealings between the parties and their shared knowledge up to the execution of the SPA, I interpret the statements as conveying that the NZX board had approved management's pursuit of the strategy to develop an Agri-Portal and that the board would be prepared to commit up to $100 million to expanding businesses of the requisite type, as opportunities arose.

[412] The statement did not constitute a present promise that NZX had earmarked and had available up to $100 million for investing in agri-business initiatives. However, the statement remained relevant to the extent that it assured Ralec that NZX was taking the prospects seriously. It reflected the scale of what might follow and, subject to specific transactions still to be identified, foreshadowed the prospect of committing up to $100 million.

[413] The absence of any contractual commitment, and the lack of presently identified specific transactions, does not necessarily deprive the statement of all effect as either an actionable representation, or a false and misleading statement. A representee in Ralec's position was reasonably entitled to take from the statement that NZX's board had indicated support in principle to pursue new agri-business ventures. If justifiable once more specific proposals were advanced, the support could extend to investment of around $100 million. This was a pre-contractual statement intended to convey how seriously NZX, at that time, viewed the opportunities that it saw as following on from an acquisition of the Clear assets.

[414] I am mindful that the representation outlined in the preceding paragraph is different from the terms of the misrepresentation alleged against NZX. Care is required to distinguish between nuances arising from the terms of the representation complained of, and a different (unpleaded) representation.

[415] The unqualified terms in which an existing commitment to both the strategy and the investment of around $100 million were described overstated the position. On any reading, it was unjustifiably positive about the prospects of much larger capital commitments. It formed part of a pattern of overly enthusiastic views conveyed by Mr Weldon during his pre-contractual dealings with Messrs Thomas and Pym. However, whether it amounted to an actionable misrepresentation, that NZX was committed to investing $100 million depends on how it is interpreted in the context of all the pre-contractual dealings. Specifically, this depends on whether a reasonable person in Messrs Thomas and Pym's position could have ignored the context qualifying any commitment, so that its reasonable meaning conformed with the approach the board had indeed taken at its 6 August 2009 meeting.

[416] By the time Clear committed to the SPA, the effect of all the dialogue between the NZX due diligence team (and Mr Weldon in particular) and Messrs Thomas and Pym meant that two qualifications to any significant additional commitment by NZX had to be recognised. First, that further investment was dependent on the grain exchange performing substantially in accordance with Clear's representations as to the growth and volume of trading. Secondly, the acquisition of further businesses and commitment of significant further capital to developing the Agri-Portal were dependent on finding such businesses and assessing the justification for additional capital expenditure by reasoned business cases.

[417] I am not satisfied that Ralec was entitled to rely on the literal terms used in the document. The context requires the qualifications NZX contends for. It follows that the statements about a commitment to spend around $100 million did not constitute an actionable misrepresentation.

[418] In reflecting on the tenor of Mr Weldon's communications during the pre-contractual dialogue with Messrs Thomas and Pym, there is scope for finding that he conveyed an impression that NZX was materially closer to an unqualified commitment to spend significant additional amounts on developing new businesses in the agri-data sector than was actually the case. However, there is no scope for assessing the prospect of an actionable misrepresentation on such different terms from those that were pleaded. In pre-trial exchanges, NZX insisted that Ralec should

be confined to the specific terms of the alleged misrepresentations, which were expressed in prolix and heavily cross-referenced pleadings.[157] The point was made on its behalf at trial that it could only be expected to respond to misrepresentations in the terms alleged in Ralec's pleading.

[419] The pleading constraint might not apply in the same way on the cause of action for false or misleading conduct, where the nature of what amounted to false or misleading conduct might be interpreted in a less restricted way. However, the dominant feature of the analysis remains the context in which the statement was made when assessed against all the other information conveyed up to the time at which Clear entered into the SPA. I am satisfied that the two implicit conditions, first about the need for the grain exchange to successfully expand, and secondly the need for NZX to identify new business initiatives and to individually assess the justification for committing to them, mean that the literal overstatement in Mr Weldon's reference to a commitment to the spending of $100 million could also not amount to false or misleading conduct.

Second representations: immediate and independent commitment to build the Agri-Portal

[420] The second group of representations complained of were to the effect that NZX was committed to the development of the Agri-Portal immediately after completion, and that work on it would be independent of progress with the grain exchange. These representations were allegedly conveyed in oral statements from mid July 2009 to 5 October 2009, and in a number of documents emanating from NZX during the pre-contractual dealings.

[421] Mr Pym claimed that oral statements to this effect were made by Mr Weldon in meetings in Wellington on 30 and 31 July 2009 and on 2 October 2009.[158] Mr Thomas cited statements to the same effect by Mr Weldon in a telephone conversation on 19 August 2009.[159] Mr Weldon did not recall making the alleged statements.

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157 That observation can apply, to a degree, to the pleadings on both sides.
158 Pym BoE at [295], [355].
159 Thomas BoE at [184.1].

[422] In terms of written statements, Ralec cited the content of an email Mr Weldon sent to Mr Thomas on Sunday, 9 August 2009. The negotiations and planning for a transaction were in a very positive phase at the time, and Mr Weldon had been reflecting on the prospects of the Melbourne tech team being deployed to do contract work for third parties, which had been a part of its business up to that point. He described his email as "… a short note on logistics, and on one of the bigger issues". His thoughts included the following:[160]

> …
>
> In terms of the issue, I think the main one is allocation of that all important thing - energy and attention, as between building out the NZX Agribusiness global portal, and other work. I have given this quite some thought over the w/e, and think it should be solvable. My sense is:
>
> - biggest return will come from getting the portal right, and getting it right early so there is a strong first mover advantage. For us, this is the key strategic rationale of the deal, so any work that is outside of this, would need to be managed by additional resource[s]
>
> …

[423] In an email on possible terms for the transaction sent by Mr Weldon to Mr Thomas on 14 August 2009, he addressed what became the APPP in the following terms:[161]

> 5. We have also agreed that the final tranche is based on the delivery of the platforms discussed in our meetings and strategy documents. As agreed, we will keep this language simple. This is, again, risk management/confidence for my Board. As you agreed, this is a no-brainer and is why you are coming on board. The key here is getting the language in business, not legalese.

[424] Messrs Thomas and Pym also cited discussions during the pre-contractual negotiations in which Mr Weldon and others of NZX management attributed importance to having the Agri-Portal delivered within three years, and the importance of retaining the existing skilled IT staff to achieve that. Mr Thomas took from those comments a recognition by NZX that completing the Agri-Portal was a separate initiative for NZX.

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160 CB11/08022.
161 CB11/08218.

[425] On 2 October 2009 (the day the SPA was signed in Wellington), Ms Kirkham despatched the F-90 document. Messrs Thomas and Pym took the content of that document to reinforce NZX's separate commitment to the Agri-Portal. Mr Thomas's evidence was that he relied on the content of the F-90 document in making his final decision as to whether Clear should enter into the SPA.[162] In terms of "overall organisational principles", the document stated that areas of expertise and focus for the Melbourne office would include the Agri-Portal platform development.[163] Mr Thomas's evidence was that 2 October 2009 was somewhat pressured because he and Mr Pym were required to catch a flight back to Melbourne. When time was short, Mr Thomas raised the absence of the fifth schedule from the version of the SPA that they were considering. The fifth schedule was to contain the definition of the Agri-Portal. Mr Thomas sought an assurance that the terms of the definition would be consistent with his discussions with Mr Weldon. These discussions had included that its development was a "no brainer", it would be built immediately after completion and Ralec would be entitled to be paid as soon as it was completed. Mr Thomas recalls Mr Weldon assuring him on these matters.[164]

[426] NZX denied making any actionable representations about the manner in which it would build the Agri-Portal. NZX argued that any pre-contractual representations were superseded by the detailed provisions in the SPA setting out what was required for a successful Agri-Portal to be recognised by NZX and NZX's post-completion commitment to resource the businesses by having regard to the earn-out targets agreed in the SPA.

[427] None of the written statements relied on by Ralec refer to an NZX commitment to pursue the Agri-Portal development independently of the progress made with the grain exchange. Given Mr Weldon's enthusiasm for the larger potential strategy during the pre-contractual negotiations, I accept that it was more likely than not that he made statements reflecting his confidence that the Agri-Portal would be successfully completed.

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162 Thomas BoE at [258]–[260].
163 CB15/11560.
164 Thomas BoE at [262].

[428] I am not satisfied that the statements comprising this second group of alleged representations coincided sufficiently with the matters addressed in the SPA for its provisions to displace the effect of any pre-contractual representations. If Messrs Thomas and Pym could reasonably claim that they took the statements cited as NZX's then intentions to promptly build the Agri-Portal and to do so independently of progress with the grain exchange, then such statements could constitute representations as to how NZX would approach its cl 9.6(c) obligations. Arguably, this could have induced Ralec to accept the terms of cl 9.6(c) as adequate, because NZX had represented that its commitment to build the Agri-Portal was one they would undertake immediately after completion. If that was represented as NZX's intention, then Ralec might reasonably have relied on it in deciding that no greater commitment was required beyond the terms of cl 9.6(c).

[429] From NZX's perspective, the context in which it discussed the development of the Agri-Portal included the due diligence team's understanding from Clear's representations about the achievable level of trading on the grain exchange. An important component of NZX's planning for the Agri-Portal was the anticipated growth of the grain exchange, progressing on a trajectory towards a volume of trading sufficient to give the trading data proprietary value.

[430] To the extent that Ralec could make out any representations that NZX would commit to building the Agri-Portal independently of progress with the grain exchange, and would start doing so immediately, then such representations would have been made on behalf of NZX unwittingly. I accept the consistent evidence from numerous NZX witnesses to the effect that the grain exchange would be a critical component of the Agri-Portal because it was to be an important source of data that subscribers would pay for. Whilst rationalisation of NZX's agri-information businesses might well continue for its own sake, developing the Agri-Portal as defined in the SPA would not be justifiable without markets operating on a sufficient scale to generate data with marketable value. This is exemplified in the paper circulated to the NZX board for its 6 August 2009 meeting that recognised the sequence:[165]

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[165] CB10/07854.

> Before recommending to proceed with Alcazar, it is important that we are confident in the success of our investment in CLEAR Grain.

[431] None of the written statements relied on by Ralec sustain the meanings they attribute to them. Those statements reflect NZX's enthusiasm to pursue additional initiatives towards development of the Agri-Portal. Indeed, some of the statements are expressed in terms that could be treated as independent of progress with the grain exchange. However, in the context of all the dealings between the parties, they do not form a foundation for the proposition that NZX was committed to developing the Agri-Portal irrespective of whether the grain exchange grew in volume consistently with the parties' expectations. NZX's definition of a successful Agri-Portal required two commodity exchanges operating with volumes of trading that gave their trading data value to potential subscribers. There would be no commercial sense in NZX committing very substantial additional resources to a business reliant on such components if the first of those exchanges was failing to perform at a level that gave any encouragement that it would grow to a level where the trading data would have value.

[432] I am not satisfied that the oral statements cited by Messrs Thomas and Pym went materially further than the written statements in circumstances where reliance could be placed on them. On all the evidence, I find that the proposals for developing the Agri-Portal assumed a sufficient measure of growth in the volume of trading on the grain exchange (even if the earn-out targets were not met) to justify persisting with it. Whilst the grain exchange failed to generate trades anywhere near a growth path towards the level at which the trading data would have value, all comments about developing the Agri-Portal would lack what is reasonably treated as this implicit premise.

[433] Even if representations as to the commitment to proceed with the Agri-Portal were made out, they could go no further than an expression of NZX's then intentions based on its understanding of the likely rate of growth of the grain exchange. NZX could not be held to this commitment once it discovered that the grain exchange was not progressing at anywhere near the rate that was needed to justify building an Agri-Portal. This required not one, but two, agricultural commodity markets operating on a sufficient scale to generate data that had proprietary value.

[434] I find that the statements relied on by Ralec did not constitute representations that NZX was committed to the immediate development of the Agri-Portal, and that it would do so independently of the progress made with the grain exchange.

Third representations: extent of NZX's support for the businesses

[435] The third group of representations complained of involved pre-contractual statements about the extent to which NZX would provide business and marketing support for the Clear businesses post-acquisition. The support was to include resourcing relationships with key stakeholders to build the volumes on the grain exchange, developing the customer base, hiring a senior person to run the "IMI Agribusiness portal" and supporting the technology team.

[436] There were a number of strands to this group of alleged representations. For instance, Ralec cited draft documents that used very enthusiastic and positive terms about the prospect of co-operation, and what Ralec treated as indications of commitment to provide additional resources for the Clear business. In particular, Ralec cited the content of a draft document forwarded by Mr Weldon on 5 August 2009 called "Organisation – CLEAR and NZX". The covering email described it as a document that had been put together "… outlining how we would anticipate CLEAR and NZX working together". The email commented:[166]

> It is labelled draft, as I would be keen on feedback on the content, and your ideas in these areas as well.

[437] The tone of that document was provisional. It was despatched the day before the NZX board considered the proposal, two days before the first non-binding offer was conveyed and nearly a month before the initial terms sheet was executed. Its content included:[167]

> NZX intends to hire a senior person in to run the IMI Agribusiness portal. … Members of CLEAR would be a material part of the hiring process.

[438] The document also provided an instance of NZX's caution about approving expenditure. Under a heading "Budgeting and Capex", it stated:

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166 CB10/07816.
167 CB10/07817 at 07820.

> NZX does not allocate budget at the line manager level. Instead, we expect that all monetary decisions are made using sound business logic and business cases. Our expectation is that the set of value creating opportunities grow, rather than shrinks. What NZX does require, is discipline around sizing these opportunities and delivering Results against them.

[439] Ralec also cited comments in the F-90 document, despatched in draft the day the SPA was signed, that were largely aspirational. There is merit in NZX's response that these were draft thoughts clearly in aspirational terms that were not intended to create any commitment to which NZX could subsequently be held. As statements of intended future courses of action at the time they were made, there is reasonable scope for accepting that NZX would have believed (had all else developed satisfactorily) that it would provide the types of resources referred to.

[440] A subset of the alleged representations arose out of NZX recognising a number of "unspoken expectations" that Clear might have about how NZX would conduct the businesses post-acquisition. Ralec criticised NZX for failing to raise these matters with Clear so as to rectify these incorrect expectations that might have influenced Clear's entry into the SPA.

[441] Towards the end of the pre-contractual negotiations, senior NZX due diligence personnel reflected on any "unspoken expectations" that Ralec might have. Rachael Cross emailed her thoughts to Mr Weldon, Rowan Macrae, Rachael Newsome and Heather Kirkham on 30 September 2009. Although the subject header was "10 unspoken expectations CLEAR might have", she listed only five. They reflected concerns as to how NZX would manage the relationship with Clear personnel once it had acquired the businesses. Her list began:[168]

> 1. As we discussed, expenses, expenses, expenses! This I think is the expectation biggy. Definitely the fact that they have a culture of spending money and not being aware of costs/caring about costs is going to be a major hurdle for them/us. …
>
> Definitely a key issue with the acquisitions to date has been their impression that NZX is a big organisation and therefore has money it will give out like lollies (despite saying business cases etc required) – I suspect that this will be the same with CLEAR despite talking through the business case requirements with them pre acquisition. …

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[168] CB14/11075.

[442] The concerns raised in that email do not suggest that NZX had in any way misrepresented its position to Clear. It anticipated that Messrs Thomas and Pym might have unreasonable expectations as to how the businesses should be resourced and operated post-acquisition by NZX, despite being warned about how NZX does business, and its expectations for the Clear businesses. The email made suggestions as to how Messrs Thomas and Pym could be made aware of the standards by which NZX operated. In some respects, Ms Cross's concerns did not reflect her dealings with Clear in the current exercise, but drew instead on her experience of other acquisitions NZX had completed.

[443] Ms Cross made no suggestion that NZX should remain silent so that the misapprehensions might continue. To the contrary, her concern was to engage with Messrs Thomas and Pym in a manner that disabused them of any "unspoken expectations" they may in fact harbour. Ms Cross's unspoken expectations were raised shortly before the SPA was executed. From relatively early in the dealings between the parties, there had been comments on behalf of NZX that it required business cases to be completed in support of requests for capital expenditure. The 5 August 2009 document quoted at [438] above was an early example of this. Messrs Thomas and Pym's complaint was not that they were taken by surprise by the requirement to present a business case, but rather that they were not provided adequate guidance in how to prepare these.

[444] I do not accept that NZX inadequately warned Clear of the process required to authorise additional expenditure. To the extent there was any inadequate articulation on NZX's part in relation to any "unspoken expectations", I am not persuaded that could have caused or contributed to any misrepresentation, or misleading or deceptive conduct, by NZX.

[445] In summary, I am not persuaded that Ralec can make out any of the alleged misrepresentations.

Fifth cause of action: breach of fiduciary duty

[446] Ralec's fifth cause of action pleaded that NZX and NZX4 (both referred to in the analysis of this cause of action as NZX) owed fiduciary duties to Ralec in the

way in which it conducted the businesses post-completion of the SPA. Ralec alleged these duties were breached, causing loss.[169] The basis of this claim is that the relationship constituted a joint venture and Ralec reposed trust and confidence in NZX in the manner in which it managed the businesses.

[447] The first issue is whether there was a fiduciary relationship. As recognised by the Supreme Court in *Chirnside v Fay*, there are two situations in which a fiduciary duty may arise.[170] The first situation is where the relationship is one that:[171]

> … is of a kind which, by its very nature, is recognised as being inherently fiduciary. … These include the relationships of solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient.

[448] The second situation depends upon an examination of whether the particular aspects of the relationship justify it being classified as fiduciary. There is no single formula or test that has received universal acceptance in deciding whether a relationship outside the recognised categories is fiduciary.[172] One characteristic of all fiduciary relationships is that there is an entitlement of the claimant party to place trust and confidence in the other:[173]

> That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

[449] While there have been cases that have treated a joint venture as a fiduciary relationship, this is not yet recognised as falling into the first category. As stated in *Chirnside v Fay*:[174]

> [74] There is a strong case for saying that most joint venture relationships can properly be regarded as being inherently fiduciary because of the analogy with partnership. The relationship between partners is one which has traditionally been regarded as a classic example of a fiduciary relationship in that the parties owe to each other duties of loyalty and good faith; and they must, in all matters relevant to the activities of the partnership, put the interests of the partnership ahead of their own personal interests.

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169 2ACC at [63]–[69].
170 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.
171 At [73].
172 At [75].
173 At [80].
174 *Chirnside v Fay*, above n 170, (footnotes omitted).

[450] Ralec relied on the Court of Appeal decision in *Curtis v Gibson* for the proposition that a joint venture will always amount to a fiduciary relationship.[175] However, what was said in that case was:

> [75] Fiduciary obligations commonly arise in recognised relationships such as those of a trustee, solicitor, agent or a member of a partnership. But they may also arise in other relationships including those loosely described as joint ventures.

[451] Further, in *Chirnside v Fay* the Chief Justice said:[176]

> [14] Where parties join together in a venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture and while it continues. …

[452] Ralec further argued that this was a joint venture in which the parties made complementary contributions (Ralec brought software development skills and the embryonic exchange, and NZX brought financing and wider management capabilities), with their post-completion goals being aligned. In pursuit of those goals, Ralec was entirely reliant on NZX to make decisions about implementation of the SPA, and in particular the resources committed to development of the grain exchange and the Agri-Portal. Arguably, Ralec reposed a significant amount of trust and confidence in NZX and had a legitimate expectation that NZX would not use its position in a way that was adverse to Ralec's interests.

[453] NZX denied that the relationship was one in which any fiduciary duties might be owed. The parties were involved in an arm's length commercial transaction, reflected in the exhaustive SPA. There was nothing in the relationship that could oblige NZX to act in Ralec's interests over its own interests. NZX cited the Supreme Court's observations in *Paper Reclaim Ltd v Aotearoa International Ltd* as follows:[177]

> [31] The Courts below were too ready to label as a joint venture an arrangement that was in aspects relevant to this litigation no more than a contract of agency. To style a contractual relationship as a joint venture may be apt to distract. It is a term to be applied with caution. When parties have formed a contract the correct approach is first to decide exactly what they

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175 *Curtis v Gibson* [2011] NZCA 373.

176 Footnotes omitted.

177 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 (footnotes omitted).

> have agreed upon. Only then should the Court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require co-operation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement, express or implied, to act on behalf of another and thus to put the interests of the other before one's own is a frequent manifestation of a situation in which fiduciary obligations are owed. Partners are the classic example of parties in that situation. Their position is different from that of parties to a contract who may have to cooperate but are doing so for their separate advantages.

[454] I accept that Ralec was vulnerable to detriment to its on-going interests in the businesses reaching the earn-out targets, if NZX did not honour its obligations under cl 9.6. However, that was not sufficient to constitute the relationship as a fiduciary one, in which Ralec necessarily reposed trust and confidence in NZX.

[455] Nor am I persuaded that the contractual relationship should be overlaid with the status of a joint venture. The parties' interests were aligned to the extent that both sides would benefit from the grain exchange doing well, and the Agri-Portal being successfully developed. However, that shared interest is present in every commercial transaction where part of the consideration is deferred, and dependent on post-completion performance. That feature cannot be sufficient to impose fiduciary obligations on a party in control of the business, in favour of the interested vendor.

[456] The additional aspect here was the proposed development of the Agri-Portal. Ralec characterised that as an independent obligation. However, I accept NZX's position that its pursuit of Agri-Portal initiatives necessarily depended on adequate progress being achieved with the volume of trading on the grain exchange. Ralec's interest in the development of the Agri-Portal cannot transform the commercial relationship between the parties into one that was fiduciary in nature.

[457] Accordingly, the fifth cause of action in Ralec's counterclaims cannot be made out.

Sixth cause of action: knowing involvement by NZX4 and Mr Weldon

[458] Ralec's sixth cause of action alleged Mr Weldon and NZX4 either being knowingly involved or aiding and abetting the making of representations which contravened the FTA. Ralec also alleged that their participation rendered them joint tortfeasors with NZX in respect of the alleged negligent misrepresentations.

[459] This cause of action depended on Ralec making out its third or fourth causes of action for misleading and deceptive conduct, or negligent misrepresentations. Ralec failed on those causes of action and therefore the dependent claim of knowing involvement against Mr Weldon and NZX4 cannot succeed.

Summary as to liability on Ralec's counterclaims

[460] Ralec has established that NZX breached its contractual obligation under cl 9.6(c) of the SPA. Clause 9.6(c) imposed an obligation on NZX to assess the level of resourcing required for the businesses by having regard to the earn-out targets, and no such consideration was undertaken. The remainder of the first cause of action and all of the other causes of action have failed.

DAMAGES

Can NZX make out recoverable loss?

[461] NZX claimed damages on alternative bases. It claimed a reliance measure of loss in respect of all of its causes of action for sums committed to the businesses acquired that are claimed to have been wasted or lost.[178] These were quantified as at 31 December 2014 at $13.76 million.

[462] In all but its claim under the FTA, NZX also claimed an expectation measure of loss, reflecting the difference between its position following its purchase of the businesses, and the projected profits that it anticipated earning if Clear's representations had turned out to be accurate. On this expectation measure, NZX claimed a range between $33.5 million and $44.2 million.[179]

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178 5ASOC at [146] and [147].
179 5ASOC at [143]–[145].

[463] During interlocutory skirmishes, a repeated criticism on behalf of Ralec was NZX's failure to plead any form of quantified loss, or the basis on which it would be claimed. Quantified loss, and the manner in which it was to be claimed, were first pleaded in the 2ASOC in May 2015, nearly four years after the proceedings were commenced.

[464] NZX's pleading recognised that the breach of the no disputes representation could not justify expectation loss. Ralec argued that this meant the reliance measure of loss was not claimed in relation to any damages that could be made out for breaches of the support, alliance, costs or volume representations. That argument depended on an untenably narrow interpretation of the terms in which NZX pleaded reliance loss as an alternative to expectation loss, for damages made out in relation to those other categories of representation.

[465] Ralec argued that NZX had suffered no loss. Further, that any losses, if at all, were incurred within NZX4, which was not a claimant. I am not satisfied that Ralec's analysis on the latter point is correct, and will return briefly to my reasons after dealing with the substantive analysis on the existence of recoverable loss.

Approach to assessing loss

[466] As Tipping J observed in considering the measure of damages in the contract aspect of *Marlborough District Council v Altimarloch Joint Venture Ltd*:[180]

> It is as well to remember at the outset that what damages are appropriate is a question of fact. There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of case to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. The reference to reasonableness has echoes of mitigation. A plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps.

[467] The starting position in assessing damages for breach of contract is that the claimant has an expectation interest in being compensated for the position it would have achieved, had the contract been performed. This contemplates recovery of the

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[180] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [156].

extent of the loss of the bargain (where that can be proved and other requirements for recovery are satisfied). That measure can be applied, for example, in the sale and purchase of a business where the vendor warranted a level of profitability which, through no fault of the purchaser, was not achieved. There, the purchaser is entitled to any quantifiable difference between its return from the business and that which the vendor warranted.

[468] In some cases it is not possible or appropriate to calculate the expectation loss. In such cases, the courts will consider the innocent party's reliance interest, that is, any money spent in reliance on the other party performing its contractual obligations.[181] As with tortious damages, the reliance measure seeks to return the innocent party to the position in which it would have been, had the contract never been entered into. Essentially, the innocent party is given the benefit of a rebuttable presumption that, had the contract been performed, it would have at least made sufficient gains to cover its reliance expenses. This is subject to the defaulting party showing that the loss was caused not by its breach, but by it being a bad bargain.[182]

[469] A reliance measure of damages includes:

- the difference between the price paid and what the asset was actually worth;
- any expenditure made in reliance on the contract; and
- the lost opportunity costs.

[470] These losses must all flow from the breach of contract, and it may be open to a defendant in Ralec's position to prove that NZX entered into a bad bargain and would not have recovered these expenses in any event.

[471] The reliance basis for quantifying loss from breach of contract aligns such claims with those for misleading and deceptive conduct under the FTA, where NZX has claimed only a reliance measure of loss. The object on that cause of action is to

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181 *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC).
182 *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 (CA).

restore NZX to the position that it would have occupied had the misleading or deceptive conduct not induced entry into the contract.

[472] To establish expectation loss, NZX must show that the value of the Clear businesses it received was less than the value of the businesses that was promised under the SPA, or that it lost profits that were promised.

[473] To establish reliance loss, NZX must show that the value of the Clear businesses it received was less than the price it paid for them, plus funds spent resourcing the business in reliance on the SPA.

[474] The time for assessing loss is usually at the time the contract was breached, which in this case is at the time the SPA was entered into. However, that prima facie rule yields to the Court's inherent power to fix another date that may be appropriate in the circumstances.[183]

[475] It is permissible for a plaintiff to claim damages on both bases, but the Court will be wary of the prospect of double recovery. Accordingly, at least in practical terms, an election is probably required as to which formulation of loss is ultimately claimed.[184]

Assessing the evidence on loss

[476] Reconstructing the financial impact of NZX's purchase was not straightforward. The assets had been purchased by NZX pursuant to the SPA. Those assets, apart from the major component comprising the software involved in operating the grain exchange, were transferred by NZX to NZX4, its wholly owned subsidiary, at cost. The software was retained by NZX and was the subject of a licence agreement pursuant to which NZX4 paid an annual licence fee that NZX treated as being at arm's length. NZX4 also operated other Australian agri-businesses acquired by NZX, and no financial statements were prepared separately for just the businesses acquired from Ralec. Accordingly, when a quantification

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183 *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 420.
184 *Herbison v Papakura Video Ltd (No 2)* [1987] 2 NZLR 720 (HC) at 734.

exercise was undertaken in 2015, Ms Amy Trotman,[185] an accountant with NZX, completed a reconstruction to separate out a set of financial statements for the businesses acquired from Ralec.

[477] Mr North was highly critical of Ms Trotman's work. He challenged certain individual items in the reconstruction as having no justification or being incorrect. He also challenged the integrity of the process generally, pointing to the absence of vetting and sign-off by either the board's audit and risk committee, or external auditors. Mr North suggested that Ms Trotman's work, done at Mr Weldon's instruction, amounted to window-dressing, intended to present the financial statements of the businesses in a way that supported the present claims. He suggested they were unreliable as an accurate reflection of the financial activity.

[478] I am satisfied that Ms Trotman undertook the reconstruction objectively. The reasons for her adjustments were adequately explained so that the outcome was transparent. She conceded the prospect of some cost allocations being recast depending on the view adopted of what fell within the businesses, and what constituted work undertaken by them for other parts of the larger NZX group. If the amounts in issue on these points became critical, some allowance for the approach Ms Trotman elected to adopt would likely be appropriate, but for reasons discussed below, a detailed breakdown does not become material.

[479] Analyses of the loss claimed by NZX on both reliance and expectation bases were undertaken by Mr Grant Graham, who was called as an expert accountant. He is a chartered accountant, practising at KordaMentha, having practised as a partner of that and its predecessor firm since 1991. In total, Mr Graham has over 30 years' experience, and specialises in valuation and litigation support. He is and has been a director of state-owned enterprises, publicly listed companies and private companies.

Was expectation loss made out?

[480] This basis for quantifying damages was argued on the basis that if the representations and warranties had been true, the businesses would have flourished,

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[185] Née Wilding, the name in which her briefs of evidence were completed.

generating substantial profits even after triggering the additional earn-out payments to which Ralec would become entitled. The projection included an assumption that the Agri-Portal had been successfully completed and operated.

[481] The total expectation losses were calculated in a range between $33.5 million and $44.2 million. That represented a discounted cash flow calculation of the positive cash flows that might reasonably have been expected. The range arose because the calculations applied a range of discount rates for the discounted cash flow calculation between 12.43 and 15.43 per cent. The components of this calculation included a range of between $19.3 million and $30 million for successful operation of the grain exchange, with the balance attributable to the expectation of cash flows from a successful Agri-Portal business.

[482] In his brief, Mr Graham acknowledged that his projections for profits from an Agri-Portal business were less reliable than they might be because of the lack of certainty of revenue from an Agri-Portal. He similarly acknowledged that component of his calculations of an expectation loss was uncertain.[186] My view of all his evidence after cross-examination and re-examination was that, although Mr Graham had complied with his instructions to produce a form of calculations that addressed an expectation loss, he was uncomfortable in doing so because of the extent to which significant components in it were speculative.

[483] NZX's closing submissions addressed the expectation loss alternative second and, although Mr Cooper did not abandon it, the lack of meaningful support from NZX's accounting expert appeared to contribute to Mr Cooper's relatively scant attention to this alternative.

[484] I agree with Mr Graham's concerns that there were too many uncertainties, some of them fundamental, in the way of any meaningful success. These were high risk investments, and were appreciated by NZX as being so. NZX has made out breach of pre-contractual representations because the embryonic business did not have the support, and therefore the prospects, that were fundamental to the decision to acquire it. The outcome was very dramatically different from Clear's projection.

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[186] Graham BoE at [115], [134].

Notwithstanding that, NZX did appreciate, as it ought to have, that many considerations would influence the successful realisation of its aspirations for the businesses. This was not a contract where the purchaser could realistically claim that the breaches caused it to lose the optimum expectation of the success that might have been achieved.

[485] There are somewhat ironic symmetries in the competing positions advanced for NZX and Ralec in supporting their own formulation of damages claims, but challenging those of the other party. For the reasons I address in analysing the prospects of Ralec achieving the earn-out targets,[187] I find that the impediments to successful growth of the grain exchange business, and to a successful Agri-Portal (essentially preferring NZX's evidence), were so significant that NZX's prospects of making out expectation losses can be dismissed as unrealistic.

[486] I accept that uncertainty of quantification is not a barrier to recovery of damages.[188] In that context, it is also necessary to consider NZX's alternative of a claim for damages on the basis of loss of a chance. However, the considerations described in the preceding paragraph apply equally to any loss of a chance claim for NZX's expectation loss. Such an expectation loss would have depended on the grain exchange succeeding in line with Clear's representation about the level of trading that might be achieved on the grain exchange. NZX's own case is that such an outcome was unattainable. Any theoretical projections of profits NZX may have earned had the Clear representation been borne out were therefore too speculative to found any credible calculation of damages, even on a loss of a chance approach. It would offend the basic requirement for fairness to recognise an NZX expectation loss on the premise that the grain exchange had developed successfully, whilst denying Ralec's claim for damages on the basis that they could not make out any reasonable and substantial prospect of the grain exchange achieving the earn-out targets.

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187 See generally [597]–[628] below.

188 Burrows, Finn and Todd, above n 60, at [21.2.2(e)]; *Chaplin v Hicks* [1911] 2 KB 786.

[487] This analysis applies equally to each of the causes of action in which NZX claimed expectation loss, namely the support, alliance, volume and costs misrepresentations made out under the CRA, and the breaches of warranties.

Was reliance loss made out?

[488] Mr Graham's quantification of loss on a reliance measure involved identifying the purchase price NZX had paid for the businesses, adding the amount NZX spent by way of inter-company funding to continue the businesses, and subtracting the tax benefits NZX had enjoyed from expending the amounts involved. Mr Graham then added an additional amount for the opportunity cost (that is, the return NZX claimed it could reasonably expect to have earned on the funds committed to this project, had they been utilised in another venture that had achieved the target rate of return required for the board to approve it). Once that figure was arrived at, Mr Graham's calculation subtracted the residual value of the businesses as he assessed that as at 31 December 2014. His numbers were as follows:

Purchase price	$7,000,000
Inter-company funding (acquisition to 31 December 2014)	7,110,000
Less tax benefits	-3,860,000
Plus opportunity cost, discount rate of 12.43 per cent	6,970,000
Less residual value (31 December 2014)	-3,453,000
Total calculated reliance loss	**$13,760,000**

[489] Mr Seear, an expert accountant retained by Ralec, criticised a number of the aspects of Mr Graham's calculation of loss. Mr Seear is a Melbourne-based partner in accounting practice BDO, with 14 years' corporate advisory experience, specialising in valuations and dispute resolution transaction advice. In particular, Mr Seear considered that the application of a discount rate of 12.43 to 15.43 per cent was too low, thereby inflating the valuation of opportunity costs.

[490] With some justification, Mr Seear categorised this as a high risk investment. The grain exchange was a start-up business with limited historical information and a wide range of possible outcomes. In contrast to Mr Graham's range, Mr Seear calculated the appropriate discount rate at 58.79 per cent, justifying this on grounds,

among others, that it fell within the 40 to 60 per cent range of venture capital rates of return for first stage companies, as projected in a study by New York University Stern School of Business on which he relied.[189]

[491] More generally, Mr North argued that Mr Graham's calculation of loss ignored the economic reality of how NZX had valued the assets it had purchased, for several years after completion. He cited numerous valuations of the assets by NZX that suggested the assets purchased had indeed appreciated in value.

[492] Mr Seear was critical of Mr Graham's methodology for not addressing the history of the value attributed to the assets in the period between acquisition in 2009 and December 2014, which was the point in time Mr Graham focused on.[190]

[493] A first indication of value of the assets acquired was in a 21 August 2009 draft memorandum to the board that Mr Weldon worked on. In providing a counterfactual option to proceeding with the purchase of the Clear businesses, Mr Weldon estimated that it would cost NZX approximately $7.5 million to build the Clear grain business.[191] The draft paper in which that comment appeared was apparently not finalised or provided to the board.[192] It could only have been a rough approximation, but suggests that in crude terms NZX got "value for money" on the initial aspect of the transaction, namely all rights to the software and the embryonic trading businesses, for $7 million.

[494] In his cross-examination of Ms Newsome, Mr North tested NZX's thinking on the breakdown of the consideration payments in the SPA. He had her acknowledge that if the earn-out targets were not reached, NZX would have mitigated its risk and would not have paid too much for the assets acquired.[193]

[495] Despite the rapid disillusionment with the performance of the grain exchange, NZX continued to recognise the intellectual property in the assets it had purchased as having significant value. A first assessment of it by the NZX audit and risk

189 Seear reply brief at [77]–[79].
190 Seear reply brief at [53.1].
191 CB11/08459.
192 Weldon BoE at [7.17].
193 NoE at 1551/6–8.

committee in December 2009 confirmed management's assessment of the value of the grain exchange software at $13.2 million. A comparator used at that time was a high level estimate of the cost NZX would have incurred to build a similar system and that was put at between $10-15 million.[194]

[496] Management's report to the audit and risk committee dated December 2009 reflected the pre-completion optimism for increased trading on the grain exchange. Management contemplated that the level of business that would trigger the first earn-out target was realistic, and that if the target was not achieved in June 2010, then subsequent thresholds might be met in 2011 or 2012:[195]

> NZX management believe even if the 1.5m threshold is not met in 2010 the increased thresholds in 2011 and 2012 are more likely than not to be met and therefore have fully provided for the Grain Market software payment.

[497] The minutes of the audit and risk committee's assessment of this analysis record that the committee was comfortable with management's treatment of the items involved in the Clear acquisition.[196]

[498] In a confidential response to a request for information from GrainCorp on 9 December 2011, NZX provided a comprehensive information memorandum. At that time, there was a prospect of GrainCorp acquiring or investing in the grain exchange. That context suggests the assessment was influenced by salesmanship, but GrainCorp was a well-established player in the Australian grain industry, and NZX would have harmed its own credibility if its "sales pitch" was unjustifiably optimistic. The valuation of the business was expressed in the following terms:[197]

> The valuation of CGX has been assessed at between NZ$12 – 15 mn, after very detailed analysis based on the macro environment, conservative assumptions and a high degree of confidence at this point in the cost base and execution risk. A range of methodologies and techniques were applied and these techniques generated a "worst case/bear" valuation of NZ$9mn, a "base case" valuation of NZ$15.3mn and a "bottom up/best case" estimate of how the business will track valuation of NZ$20.1mn.

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194 CB19/15116. Another part of the same document valued the software at $13.82 million.
195 CB19/15115.
196 CB19/15176.
197 CB33/26029.

[499] Irrespective of the exchange rate at the time, the worst case valuation of NZ$9 million was still approximately at or somewhat above what NZX had paid for the businesses. I am not persuaded that the different context in which that valuation was prepared requires it to be disregarded in considering the loss that NZX has claimed in the proceeding. NZX had owned and operated the grain exchange through two seasons, and the impediments to increased trading on the exchange had been intensely scrutinised. Allowance would have to be made for the optimism of a sales pitch. Accepting that allowance would also need to be made for the extent of money that NZX had spent on the grain exchange in those two years, NZX's valuation is still inconsistent with it having suffered any significant loss at that point.[198]

[500] Mr Graham disputed the relevance of the valuation provided to GrainCorp in December 2011. His cynicism about the integrity of the valuation used in a sales pitch to GrainCorp is understandable. However, I do not accept that merely because it is now inconvenient, NZX can simply disavow the representations of value that it put to GrainCorp in circumstances where it was intended to be relied on.

[501] Both Mr Graham and Ms Trotman accepted that if NZX's internal valuations in the years between assuming control of the businesses and commencing the proceedings were applied, then NZX could not make out any meaningful reliance loss.[199]

[502] The first impairment to the carrying value of the grain exchange was resolved for the year ended 31 December 2013, which balance date was some two and a half years after the proceedings were commenced and four years after NZX took control. The impairment was NZ$2.412 million, applied by writing off the goodwill component of $395,000 and impairing the carrying value of the intangible software asset by the remainder of $2,017,000.

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198 Ms Trotman's schedule of working capital support (schedule 9 to her brief) quantified the support in all forms at $1.614 million in the 2009 year and $2.45 million in the 2010 year. The latter year included NZX's assumption of liability for Mr Thomas's resignation payments of $230,000.

199 Mr Graham, NoE at 2483/1, Ms Trotman, NoE at 1959/3–7, 1960/23–26.

[503] Impairment testing had occurred at regular intervals since acquisition of the businesses. Mr Seear's reply brief included a table of the values that NZX attributed in various contexts to the intangible assets acquired with the grain exchange. That table provided, in part, as follows:[200]

Date	Parent Carrying Value (NZ$'000)	Group Carrying Value (NZ$'000)	Impairment (NZ$'000)	NPV (NZ$'000)
31/10/2010		$8,527	-	$16,144
31/12/2010	$11,068	$8,725	-	$16,542
30/06/2011	$10,901	$7,932	-	$15,330
31/12/2011	$10,542	$7,991	-	$15,498
30/06/2012	$10,643	$8,214	-	$14,879
31/10/2012	$10,542	$7,991	-	$11,253
31/12/2012	$7,868	$8,031	-	$11,768
30/06/2013	$7,352	$7,440	-	$8,223
31/10/2013	$7,663	$7,139	-	$7,823
31/12/2013	$4,744	$4,744	$2,411	$5,069
30/06/2014	$5,062	$4,294	-	$4,744
31/10/2014	$5,522	$4,149	-	$4,375

[504] Ms Trotman's reply brief criticised these carrying values as being "not correct". The only element that she specifically criticised was for the period as at December 2014, which I have omitted.[201]

[505] On Mr Seear's analysis, NZX attributed to the assets values greater than it had paid for them for some three and a half years.

[506] Mr Graham's opinion was that these earlier valuations by NZX for the purpose of testing whether an impairment was required should not be relied on. The valuations depended on future revenue assumptions, which he described as "massively out of kilter".[202] On the basis of longer experience of on-going poor performance of the grain exchange, Mr Graham preferred to ignore the earlier projections of future performance, and apply a much more pessimistic projection of likely revenues.

[507] I do not question the objectivity that Mr Graham applied to his task. However, he would likely be influenced by the views of the future prospects for the

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200 Seear reply brief at [44].
201 Trotman supplementary brief at [23].
202 NoE at 2483/3.

businesses held by those responsible for them at the time of his instructions. It is impossible to tell whether those attitudes are influenced, even subconsciously, by the adverse picture NZX seeks to draw of the value of the businesses for the purposes of its claims in these proceedings.

[508] Further, a consequence of Mr Graham starting "with a clean sheet" as at December 2014 is that his projections from that time forward take no account of the impact on value of the manner in which the businesses had been operated since acquisition five years earlier. Bearing in mind Tipping J's observation in *Altimarloch* that my task in assessing quantum is to reflect the extent of the loss actually and reasonably suffered by a claimant,[203] I am not prepared to disregard NZX's own valuations of the business on Mr Graham's approach to the task.

[509] The audit and risk committee's considerations of impairment appear to have applied consistent standards. Therefore the absence of impairment until 2013, and the increased impairment since then, must be taken to reflect the value assessed in light of the business conditions confronting the grain exchange, at each of the balance dates.

[510] The impact, if any, of depreciation on the revaluations was not analysed in the evidence. At the very least, depreciation could not result in an increase to the valuations, so it can be disregarded.

[511] NZX argued that Ralec could not rely on the contemporaneous NZX valuations between settlement and 2013 without adducing evidence from their own expert undertaking that valuation exercise. I do not agree because it was open to Ralec to rely on NZX's own valuations as being the best informed contemporaneous assessment of value. Unless Ralec contended for higher values, it was appropriate, and certainly sufficient, for it to adopt NZX's values for the purposes of its challenge to NZX's claim that it had suffered a reliance loss.

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[203] *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 180, cited at [466] above.

[512] There are two points which support the conclusion that recoverable loss cannot be made out by NZX. First, the overwhelming proportion of the purchase price paid was for rights to software. NZX's own estimations of value reflect its on-going opinion for a number of years that it got value for money on those assets. In quantifying a reliance loss, at least the starting position is that NZX should make out the difference in value at the date of Ralec's breach, between what was paid under the SPA and the value of what it received. That approach eliminates the need to take into account amounts spent on maintaining or improving those assets post-settlement, in order to reconcile a reconstructed value at a later date to contrast that with the purchase price actually paid. On that approach, NZX certainly suffered no loss. It is simplistic, but nonetheless valid, in considering the reasonableness of NZX's claim to allocate the consideration provided for in the SPA to the components of what was being acquired.

[513] NZX entered into a licence agreement with NZX4, that it treated as being at arm's length, and was paid the licence fees contracted for under that agreement. From NZX4's perspective, there were no fundamental complaints that the software could not carry out the functions for which it was intended. Rather, NZX's complaint is that the grain trading business, which Clear represented would be available to utilise the software, has not materialised.

[514] My finding below is that NZX is not liable for the earn-out payments, or any measure of damages payable to Ralec for not affording the businesses a better opportunity of achieving the earn-out targets. It follows that NZX has not paid the components of the total purchase price that reflected the value of successfully growing the businesses consistently with Clear's representations: NZX has not had to pay for what it expected out of the contract but did not get.

[515] Secondly, the breach made out by NZX is of a contract to acquire the assets of a start-up business in a novel area that was a high risk investment. This was not, for instance, a case in which NZX relied on a warranty that the business would continue to be profitable, consistent with a number of prior years' trading. If that were the case, NZX could then claim the warranty was breached because the business had failed to trade profitably, within relatively close margins of what had

been projected. This point is relevant to the significant component of Mr Graham's reliance loss calculation reflecting opportunity costs, calculated at a discount rate of 12.43 per cent. In contrast, Mr Seear would have applied a discount rate of 58.79 per cent, given the high risk nature of the start-up business. In the end, it is unnecessary to attempt to resolve this stark difference, but it would most likely be materially higher than the rate Mr Graham settled on.

[516] NZX appreciated the need to provide additional working capital for the businesses. In that situation, NZX cannot claim as a reliance loss every dollar it had to commit by way of working capital to the businesses. It did so in the hope of expanding the volume of trading on the grain exchange, as well as to maintain the capacity of the software (that is, carrying out "bug fixes"). On this point, I am not able to attempt a break-down of the inter-company funding component of Mr Graham's reliance loss calculation. No doubt a part of that amount of some $7.1 million would be attributed to maintaining and enhancing the software, the valuation of which has been the main focus in assessing the prospect of reliance loss being made out. However, it is also likely that the greater part of inter-company funding was committed by NZX to fund initiatives to expand the size of the grain exchange business. I have found that NZX was not obliged to pay for that business in the sense that it was to be reflected in the subsequent earn-out payments.

[517] I note that one of the areas of challenge to Ms Trotman's reconstruction of separate accounts for the Ralec businesses was how the time of tech team employees was allocated to non-Ralec business IT projects, and the value attributed to capitalised costs recognised in developing those other projects. No absolute precision in those matters is possible. It does mean, however, that NZX could not make out with any precision the operating losses within the Clear businesses, when costs incurred by it had been expended on other NZX businesses.

[518] It follows that NZX has been unable to make out any material extent of recoverable loss resulting from Ralec's misrepresentations. Because the same analysis applies in considering loss for breach of warranties, the analysis I have undertaken is sufficient to determine that NZX can also not make out recoverable loss for breach of warranties.

[519] The comparable consideration of damages under s 43 of the FTA, once misleading or deceptive conduct is found to exist, is whether that conduct was either the, or an effective or operating, cause of loss or damage.[204] In this case, NZX could not make out, on any different approach to the inquiry, that loss or damage has been caused by Clear's misleading or deceptive conduct. Accordingly, the analysis already undertaken is determinative of NZX's inability to make out any relevant loss or damage on its cause of action under the FTA.

Was NZX or NZX4 the appropriate claimant?

[520] In light of my findings that NZX cannot make out material loss on either a reliance or expectation basis, I record relatively summarily my views on Ralec's argument that any recoverable loss ought to have been claimed by NZX4.

[521] NZX4 operated the businesses in Melbourne. It was also the entity in which NZX placed other Australian agricultural businesses, Profarmer and ACF, so that the revenue and expenses that Ms Trotman had to deconstruct included costs for those as well. One point Mr North made was that it was impossible, by the time Ms Trotman undertook her exercise, to accurately attribute which of the businesses being operated by NZX4 had required various injections of additional working capital that had been provided over the period by NZX.

[522] More fundamentally, Ralec argued that NZX's claim for losses it allegedly suffered were misconceived because it would require overlooking the separate legal identity of NZX4, and required the Court to "look through" NZX to the financial consequences of trading by NZX4. On or shortly after completion, NZX had transferred all of the assets except the software to NZX4 at cost. It entered into a licence agreement with NZX4, characterised as being at arm's length, for use of the software, and on which it charged a royalty. Mr North's argument was that, at that point, NZX had dealt with the consequences of the acquisition on a no profit, no loss basis.

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204 *Red Eagle Corporation Ltd v Ellis*, above n 88.

[523] Mr North argued that the circumstances of the claim were not ones in which the Court ought to lift the corporate veil. Further, that a parent company could not claim as its own, losses incurred by a subsidiary. Mr North cited decisions in which creditors of a subsidiary were forced to accept that (in the absence of a guarantee) they could not pursue their claim against the parent if the subsidiary was unable to pay.[205]

[524] The requirement to respect separate legal personality in enforcing debt obligations incurred by a subsidiary is one matter. It is a different matter for a parent company to pursue claims against another party to a contract it has entered into for the losses caused to the parent by virtue of its funding the relevant loss-making activities through a subsidiary.

[525] Both parties cited the English Court of Appeal decision in *Gerber Garment Technology Inc v Lectra Systems Ltd*, which considered an inquiry as to damages in a claim for patent infringement.[206] The plaintiff was a company incorporated in the United States that had subsidiary companies incorporated in other countries, including in the United Kingdom and Belgium. Those subsidiaries did not pay dividends. Instead, transfer prices were set retrospectively as between the companies in the group, having regard in particular to the ability to minimise the overall group's tax liabilities in the various countries in which they operated. The trial judge had assumed that every dollar lost to a wholly-owned subsidiary by infringement of a patent was a dollar lost to the parent.

[526] The Court of Appeal was divided in its analysis on the facts as to whether that proposition should apply to the circumstances of the plaintiff in that case. One issue was whether the patentee (the plaintiff) could claim, by virtue of its shareholding, for losses suffered by its subsidiaries. The Court was agreed that, as a matter of law, the parent of a wholly-owned subsidiary can recover damages in respect of the parent's loss, caused by misfortune that has fallen upon the subsidiary, if the parent has a cause of action against the wrongdoer, but the subsidiary does not.[207] Staughton LJ agreed with the trial judge that in the circumstances of that litigation the parent was

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205 For example, *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567.
206 *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 (CA).
207 At 456.

entitled to a presumption that a dollar lost to the subsidiary was a dollar lost to the parent. On the facts, the majority of Hobhouse and Hutchinson LJJ came to the contrary conclusion that there should not be anything in the nature of a rebuttable presumption of fact in favour of a parent having suffered equally in a loss quantifiable by a subsidiary. Respect must be maintained for the property held in each separate legal entity. The majority considered that the separate business of the subsidiary in each jurisdiction precluded the plaintiff claiming that the financial consequences were the same as if the businesses of the United Kingdom and Belgium subsidiaries were accounted for in a single group with the USA based patentee.

[527] I agree with Mr Cooper's submission that this is a finding against the recoverability by a parent of losses that occurred in a subsidiary, on the facts of the case in *Gerber*. The case reinforces the requirement for a parent to make out the loss that it has suffered, but that does not preclude a claim advanced on that basis. What is required is to prove in the circumstances of the economic activity undertaken, and the relationship between the parent and its subsidiary, that the loss claimed to have been suffered by the claimant has indeed been so.

[528] In this case, NZX relied on the pre-contractual representation as to the likely capacity for the businesses in ensuing periods of trading. Working capital would have to be provided by NZX and, if the businesses had prospered, NZX would be liable to fund the earn-out payments. If recoverable loss had been made out in this case, then I am satisfied that NZX would have been able to claim it on the reliance analysis it advanced.

Can Ralec make out recoverable loss?

[529] Ralec succeeded in its first cause of action claiming breach of cl 9.6(c) of the SPA because NZX failed to take into account its obligations under that clause. To succeed for an award of damages, Ralec must establish recoverable loss. There are two ways in which loss could be made out. Ralec could show:

(a) that a different level of resourcing, which NZX could reasonably be expected to have committed if it had regard to the earn-out targets, would have resulted in the targets being met; or

(b) loss of the chance to achieve that outcome.

[530] Where damages are awarded for loss of a chance, the claimant recovers for an outcome that may or may not have happened, rather than for an outcome which is proven on the balance of probabilities.[208] This does not require the claimant to prove that the favourable outcome was more likely to occur than not.[209] Instead, the question is whether the chance that was lost was a real and substantial one, as opposed to a chance that is merely speculative.[210]

[531] Ralec relied on a counterfactual analysis to show that if a different resourcing strategy was applied, the targets would have been met. NZX submitted that the earn-out targets were unrealistic and would not have been achieved even if a different resourcing strategy was applied.

[532] I will first review the evidence relied on by each side. Then I will consider certain influences on NZX's management of the businesses before considering other suggested strategies that NZX could have applied and how these may have affected the business outcome. The question is whether there was any reasonable prospect that the targets could have been met. That leads to a consideration of the prospects for successfully creating the Agri-Portal.

[533] The context in which NZX's obligation under cl 9.6(c) was assumed has significant bearing on what was reasonably required to discharge it. The obligation to have regard to the earn-out targets was assumed in circumstances where NZX could reasonably have expected that the grain exchange would perform, even in adverse circumstances, to a level that amounted to, say, 50 per cent, or at worst 40 per cent, of the projected level of trading. Providing additional resourcing to

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208 See, for example, *Chaplin v Hicks*, above n 188.

209 *Martelli McKegg Wells & Cormack v Commbank International NV* (1996) 10 PRNZ 153 (CA).

210 *Davies v Taylor* [1974] AC 207 (HL); *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA).

double the level of trading (if performance was at 40 or 50 per cent) is an entirely different order of magnitude than having to virtually start again. As matters developed, the volume of trading needed to be increased from some 14 per cent to 100 per cent of the agreed target. The magnitude of the increase required was much more significant than NZX ought reasonably to have anticipated when it made the commitment.

Ralec's evidence

[534] Messrs Thomas and Pym each provided confident assessments that the grain exchange would have achieved the earn-out targets if adequately resourced. Ralec called three expert witnesses to give evidence on the prospects of achieving the earn-out targets. First, Mr Mitchell Morison, who was instructed to analyse what he considered to be the strategic advantages of the Clear exchange, the disadvantages it had, different initiatives that might have been developed to help the business grow more quickly, and how the exchange might have attracted a further BHC to enter into an integration agreement with Clear.[211] Mr Morison identified a number of positive business opportunities available to Clear. Ralec invited me to find that the cumulative impact of these opportunities would have created a realistic prospect for achieving the earn-out targets. Mr Morison did not opine that adoption of the strategies he favoured would have enabled the earn-out targets to be reached. Nor did he venture any percentage prospect of that outcome, if some or all of the strategies had been adopted.

[535] In applying his business judgement to these topics, I found Mr Morison for the most part reasonably measured, but some aspects of his projections for greater prospects for the grain exchange were more optimistic than an objective analysis of all relevant aspects of the grain industry could justify.

[536] The summation of Mr Morison's suggested strategies was listed in Ralec's closing submissions as follows:[212]

(a) expand the business development team nationally;

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211 A brief summary of Mr Morison's experience is at [35] above.
212 At [971].

(b) engage a professional call centre;

(c) undertake a national marketing/promotion/advertising campaign;

(d) pursue strategic buyer and BHC initiatives;

(e) target growers in Western Australia and South Australia; and

(f) secure a long term agreement with a large exporter.

[537] Mr Morison had been briefed that NZX had committed to spending $100 million on agri-businesses, and within that to spending a significant amount on development of the grain exchange. His analysis was provided without costing his suggested initiatives. Therefore he did not provide any evaluation of the cost effectiveness of his suggested strategies. It represented an aspirational "growth at any cost" analysis. When invited to reconsider his opinions in light of additional matters put to him in cross-examination, Mr Morison did make a number of concessions.

[538] The strategies Mr Morison proposed would be more relevant if NZX's obligation under cl 9.6(c) was an unqualified one to do everything possible to increase volumes so that the earn-out targets would be met. However, I am not satisfied that his approach was equally appropriate where the commitment is a somewhat lesser one to have regard to what might be done to achieve those targets. That is not to say that NZX could have rejected any initiative that appeared unlikely to return a profit on the costs it would incur, in the short to medium term. In taking on an embryonic business NZX had to expect that profitable trading on the scale it anticipated might be some distance away.

[539] Ralec also served a relatively extensive brief from respected Melbourne economist, Philip Williams. Mr Williams, a former academic and current consultant on topics including economic issues arising in competition law disputes, has provided expert economic evidence in numerous cases raising such issues, on both

sides of the Tasman. NZX elected not to cross-examine Mr Williams and I was accordingly invited to treat his economic analysis as being unchallenged.

[540] Ralec also relied heavily on the analysis of Mr Seear, the expert accountant it retained, to make out the prospects of the businesses reaching the earn-out targets, had they been resourced and directed differently. Mr Seear made his own findings on what he interpreted the subjective expectations of the parties were for the volume of business and how projected volumes were likely to be achieved. His approach attributed relevance to those subjective expectations because he saw them as influencing the approach taken to the obligation under cl 9.6(c). Mr Seear also drew on the economic analysis undertaken by Mr Williams, and the grain market analysis undertaken by Mr Morison, to make his own findings of fact as to the relative likelihood of the businesses achieving the earn-out targets. The result was an aspirational version of what Ralec would want me to find on this aspect of the case, so as to qualify Ralec for damages for NZX's breach of the cl 9.6(c) obligation.

[541] NZX objected to the admissibility of Mr Seear's analysis, on the basis that he advanced and relied on a variety of opinions clearly outside his area of expertise as an accountant. NZX claimed his evidence amounted to an improper attempt to present answers to all aspects of the ultimate issue as to whether Ralec has suffered recoverable loss.

[542] There was substantial content in Mr Seear's evidence that went beyond that which an accountant with his qualifications might appropriately offer as expert opinion evidence. I intend no disrespect to the very substantial extent of reading and analysis of the evidence of other witnesses (including transcripts of cross-examination) that Mr Seear undertook. In numerous respects Mr Seear's analysis depended on opinions he had formed about the likelihood of the businesses achieving certain outcomes that reflected his non-expert analysis of the evidence of others. It is my task to assess all of the evidence, and it is inappropriate to give weight to Mr Seear's conclusions, to the extent that they rely on his non-expert findings, some of which I am unable to agree with. Mr Seear's expressions of opinion on the likelihood of the businesses achieving the earn-out targets that relied

on the analyses of other witnesses and the pre-completion subjective expectations of the parties cannot be substantially helpful to me.

NZX's evidence

[543] NZX's response was that, as matters transpired, the earn-out targets were quite unrealistic and there were no likely prospects of achieving any of the earn-out targets, irrespective of what changes NZX may have made, or additional resources it may have committed.

[544] NZX adduced evidence from Mr Phillip Holmes who provided his own review of the Australian grain industry, including the position of the BHCs, the timing and impact of deregulation, the established relationships between industry participants and the ways in which grain is sold.[213] Mr Holmes then provided an analysis of the advantages and disadvantages of the Clear model, leading to his conclusions that the targets set were unrealistic in the extreme. Mr Holmes' view was that any significant measure of success, such as contemplated by the earn-out targets, would take many years to achieve.

[545] NZX also called evidence on the hurdles confronting any significant success for the exchange, from Mr Ron Storey. A substantial part of Mr Storey's evidence was a factual review of the subsequent history of the grain exchange. Mr Storey had first-hand involvement in that, and there was no challenge to the admissibility of the factual review he undertook.[214]

[546] Ralec objected to the admissibility of opinion evidence from Mr Storey. This was on the grounds that he had not completed an acknowledgement of compliance with the Code of Conduct for Expert Witnesses from sch 4 of the High Court Rules, and that he was not sufficiently impartial, given his on-going consultancy relationship with NZX.

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213 A summary of Mr Holmes' experience is at [34] above.

214 There were numerous disagreements between witnesses for each side as to the accuracy of statistics cited in respect of volumes in the Australian grain trade.

[547] I am not satisfied that Mr Storey's relationship with NZX (which included a period managing the grain exchange for NZX) renders the opinion evidence he gave about the prospects for the businesses inadmissible. His evidence was provided on the basis that he was not independent of NZX. Mr Storey does not have any personal interest in the outcome, but he did identify with the manner in which NZX managed the businesses and that is a factor in the weight I can attribute to his opinions. I am not persuaded that he is partisan to an extent that requires me to exclude his opinions entirely.

[548] Ralec criticised the analyses of the prospects of the businesses by Messrs Holmes and Storey on the ground that they were not adequately informed. In particular, Mr Holmes had not been advised of what Ralec treated as NZX's commitment to spend $100 million on agri-businesses, including substantial amounts within that allocation, on developing the grain exchange. Further, Mr Holmes had not been shown the views of Mr Tutt (a CBH executive in Western Australia) about the prospects of the grain exchange being able to complete an integration agreement with CBH.

[549] I have taken into account the limits on the information available to Messrs Holmes and Storey, but I am not satisfied that their evidence is rendered invalid by the limits on the information they had. Both demonstrated a sound grasp of the market conditions in which the grain exchange was struggling to obtain a foothold.

[550] The Clear exchange was confined to marketing harvested grain that was in the possession of a BHC. In the general market, broker transactions could occur pre-harvest, when the grain was still on the farm or in some other private storage facility.

[551] Mr Storey produced a schedule detailing the total amount of Australian grain production. This was divided into regions and how it was dealt with after leaving the growers, for each of the seasons from 2009/2010 to 2014/2015. There were differences in opinion between the experts as to the accuracy of some of the data cited, but this was sufficiently reliable for the indicative positions relevant to my analysis. That data included the following:[215]

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[215] Storey BoE, sch 2.

	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Total Australian grain production	34,589,743	43,212,120	46,683,520	39,872,472	44,399,276	39,985,776
Total CGX trades	259,000	405,000	730,000	597,000	608,000	532,000
Estimated CGX market share of GrainCorp receivals	2.36%	2.63%	5.80%	5.56%	7.23%	7.07%

[552] Mr Williams criticised the way Mr Storey constructed his grain production statistics. He challenged the exclusion of significant parts of the Australian grain production from that notionally available to Clear where growers disposed of their grain via pools, or means other than through BHCs. In essence, Mr Williams' point was that growers did not have formal contractual commitments as to the manner in which they marketed their grain for future years. Accordingly, he stated the target market for the grain exchange ought to include, in the seasons after 2009/2010, grain that was historically dealt with in those other ways, but which might have been available to the grain exchange had the businesses been proactive in other ways. Understandably, the larger market would provide the grain exchange with many more opportunities to expand.

[553] Mr Williams' perspective on "available" grain may be valid in constructing a theoretical alternative scenario. However, Mr Storey's exclusion reflects the reality of what was feasible given the modest level of trading, particularly in 2009/2010 when strategic assessments had to be made. Based on the statistics of the total Australian grain crop provided by Mr Holmes,[216] the tonnes traded as a percentage of the total crop was 0.75 per cent, and the tonnage did not increase beyond 1.56 per cent.[217]

[554] Mr Holmes analysed the segment of the total grain market that was potentially available to trade on the exchange as being relatively limited. It was confined to grain stored by BHCs so that receipts for the type, weight and location of grain were available to facilitate trading. Grain committed to a sale before leaving the grower's property was excluded, both where it was handled through BHCs and where it had been pre-sold by other means. It also excluded grain dealt with by growers through pools, although this mode of sale was becoming less dominant prior to deregulation. In 2009, it also excluded grain that was stored on-farm or in private storage arrangements outside the BHC system. Clear's estimate was that up to

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216 Holmes BoE, table 2.

217 See [27] above.

50 per cent of the grain was being pooled by growers and not traded on the open market,[218] whereas Mr Holmes' estimate was that around 35-45 per cent was still being pooled in the 2008/2009 season.

Influences on NZX's management of the business

[555] Before evaluating the criticisms of how NZX managed the grain exchange during the period in which the earn-out targets might be reached, it is relevant to consider how NZX approached its task. Reflecting on all the evidence, I find that NZX's approach to the operation of the businesses was affected by at least the following four factors. They are not exhaustive, but are clearly material.

[556] First, Mr Weldon and other senior management within NZX were very promptly disillusioned with the performance of the grain exchange. It was rapidly apparent that trading was not taking off at all. A trading volume of 14 per cent of the targeted volume was not missing the target by an explicable margin, it was a resounding failure, with little scope for optimism that it would markedly improve.

[557] Secondly, in January 2010, Mr Weldon became very concerned about the state of NZX's overall financial position. He commented that he had never been "this affirmatively worried". He observed that some areas were massively underperforming relative to their forecasts. This included a number of other NZX businesses, as well as Clear. He observed, "we may need to put some sort of freeze in place".[219] Clear, along with other businesses, were identified as non-revenue generating units which may require re-assessment in light of a wider revisiting of NZX's financial position.

[558] Thirdly, there was a rapid souring in the personal relationships between Mr Weldon and Messrs Thomas and Pym. During due diligence, Messrs Thomas and Pym had represented that they could drive the levels of growth that were needed to reach the earn-out targets. However, post-completion Mr Weldon promptly came to the view that they were not competent to fulfil these roles.

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218 CB3/01639.
219 CB21/16509.

[559] Mr Thomas was arguably constructively dismissed by Mr Weldon's presentation of a harsh performance assessment in April 2010. From NZX's perspective, many of the criticisms of Mr Thomas were no doubt seen as appropriate. Others of the criticisms were coloured by the souring of personal dealings between the two men. No fine employment law judgement is required, but the loss of any positive working relationship was a factor in NZX's management dealings with the Melbourne businesses.

[560] As to Mr Pym, I find that he was bullied by Mr Weldon. At least to a material extent, he moderated or changed his own views to appease Mr Weldon in attempts to stay on side with him. Mr Pym spent time on matters at Mr Weldon's direction that did not best utilise his expertise with the technology.

[561] This lack of a positive relationship in the dealings between NZX's senior management and Clear's management in Melbourne is relevant to the manner in which NZX should reasonably have discharged its resourcing obligations under cl 9.6(c). In an ideal world, NZX's CEO might reasonably be expected to discuss with Ralec how the grain exchange's dismal performance affected NZX's analysis of how to appropriately resource the businesses. Ralec pleaded a separate breach of cl 18.10 that arguably such a dialogue was expected. Although I have not found any breach of that contractual obligation, the dialogue between the parties could well have been on a more constructive level, had the personal relationships remained positive.[220]

[562] A point would have been reached by January or February 2010 when objectively there would be no realistic prospects of reaching the target of trading 1.5 million tonnes in the 2009/2010 season. A prudent business owner at that time, obliged to appropriately resource the businesses having regard to the earn-out targets, could take into account that the targets could never be achieved, regardless of the initiatives pursued.

[563] By, say, February 2010, NZX might reasonably have said to Ralec that the lack of uptake on trading on the exchange meant, in its reasonable business

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[220] See [353]–[356] above.

judgement, that no reasonable level of additional resources could possibly achieve the June 2010 earn-out target. The parties could then have refocused on the possible achievement of longer term earn-out targets. No dialogue of that type occurred.

[564] The fourth factor was a mismatch of expectations. The projected P&L provided to NZX in early September 2009 projected how the grain exchange might achieve the earn-out target of trading 1.5 million tonnes by 30 June 2010. The revenue component of that projection contemplated trading 1.5 million tonnes of grain at an average handling fee of about $2 per tonne. This was consistent with earlier representations Clear made during due diligence that trading 1.5 million tonnes was an achievable target. Clear had also provided assurances that NZX could expect the business to be maintained on the projected level of operating expenses.

[565] I have found that Messrs Thomas and Pym did not qualify the representations about performance in the projected P&L. Notwithstanding that, they expected that NZX would readily be persuaded to spend substantially more on promoting and developing the grain exchange. Those expectations were likely encouraged by the passion Mr Weldon had demonstrated to increase the business to a level at which the trading data it generated would have proprietary value.

[566] Clear's pre-contractual representations were reasonably interpreted by NZX as meaning that at least the bulk of the trading of one million tonnes of grain under GrainCorp's control would be traded by GrainCorp itself.[221] In the early months of 2010, NZX had difficulty in identifying the reasons for the huge gap between projected levels of trading and what was being achieved. One of the issues NZX had difficulty comprehending was why GrainCorp had not traded. The answer (known to Messrs Thomas and Pym at the time) was that GrainCorp's head of trading was opposed to any trading by GrainCorp on the Clear exchange.

[567] NZX therefore committed to the terms of the cl 9.6(c) obligation, and took control of the grain exchange under two material misapprehensions. First, that the projected revenue was likely to be achievable on the projected level of expenses, when Messrs Thomas and Pym in fact anticipated substantial further funding would

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[221] See[167]–[170] above.

be necessary. Secondly, NZX believed that GrainCorp had, at least in some qualified terms, agreed to trade one million tonnes of the grain it was responsible for listing on the Clear exchange, and that Messrs Thomas and Pym agreed with that assessment. The reality was that Messrs Thomas and Pym were aware that GrainCorp could not be relied on to undertake any meaningful level of trading.

[568] I now return to the second factor affecting NZX's operation of the businesses, namely Mr Weldon's concerns at NZX's overall liquidity.[222] It invites an argument for Ralec that NZX provided less resources for the businesses than it would otherwise if it was complying with its cl 9.6(c) obligation, for reasons other than the poor performance of the grain exchange. I am not satisfied that this supports Ralec's claims to have suffered recoverable loss. The extent of the resourcing commitment was subject to a reasonableness test. I have found that NZX breached the cl 9.6(c) obligation by not positively considering what resources were required to afford the businesses a reasonable opportunity of achieving the earn-out targets. I am not satisfied that any influence of other financial constraints on NZX would have made NZX's breach any more serious, or alter the analysis of whether Ralec could make out recoverable loss flowing from that breach.

The forces at work

[569] Mr Williams' economic analysis suggested that the Australian grain market had the features required for an efficient exchange (such as the grain exchange) to be established successfully. Further, once an organised market such as the exchange was established, it would be unlikely to be challenged by a second entrant competing in the operation of that market. As a matter of economic theory, a market such as the grain exchange ought to succeed, but at a rate that could not be reliably predicted. Its progress would depend on the liquidity of the exchange, in the sense of more or less matching volumes of sellers and buyers.

[570] It is somewhat facile for NZX to criticise the economic analysis in Mr Williams' evidence, without testing him in cross-examination. NZX invited me to reject his evidence because it assumed an exchange starting out in a new

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222 See [557] above.

environment, whereas the grain exchange started in an established market which was dominated in each region by BHCs enjoying a strong position. Those dominant players and others with vested interests to protect were under threat from any significant success with the grain exchange. I am not inclined to disregard Mr Williams' evidence merely because it does not adequately take into account the features of the existing environment that NZX cited. However, I incline to the view that in analysing the material impediments to greater success for the grain exchange, Mr Williams' analysis does not give appropriate weight to the difficulties represented by the existing market structures, and the incumbents' opposition to change.

[571] Mr Holmes identified a number of difficulties confronting the grain exchange in its attempts to expand. First, the measure of deregulation in 2008 was not as extensive a game changer as those who promoted the grain exchange perceived it to be. It related only to wheat exported from Australia in bulk. Over the previous 10 to 30 years there had been deregulation of all aspects of the domestic wheat market, and also the market for the export of wheat in bags or containers. That meant that there were well-established operators in the grain market, with existing marketing channels ready and willing to take up the void created by deregulation of the last component of the wheat market.

[572] Mr Holmes observed an increase in the number of grower brokers and consultants that had entered the industry since deregulation. They were joining established means of facilitating the marketing of growers' grain. They were perpetuating relationship-based models with which he considered growers were familiar, and which they trusted. None of those who enjoyed positions of dominance under the existing marketing arrangements had reason to encourage the grain exchange, and in general they were financially incentivised to oppose it.

[573] The second feature cited by Mr Holmes is that the grain industry is conservative and would be slow to adapt to change. His opinion was that it could take five to 10 years, or even more, for a new entrant to establish a significant foothold in the Australian grain market. Although there are acknowledged differences, Mr Holmes cited the experience of ASX which took some six years to achieve liquidity in a grain futures market that it operates.

[574] The conservatism of growers is linked to their limited familiarity with technology. The grain exchange operates entirely via the internet. A lack of familiarity with computer-based systems for their farming business was likely to add to the reluctance growers would have to embrace this innovation. Mr Holmes observed that contact between growers, marketing consultants and buyers was predominantly by way of personal contact using mobile phones. The small number of large "corporate" farmers, who might be more familiar with conducting aspects of their business by computer, were those most likely to be closely aligned to buyers or traders or consultants on whom they relied to sell their grain.

[575] My impression from Mr Thomas's evidence was that he had not appreciated the conservative nature of the growers as an impediment to developing the business, but subsequently accepted that it was a material impediment.

[576] The third impediment Mr Holmes identified was that there were several terms on which the grain exchange conducted its business that were unattractive to industry participants. This was particularly so for the participants who would be important to its success, such as large traders and the BHCs. The anonymity of trading on the exchange was likely to cause unease for both sides. For growers, the risk of not being paid was largely managed by the short period of five days for settlement, and the retention of title to their grain until payment was received. However, that still left a perceived risk when compared with the established mode of trading based on relationships, where growers would sell (on much more extended credit terms) only to buyers of good standing whom they trusted.

[577] For buyers, there was no material risk of non-performance by a grower/seller. However, once the exchange was being used for trade to trade sales, issues would arise, such as the capacity of one trader selling to another being able to perform its obligations. Again, the established pattern was relationship-based dealing so that individual judgements could be made on the good standing of the counterparty.

[578] Mr Holmes also cited the somewhat cumbersome processes for growers to list their grain on the grain exchange, and also to subsequently remove the grain if they wished to do so. The GIA provided an arrangement which removed the

cumbersome steps for grain growers on the east coast. These steps remained for growers in South Australia and Western Australia. Mr Holmes drew on statistics Mr Storey had compiled to illustrate that there had been, at least in the 2009/2010 season, a markedly more limited uptake of trading on Clear in those states. Numerically, 650 growers on the east coast had used Clear, leading to 2.4 per cent of the GrainCorp grain being traded on Clear. In contrast, in South Australia there were 113 growers, and in Western Australia 62 growers, who used Clear. Only 0.75 per cent and 0.30 per cent respectively of the available grain in those states was traded on Clear.

[579] Mr Holmes considered the difference in the terms of trade used by the grain exchange, as compared with existing practices, was a source of confusion for growers which would dissuade them from using it. The Clear exchange was out of step on the east coast in requiring sellers to make offers on a "free in store" (FIS) basis, which meant that sellers were liable for storage and handling charges until the grain was available for uplift by a buyer from a BHC's storage facility. Those terms also required the seller to assume liability for shrinkage in the volume of grain being sold. On the east coast, the arrangement growers were used to was that they would be quoted a purchase price by buyers that built in these costs. Therefore the buyers were responsible for cartage, storage and handling of the grain from the grower's property and shrinkage in the volume of grain ("delivered in store" (DIS) or "track pricing").

[580] The position was the reverse in Western Australia where the norm was FIS, so that growers using the grain exchange in that state would be familiar with the basis of quotes they were considering.

[581] Mr Holmes considered that growers unfamiliar with FIS on the east coast would not readily be able to compare prices cited for transactions via other channels on DIS or track pricing.

[582] NZX did alter this term for trading on the exchange, so that the track pricing model used in other trading on the east coast has also been applied on the Clear exchange. In addition, NZX's ownership of Mr Storey's former business, Profarmer,

has been used to provide a conversion between track and FIS pricing so that those interested could access the comparisons. That feature has been available since 2013.[223]

[583] Ralec criticised NZX for not appreciating the need for these changes more promptly, and for failing to commit the resources needed to re-write the software for the exchange more promptly. Ralec also criticised the failure to promote the availability of those varied terms more extensively. I accept Mr Storey's explanations for the adequacy of NZX's response on this point.

[584] Mr Holmes treated the requirement for buyers to pay within five days of the transaction as a further disincentive for traders to use the exchange. He acknowledged that the industry standards have adapted since Clear introduced this term, so that this is not as relevant a consideration as it was between 2008 and 2010. The industry standard was for growers to sell and pass title to their grain, and then wait to be paid for up to 30 days from the end of the week in which the transaction occurred. Mr Holmes cited the opinion of the managing director of Glencore, who advised that Clear's terms would require an additional $150 million in working capital to buy 2.5 million tonnes, which was the volume of grain it was trading.

[585] I accept that that working capital requirement would be a significant issue. In the case of Glencore, the reaction was that they would "… not hesitate to discount cash purchases by at least $5/tonne … ".[224] The consequence of making this allowance is that buyers' bids would be reduced by that extent. The growers might not appreciate the extent to which the offer price was lowered for that reason and consequently bids might appear to be relatively less attractive.

[586] Mr Holmes also saw the size of Clear's fee and the way it was charged to buyers as likely to cause resistance to using the grain exchange. He cited brokerage fees as ranging between $0.50 and $1, to $2, depending on whether it was grower brokerage or trade to trade business. Clear's fee of $2.50 per tonne was materially more expensive than other options. Imposing the charge on buyers would, for many

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223 Storey BoE at [11.24].
224 CB3/01716.

of them, duplicate costs because large traders were also maintaining their own accumulation networks and supporting systems, including the costs of teams of BDMs, which could not be reduced because a part of their trading was undertaken on the exchange.

[587] As with the working capital costs, if buyers deducted the $2.50 before making the bids equate with buying via other channels, then the bids would inevitably look less attractive to the grower/sellers.

[588] A fourth feature of the grain market that Mr Holmes viewed as an impediment to growth was that the position of the BHCs in South Australia and Western Australia, where ABB/Viterra and CBH respectively enjoyed dominant positions with no substantial competition, meant that an integration agreement with Clear offered little attraction to them. Further, numerous features of the Clear exchange were seen as competing with, or harming their interests. Mr Holmes suggested that that antipathy is borne out by the absence of any integration agreements with them. Without the access to growers' grain that was afforded by an integration agreement, the prospects of Clear gaining any substantial volume of trading in those states were seriously hampered.

[589] Mr Holmes treated GrainCorp on the east coast as not enjoying nearly so dominant a position as was the case with the major BHCs in those other states, giving it a correspondingly greater need to bolster its own position by an arrangement such as it concluded with Clear. The exclusivity this arrangement demanded prevented Clear from having similar arrangements with any other BHC on the east coast. It also prevented Clear from expanding the scope of its business to list grain that was stored on-farm, or in other non-BHC facilities. As GrainCorp had no commitment to make offers on any terms on the Clear exchange, the GIA gave it an advantage in monitoring how the Clear exchange operated, without compromising the freedom of its trading division to use all alternative means of accumulation, in addition to using the Clear exchange if it wished to do so.

[590] Fifthly, there were difficulties in the grain exchange's relationship with the BHCs. Mr Holmes considered that the integration agreement created a perception

amongst other parts of the grain industry that the exchange was aligned with GrainCorp, so to the extent that others in the market saw GrainCorp as a competitor, that status extended to Clear. Mr Holmes considered the integration agreement also hampered growth because the GrainCorp trading division was opposed to using Clear. This meant that the rest of the grain industry saw Clear as being aligned with GrainCorp without that alliance generating trading on the exchange.

[591] In its first season of operation, 2008/2009, Clear had registered as a buyer of grain to obtain access to the storage and handling systems of the BHCs. That led to a cumbersome process (other than with GrainCorp) for transferring growers' grain onto the grain exchange, and also taking it off it again if the grower so wished.

[592] In Mr Holmes' assessment, Clear had not received support or promotion from the main BHCs in any state. As each of them was a major trader of grain within their areas of operation, having extensive and established networks of relationships with both growers and buyers, their lack of support and preparedness to promote the exchange impaired the potential growth of the grain exchange.

[593] Finally, Mr Holmes also considered that Clear's decision to offer the services of the exchange on a "DIY" basis directly to growers alienated it from grower brokers because it became their competitor. Understandably, such brokers would be likely to discourage their clients from using Clear as it would take business away from them.

[594] In summary, Mr Holmes' assessment was that no range of different initiatives in operating the grain exchange could have created realistic prospects for its success. It would be impossible for the exchange to achieve any of the earn-out targets in the three year period. Rather, his opinion was that the grain exchange business would take substantially longer to achieve changes in the somewhat entrenched patterns of behaviour in the industry, as he perceived them.

Different strategies

[595] I turn next to the different strategies that might have been pursued, to increase trading on the grain exchange. The evidence, and indeed submissions, for both sides

failed to maintain a clear distinction between decisions about how the businesses should be resourced in terms of financing and personnel on the one hand, and governance or management decisions on the preferable strategies to pursue to optimise the prospects for growth on the grain exchange on the other. It is not feasible to make that distinction on each issue, and it becomes part of the evaluative task in considering whether additional reasonable levels of resources could have made a sufficient difference to enable the earn-out targets to be met, or to afford a substantial chance of that occurring.

[596] Mr Morison accepted many of Mr Holmes' opinions in his analysis of the Australian grain industry, but disagreed on the scale of the impediments to achieving substantial growth. Mr Morison questioned the integrity of many of the statistics cited by Mr Holmes, suggesting that informal anecdotal sources may not be sufficiently reliable. In reviewing his own analysis in light of Mr Holmes' opinions, Mr Morison agreed that factors preventing the grain exchange achieving a tipping point were the pricing model it had adopted, the lack of regional marketing to growers by the grain exchange, and the exclusivity deal with GrainCorp. In Mr Morison's assessment, each of those problems could have been overcome.

[597] First, the terms of trading on the grain exchange could have been changed. Messrs Storey and Morison agreed that charging buyers the service fee was a disadvantage because that was out of step with usual practices in the industry. In the other modes of trading grain, sellers met the costs of the transaction, whereas Clear levied its $2.50 transaction fee to the buyers. Although theoretically the party required to absorb the transaction cost ought not to make a material difference (given that buyers would simply factor in this transaction cost in deciding the level at which to bid for grain), those with experience in the industry suggested that the imposition of the transaction cost had discouraged buyers.

[598] I accept Mr Storey's point that, having inherited that model as the 2009 season was about to begin, it was too late to change the fee basis for that season. In the following season, 2010/2011, the fee structure was changed so that $1.50 was charged to the buyer and 50 cents to growers. A further change occurred in 2012,

when the fee structure was brought more into line with an independent exchange so that a $1 fee was charged to each of the seller and buyer.

[599] I am not satisfied that criticism of the pace of these changes is warranted. It is artificial to attribute a responsibility to NZX to resource the grain exchange differently by changing the mode of charging fees more quickly, in the hope of increasing the volume of its trading.

[600] Mr Morison's opinion was that the Clear exchange ought to have been encouraging buyers, by offering rebates for significant levels of transactions. Mr Storey's rejoinder to this was that rebates and similar arrangements were negotiated with a number of significant buyers who were interested in procuring them.[225]

[601] Secondly, Mr Morison suggested that integration agreements could be completed with bulk handlers in South Australia and Western Australia. Mr Morison was optimistic that the BHCs in those states would have appreciated the advantages of an allegiance with the Clear exchange, and would have been motivated to reach an agreement because they appreciated that the market was evolving in the post-deregulation environment. Mr Morison thought that BHCs would see integration with the Clear exchange as helping them market their services to their clients.[226] Mr Holmes disagreed with this point.[227]

[602] Ralec filed a formally verified brief of evidence from Mr Colin Tutt, which was unchallenged. Mr Tutt worked for CBH, the dominant Western Australian BHC, from 1974 to November 2015, with a focus on the supply chain for grain and overseeing its transport and shipping. The major issue in his work was getting grain to port and ensuring it was in the right place at the right time to meet shipping commitments. Since deregulation of the sale of bulk export grain, Mr Tutt has been concerned at the prospect of competition for CBH in its provision of storage and handling services. His concern was to keep as many Western Australian growers as possible using CBH's storage and handling facilities. Mr Tutt would have been

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225 Storey reply brief at [2.18] cited such arrangements with Riverina, Bunge, Noble and GrainCorp.
226 Morison BoE at [217], [218].
227 See [588] above.

interested in exploring the prospect of an integration agreement with the Clear exchange because he saw it as an opportunity to offer additional services to growers that might incentivise them to continue using CBH's facilities. He would have expected any such integration to be at Clear's expense, and his brief gave no indication of what terms CBH would require for such an agreement.

[603] Mr Tutt understood Clear's contact with CBH about a possible integration agreement had been made with a Mr Ayres, who was based in a small east coast office maintained at the time by CBH. Mr Tutt implicitly suggested that Mr Ayres would not have been the operative decision-maker for CBH if the prospects for an integration agreement were being seriously pursued.

[604] Mr Tutt's responsibilities would not have extended to deciding on any integration arrangements with the Clear exchange. His focus was on retaining the business of growers for CBH (which was a growers' co-operative), and it is reasonable to anticipate that more senior executives with overall responsibility for governance would have dealt with the prospect of any integration agreement.

[605] In Mr Storey's reply brief, he commented that the reasons Mr Morison listed as to why BHCs might wish to integrate with Clear had not proven to be compelling. He confirmed that, during his tenure with Clear, soundings were taken with the BHCs in Western Australia and South Australia, but that they were not interested in an integration arrangement. As explained above, the BHCs in both states enjoyed dominant positions and, having little competition, did not see the benefits of dealing with Clear in the same way that GrainCorp had done on the east coast where it faced real competition.[228] Mr Tutt's evidence does not substantially alter the validity I see in Mr Storey's analysis that the dominance of CBH's position in Western Australia would make an integration agreement relatively less attractive. Mr Storey also observed that concluding an integration agreement enabling grain warehoused by the BHC to be available for listing on the grain exchange is a different proposition from the BHC persuading growers to use the exchange for selling their grain.

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[228] Storey reply brief at [2.20], [2.21].

[606] Thirdly, Mr Morison suggested as a possible initiative expanding the exchange to cater for the listing of on-farm grain. Mr Storey observed that the main on-farm market is on the east coast and the terms of the GIA prevented Clear from competing in the on-farm market on the east coast. Because there was relatively little on-farm storage in South Australia and Western Australia, Mr Storey dismissed the prospect of expanding the facility to on-farm grain in those states as an option that might materially increase the volume of grain traded on the exchange.

[607] In his reply brief, Mr Morison responded to Mr Holmes' observation that the proposal in his original brief for the grain exchange to offer services to on-farm grain constituted a breach of the GIA on the east coast. Mr Morison accepted that contractual constraint but maintained that the initiative ought still to have been pursued, despite the "unique challenges of developing the contractual terms …".[229] Proposing an initiative that would breach an existing contractual obligation is hardly a sound basis for increasing the business of the exchange.

[608] Fourthly, Mr Morison considered that the business could have been expanded by trading other types of grain. Mr Storey confirmed that wheat, barley, canola and sorghum, which represent about 95 per cent of the total crop, were able to be traded on the grain exchange from the 2009/2010 season. The trading data for Clear showed that other grains that have been added over time, such as lupin, chickpeas, lentils and peas, represented 0.3 per cent of the grains traded on the exchange.

[609] A fifth initiative could be to hire more field staff to engage with growers. Messrs Thomas and Pym gave evidence that NZX would not authorise them to hire additional business development managers (BDMs), or to authorise the hiring of more senior BDMs than were employed. NZX's rejoinder was that Messrs Thomas and Pym should have pursued this initiative by presenting a business case to justify the employment of these BDMs. Messrs Thomas and Pym argued that they were told a business case would be required but were never provided with an appropriate template to adapt for their proposals. I find that NZX did not decline any specific requests for hiring more BDMs, where that had been advanced in writing on terms enabling NZX to assess the merits of the proposal.

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[229] Morison reply brief at [51].

[610] It was generally recognised that personal dealings by appropriate representatives of the grain exchange with growers (or at least the more important of them) was a necessary step, or at least highly desirable, in promoting the use of the exchange by growers. The grain exchange was attempting to break into an industry that was highly dependent on personal relationships maintained with growers. However, NZX was not necessarily persuaded that the best model to adopt was the employment of BDMs located in the field, to make personal calls on growers at their individual properties. The distances involved, and growers' other commitments, placed real limits on the number of growers a BDM could canvass in any given week. Personal visits also involved extensive travel and accommodation expenses.

[611] Clear had employed a senior BDM in Western Australia, Mr Phil Brooks, who was well-known, and apparently well-liked, in the grain industry in that State. Mr Brooks became disenchanted in mid 2010, and resigned on 17 June 2010. He was not replaced. The total employment-related costs for Mr Brooks exceeded by a substantial margin the revenue from grain traded as a result of his promotion of the exchange. On the basis of that experience, NZX had some justification for questioning the prudence of incurring substantial costs with additional BDMs based in the field.

[612] After NZX acquired the grain exchange, it reduced the number and level of experience of the BDMs that were employed in the various grain growing regions. In addition to Mr Brooks in Western Australia not being replaced when he resigned, Mr Nelson, who had serviced South Australia, was dismissed. New BDMs were employed with either no experience, or insignificant amounts of previous experience, in the grain industry. Ralec called two of those, Messrs Tristan Shannon and Byron Wood. Their evidence was to the effect that the reduction in the number of BDMs made it more difficult for them to be effective. They also acknowledged a period of low morale and lack of leadership in their work in the field, especially when they were at a distance from the Ralec office in Melbourne.

[613] Mr Morison considered that substantial expansion of the Clear BDM team, and the employment of experienced BDMs with existing contacts, would have helped expand the extent of business transacted.

[614] However, NZX's experience was that the BDMs did not pay their way in what was a narrowly focused business that could only generate revenue by a fee on sales transacted on its exchange. By comparison with Cargill, the business in which Mr Morison was employed, Mr Storey pointed out that the cost of having a network of 30 BDM staff in the field would be between $3-4 million per year in salary and related costs. The scale of business they were working for, and opportunities to generate revenue, would need to be substantially larger than Clear for that number of BDMs to be sustainable.

[615] Mr Storey did not agree that an extensive network of BDMs would necessarily generate substantially larger volumes of trading on the Clear exchange. His view was that "large growers are difficult to crack".[230] Mr Storey's experience was that the larger growers are well serviced by existing brokers and advisers who offer them preferential treatment, and maintain what are often long-standing personal relationships with them.

[616] In June 2010, NZX decided to bring its BDMs in from the field, and have them all work using telephone and electronic communications, from the Ralec offices in Melbourne. On Mr Storey's analysis, relevant staff have achieved better results under that altered arrangement. I find that the grain exchange business model was sufficiently different from BHCs and brokers for the analogy with the success of BDMs in those other parts of the industry not to be a reliable one. The BHCs were generating income from a wider range of services, and brokers were not carrying the high capital cost of the intellectual property utilised in the grain exchange software.

[617] For the exchange to succeed as it was conceived, it had to break with the traditional mode of operating, which included BDMs servicing growers. Although the number of BDMs employed was a resourcing consideration, which brought decisions on this point within cl 9.6(c), it was reasonably open to NZX to decide not to follow the pattern used in different parts of the grain market.

[618] A sixth initiative recommended by Mr Morison was for the exchange to contract out a call centre using up to 50 callers. They would service enquiries from

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[230] Storey reply brief at [2.35].

growers interested in using the exchange or seeking guidance on how to do so, and make outward calls to promote the exchange to as many growers as they could contact. This suggestion reflected an initiative that had been pushed by Messrs Thomas and Pym.

[619] Mr Storey defended the adequacy and quality of the call centre function that was operated by Ralec in-house. That was recognised as one potentially advantageous model by Mr Morison, who saw a dedicated, knowledgeable "in-house" team of employees as a very valuable sales and support requirement.[231] Mr Storey's reply brief included the following comments on this point:

> 2.44 The call centre size and BDM staff has varied over time, but my experience in running Clear is that there has not been any clear link between the volume traded on Clear and staff numbers (i.e. simply adding in extra BDM resource or extra staff to the call centre does not increase volume). Clear's biggest trading year remains a year when its staff numbers were at their lowest. Market conditions have so far appeared to be a decisive factor, in terms of the volume traded on Clear. Some market conditions suit selling on Clear (e.g. prices not too high or too low, when growers tend to take a longer time to sell) whereas other market conditions do not (e.g. high prices where growers sell quickly using methods they know).

[620] I accept that the approach adopted, to use a smaller, in-house call centres, was reasonably open to NZX in the years after acquisition. I am not satisfied that contracting out a much larger call centre was a step it should reasonably have taken.

[621] A seventh initiative suggested by Mr Morison related to the grower brokers who earned their revenue from an alternative to the service the exchange would provide, and marketing advisers who earned their living advising growers. Both were similarly threatened by the "do it yourself" potential of the exchange. Part of Mr Morison's evidence suggesting a means of reducing this disadvantage was expressed as follows:[232]

> … These market advisers needed to be co-opted into the 'CGX' [the grain exchange] business as long term agents, and offered the prospect of greater earnings from a wider commodity base, once the platform was expanded. By gathering the support of more grain marketing advisers (acting as agents for CGX) through commission payment, these advisers had an interest in

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231 Morison BoE at [196].
232 Morison BoE at [141].

> marketing the platform and promoting the benefits to their clients who generally paid (and still pay) the grain market adviser for this advice and market monitoring service anyhow.

[622] This aspect of Mr Morison's analysis was adopted by Ralec in its closing submissions.[233] Mr Morison also accepted that the Clear exchange had to compete directly with grower brokers.[234] His suggestion of co-opting market advisers, whose antipathy to the exchange would be similar to those of grower brokers, made no allowance for the difficulties in doing so. Presumably they would need to be offered remuneration at least equivalent to their existing earnings, with better future prospects than offered by their existing roles. Successful market advisers would likely take considerable persuasion to change their allegiances. Also, an immediate transformation in behaviour by sellers and buyers was unlikely. This meant that market advisers earning their living by commission payments would be dependent on their ability to transform sellers' marketing behaviour, which would appear to be an unattractive and risky prospect.

[623] To the extent that Mr Morison contemplated the exchange recruiting existing grower brokers, that would require them to turn their backs entirely on their existing mode of doing business. He accepted that their mode of doing business competed directly with the Clear exchange.

[624] In considering the optimistic assessment of Mr Morison and the pessimistic assessment of Mr Holmes, I consider that both of them have been somewhat more emphatic about the positives and negatives than perhaps was warranted. Neither has done so, however, to an extent that their expert opinions were objectionable advocacy for the cause of the party that called them. The projection of market behaviour is a difficult assessment to make with any degree of probability.

[625] In the end, however, I am satisfied that the impediments to progress were certainly far more serious than Mr Morison has treated them, and that for the most part Mr Holmes' concerns at the impediments to progress are realistic. It follows that Ralec cannot make out either that one or more of the earn-out targets would

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233 Ralec closing submissions at [964].
234 Morison BoE at [142].

have been achieved, or that there was a reasonable and substantial prospect of that occurring, had NZX had regard to the earn-out targets when deciding on the required level of resourcing for the businesses.

[626] Once the grain exchange failed to meet the earn-out target for the first season to 30 June 2010, the businesses had also to complete a second integration agreement of the type that was already in place with GrainCorp. Messrs Holmes and Storey took the view that reasonable attempts to do so had been unsuccessful, so that this component of the earn-out targets for subsequent years could not be made out, irrespective of the extent of increase in the volume of trading.

[627] Mr Morison took the opposite view. He considered that GrainCorp's reasons for completing an integration agreement ought to have applied similarly to the dominant BHCs in South Australia and Western Australia. So far as CBH in Western Australia was concerned, there was a measure of support for Mr Morison's view from Mr Tutt.

[628] On all the evidence, Ralec has not made out, on the balance of probabilities, that such a second integration agreement was more likely than not. It therefore follows that I am not satisfied that there was a real and substantial chance of such an agreement being completed, had NZX turned its mind to the resourcing necessary to afford a reasonable opportunity of the 2010/2011 and 2011/2012 earn-out targets being met.

Prospects for an Agri-Portal

[629] The APPP was included within the consideration payments referred to in cl 9.6(c). Accordingly, Ralec advanced claims that NZX failed to resource the development of the Agri-Portal, having regard to the criteria that had to be met in order for the APPP to be made.

[630] The parties were at odds as to what was required to meet the extensive definition of the Agri-Portal in the SPA. Ralec contended that the Agri-Portal constituted the technology platform that would enable NZX to offer the combination of information, access to electronically operated markets and infrastructure.

[631] NZX argued that a core component of the Agri-Portal was sufficient proprietary information to give it marketable value. NZX also emphasised that the combination of features to be developed within three years of completion of the SPA had to be completed and put into operation to its satisfaction.[235]

[632] Ralec's case was advanced on the basis that the parties recognised that work on the Agri-Portal was to be independent of the development of the grain exchange, and that it would proceed irrespective of the level of success with the grain exchange.[236]

[633] From NZX's perspective, the whole Agri-Portal structure depended on the success of the grain exchange as the first of two exchanges expected to generate proprietary data. It was required to show sufficient traction to justify building the other components of the Agri-Portal around it. NZX's evidence at trial was that the commitment of resources as had originally been contemplated simply could not be justified when it became apparent that the grain exchange was falling so far short of any growth profile that would develop trading data with proprietary value. With no realistic prospect for that first component, the commitment to the rest of the platform arguably could not be justified.

[634] NZX's case was that it did continue developing other aspects of its agri-data businesses, including by acquisition of other relatively modest-sized businesses, but only to the extent that those initiatives could be justified on their own terms. However, work that depended on the Agri-Portal offering proprietary data compiled from the grain exchange or other relevant businesses could not be justified given its poor performance.

[635] As with the commitment of resources to developing the grain exchange, the context in which NZX assumed a contractual obligation to work on an Agri-Portal included its then understanding of the likely level of trading on the grain exchange, as projected by Messrs Thomas and Pym as its then operators.

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235 SPA, third schedule, cl 6.1, quoted at [306] above.
236 Ralec closing submissions at [134], [165]–[196].

[636] I find that Mr Weldon had discussed, from the early stages of his dealings with Messrs Thomas and Pym, his target of expanding trading on the grain exchange towards 15 to 20 per cent of the grain market. Achieving growth consistent with that target was important to NZX's rationale in all the descriptions of the Agri-Portal. Any indications that work could proceed on the Agri-Portal independently of the state of progress with the grain exchange were implicitly on the assumption that the grain exchange would perform at least at a level that justified a continued belief in its viability. It would be contrary to all basic expectations for the development of such a venture that it would be pursued despite signs that a necessary component was failing to get anywhere near the volumes needed for the data to have value. I therefore am not satisfied that Ralec can make out an obligation on NZX in relation to the Agri-Portal that existed irrespective of the performance of the grain exchange.

[637] Ralec claimed that NZX breached the cl 9.6(c) obligation in relation to the Agri-Portal, by not providing any resources towards developing it. Ralec also claimed that NZX hampered development of the Agri-Portal by diverting the IT resources of the tech team onto IT projects for other NZX businesses. On Ralec's case, had those funding and resourcing obligations been met, then the earn-out target for the APPP would also have been met. At least, there would have been a reasonable and substantial chance of that occurring.

[638] NZX's response to these claims was, first, that it did commit significant capital expenditure to agri-data projects that would have formed part of the Agri-Portal, had progress with the grain exchange justified its further development. Secondly, the diversion of the tech team personnel was warranted, and was a reasonable business decision for NZX to make the best use overall of that resource, having regard to the evolving priorities of NZX's various businesses.

[639] I find that NZX cannot characterise the work it did on other projects (with the code names Agri-Data, Ingress and Pasta Maker) as constituting compliance with its obligation to attempt to develop an operating Agri-Portal within three years from completion. Although the definitional distinctions are somewhat blurred, the Ingress project was justifiable as a stand-alone means of rationalising investments that NZX had made in Agri-Data businesses. I accept that the IT development work cited by

NZX on its agri-data businesses may well have become components of the Agri-Portal, had the economic rationale for developing the whole Agri-Portal in fact ensued. However, that work was justified for business reasons independent of any conscious attempt to discharge NZX's cl 9.6(c) obligation to build the Agri-Portal.

[640] I have found that NZX's decisions about developing the Agri-Portal were made without explicit regard to its cl 9.6(c) obligation to take into account the achievement of the Agri-Portal earn-out target. However, I also find that the unexpectedly poor performance of the grain exchange significantly distracted NZX from considering its commitment to resourcing the development of the Agri-Portal by having regard to the earn-out target. Any explicit consideration would have been dominated by the failure of the grain exchange to grow by anywhere near the extent needed for its trading data to have proprietary value.

[641] Accordingly, if NZX had conscious regard to what would be needed by way of resources, then it could reasonably have made resourcing decisions not materially different to those that it did make. As a matter of sequence, at the very least there would need to have been reasonable assurances that the first of the two markets for agricultural products that were contemplated as generating data of proprietary value was at a stage that warranted the commitment of further substantial capital investment. On any view, the tiny tonnages traded on the grain exchange compared with the projections made when the Agri-Portal was being planned would cause a reasonable operator in NZX's position to defer significant capital commitments until that critical component was at least a realistic prospect.

[642] Ralec cannot make out recoverable damages for NZX's breach of cl 9.6(c). The issue of damages does not arise on Ralec's remaining causes of action as they were not made out.

COSTS

[643] Both sides may consider their positions vindicated in principle by making out breaches by the other of contractual obligations owed under the SPA. However, where it really matters in commercial litigation, in the recovery of damages, the overall outcome is a nil all draw. In reviewing the totality of the litigation to the

extent competing merits might influence the approach to costs, I am reinforced in my view that neither side should receive an award of damages.

[644] Although Ralec was insignificant in terms of comparative resources and financial strength, both parties embarked extremely willingly on the deal between them, and must be taken to have appreciated the significant risks involved. The team on each side was led by strong and combative personalities, and there can be no suggestion of inequality of bargaining power. Both sides retained professional advisers.

[645] For NZX, this was a new endeavour in an industry where it had no experience, but was one which it hoped would be a critical component of a much larger new venture. Despite a detailed due diligence analysis, the lack of experience, the novelty of the propositions and the embryonic state of the grain market inevitably meant it was a high risk venture. The prospects were oversold, but the first part of the payment that it did make was for assets, principally software, that NZX continued for a number of years to recognise as having value more or less equivalent to what it paid for it, independently of the failure of the grain exchange.

[646] For Ralec, its shareholders had effectively exhausted their own prospects of transforming their novel idea into a business generating viable levels of revenue. They were dependent on a new financial backer. Ralec sold the embryonic grain exchange business to NZX on a basis that shared the risks of that business not succeeding. They were paid at a rate substantially in excess of the value recently attributed to the businesses for the purpose of raising capital from existing shareholders.[237] Ralec should also have accepted that any further payment was subject to substantial risks.

[647] Accordingly, my provisional view is that costs ought to lie where they fall as between NZX and Ralec. Of course, I am not privy to any *Calderbank* offers to settle the proceedings that may have been made, and would need to reconsider my provisional view if any such offers are claimed by the parties to be relevant to costs.

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[237] April 2009 issue of new shares at $0.0003 per share: CB4/03036.

In the absence of such considerations, I would take considerable persuading that costs in favour of either or both parties would be appropriate.

[648] Mr Weldon's position is notionally different. Ralec pursued claims separately against him and it has failed to make them out. However, I do not accept that the inclusion of Mr Weldon in his personal capacity was entirely misconceived. There were possible concerns (not ultimately borne out) that Mr Weldon may have obtained board approval for the acquisition without full and frank disclosure, and his injudicious overstatement about a commitment to invest $100 million was not endorsed by the remaining directors who gave evidence. As matters unfolded at trial, NZX made no attempt to distance itself from any of Mr Weldon's actions or omissions, but Ralec could not be certain of NZX's stance on the point when the counterclaims were pleaded. If Mr Weldon were to pursue any claim for his own costs, I would require disclosure of whether, given the terms of the judgment on the claims and counterclaims, he is entitled to indemnity, directly or indirectly, by NZX. If indeed he is indemnified, then my provisional view is that NZX should absorb those costs as part of a larger nil all draw.

Dobson J

Solicitors:
Bell Gully, Wellington for plaintiff and counterclaim defendants
Duncan Cotterill, Wellington for defendants and counterclaim plaintiffs

Glossary of Abbreviations and Terms

08 IM	2008 information memorandum
09 IM	2009 information memorandum
2ACC	Second amended counterclaim
ACF	Australian Crop Forecasters
2ASOC	Second amended statement of claim
5ASOC	Fifth amended statement of claim
APPP	Agri-Portal Purchase Payment
AWB	Australian Wheat Board
BDM	Business development manager
BHC	Bulk handling company
BoE	Brief of Evidence
CB	Common bundle of documents
CBH	Co-operative Bulk Handling
CRA	Contractual Remedies Act 1979
DIS	Delivered in store
FIS	Free in store
FTA	Fair Trading Act 1986
GIA	Grain integration agreement with GrainCorp
GMSB	Grain Market Software Bonus payment
GMSI	Grain Market Software Instalment payment
IMI	Information/markets/infrastructure
NoE	Notes of evidence of hearing
P&L	Profit and Loss
SPA	Sale and Purchase Agreement dated 5 October 2009
WDDR	Written due diligence response

Witness summary

	NZX WITNESSES	
1	Neil **Paviour-Smith**	Director of NZX and Chair of Audit and Risk Committee
2	Andrew William **Harmos**	Chairman and Director of NZX through relevant period
3	David Philip **Godfrey**	Chief Information Officer of NZX
4	Mark Rhys **Weldon**	Former CEO of NZX
5	Heather May **Kirkham**	Former Head of Strategy, Head of Energy Business and Head of IT Development at NZX
6	Garth Kevin **Taylor**	Former Senior Accountant and Group Business Leader at NZX
7	Rowan Elizabeth **Macrae**	Former Head of Corporate Office and Head of HR and Communications at NZX
8	Rachael Frances **Newsome**	Former Corporate Counsel and Head of Direct Products at NZX
9	Ronald James **Storey**	Agribusiness consultant at NZX; former senior executive of Australian Crop Forecasters (acquired by NZX in 2009)
10	Phillip Arthur **Holmes**	Director of commodity marketing advisory service to Australian agri-businesses; former general manager of marketing for the Queensland Grain Growers Association, principal of FarMarCo Australia Pty Limited and director of Grain Trade Australia – called as expert on the grain market
11	Amy Louise **Trotman (formerly Wilding)**	Manager, Tax and Corporate Finance at NZX
12	Grant Robert **Graham**	Partner, KordaMentha, Chartered Accountants – called as expert accountant

	RALEC WITNESSES	
1	Grant Davis **Thomas**	Principal of Clear
2	Dominic Luke **Pym**	Principal of Clear
3	Rachael Lee Cross **Greer**	Former lawyer for NZX and subsequently Head of Business Acquisition for NZX
4	Graham Russell **Mathason**	Former Client Relations Manager at GrainCorp
5	Byron Thomas **Wood**	Former BDM, and Product and Operations Manager, at NZX4
6	Tristan James **Shannon**	Former BDM at NZX4, and former Operations and Product Development Manager, Market Growth Manager and Manager of the Clear grain exchange
7	Andrew McDowell **Butler**	Partner in Wellingtons, Chartered Accountants, Clear accountants
8	James Daniel **Maw**	Former Trading Manager for Glencore Grain Pty Limited
9	Malcolm Kingsley **Bartholomaeus**	Vendor of Callum Downs agricultural reporting business to NZX; consultant providing commentary and analysis of grain industry
10	Justin Howard **French**	Former Team Leader, User Interface at Clear, then NZX
11	Richard William **Koch**	Former Managing Director, Profarmer Australia Pty Limited
12	Adam Joshua **Rich**	Wisewoulds Mahony, Melbourne solicitors for Ralec
13	Marcus Robert **Crafter**	Former software engineer for Clear
14	Mitchell Jesse **Morison**	Former commercial manager with Cargill Australia Limited, significant trader of grain in Australia – called as expert on the grain market
15	Stephen John **Seear**	Partner of BDO East Coast Partnership – called as expert accountant

	BRIEFS ADMITTED BY CONSENT	
1	Philip **Williams**	Independent economist, Melbourne – called as expert
2	Colin **Tutt**	Former CBH employee