SUPREME COURT OF QUEENSLAND

CITATION:	*Wilmar Sugar Australia Limited v Queensland Sugar Limited* [2019] QSC 116
PARTIES:	**WILMAR SUGAR AUSTRALIA LIMITED** ACN 098 999 985 (plaintiff) **v** **QUEENSLAND SUGAR LIMITED** ACN 090 152 211 (defendant)
FILE NO/S:	BS No 6197 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	10 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 to 16 February 2018; 19 to 23 February 2018; 26 February 2018
JUDGE:	Davis J
ORDER:	**1. The claim is dismissed.** **2. The counterclaim is dismissed.** **3. Parties shall be heard on the question of costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the plaintiff entered into an agreement to supply sugar to the defendant and the defendant was responsible for marketing and selling that sugar – where the plaintiff brought an action against the defendant for breach of contract for failing to take reasonable care in managing production risk – where the plaintiff sought to imply an obligation to take reasonable care to manage production risk into the contract – whether an obligation to take reasonable care to manage production risk could be implied into the contract TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ACTS OR OMISSIONS – where the plaintiff brought an action against the defendant for negligence arising out of a duty to take reasonable care – where the plaintiff's claim was one for pure economic loss – where the defendant asserted that no such duty of care arose – whether

the plaintiff was sufficiently vulnerable to loss or damage arising out of acts or omissions by the defendant

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – REMOTENESS AND CAUSATION – FORESEEABILITY OF DAMAGE – IN GENERAL – where the risk of loss to the plaintiff was foreseeable – where the defendant admitted that the risk of loss to the plaintiff due to the defendant's management of the Seasonal Pool was foreseeable – whether the failure to plan for the risk of production fall due to the weather produced a proved loss

EVIDENCE – ADMISSIBILITY – CREDIBILITY EVIDENCE – WITNESSES – EXPERT EVIDENCE – where the parties relied upon evidence of expert witnesses – where the evidence of an expert witness was objected to – whether the expert witness was relevantly independent and the facts relied upon by the expert were proved

Civil Liability Act 2003 (Qld), s 9, s 10, s 32(1)
Corporations Act 2001 (Cth), s 140

Astley v Austrust Ltd (1999) 197 CLR 1, cited
BP Refinery (Westernport) Pty Ltd v The Shire of Hastings (1977) 180 CLR 266, followed
Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 & Anor (2014) 254 CLR 185, followed
Bryan v Maloney (1995) 182 CLR 609, followed
Byrne v Australian Airlines Ltd (1995) 185 CLR 410, cited
Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529, cited
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649, followed
Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd (1987) 10 NSWLR 468, cited
Causer v Brown [1952] VLR 1, cited
CGU Workers Compensation (NSW) Ltd v Garcia (2007) 69 NSWLR 680 , cited
Clark v Ryan (1960) 103 CLR 486, cited
Codelfa Construction Pty Ltd v State Rail Authority NSW (1982) 149 CLR 337, cited
Colchester Borough Council v Smith [1991] Ch 448, cited
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169, followed
Crestsign Limited v National Westminster Bank PLC [2014] EWHC 3043, cited
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588, cited
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544, cited
Electricity Generation Corporation v Woodside Energy Ltd & Ors (2014) 251 CLR 640, followed

Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10, cited
Fox v Percy (2003) 214 CLR 118, followed
Hawley Partners Pty Ltd v Commissioner of Stamp Duties (1996) 96 ATC 4847, not followed
Hospital Product Ltd v United States Surgical Corporation (1984) 156 CLR 41, followed
JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EWHC 1186, not followed
Masters v Cameron (1954) 91 CLR 353, cited
McBride v ASK Funding Ltd [2013] QCA 130, cited
Metal Roofing and Cladding Pty Ltd v Amcor Trading Pty Ltd [1999] QCA 472, cited
Niesmann v Collingridge (1921) 29 CLR 177, cited
Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388, cited
Parker v South Eastern Railway Co (1877) 2 CPD 416, cited
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] 2 Li R 511, not followed
Precision Products (NSW) Pty Ltd v Hawkesbury City Council (2008) 74 NSWLR 102, followed
R v Butler [2010] 1 Qd R 325, cited
Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland [2011] 1 Lloyd's Rep 123, cited
Reed v Warburton [2011] NSWCA 98, followed
Sullivan v Moody (2001) 207 CLR 562, cited
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, cited
Thornton v Shoelane Parking Pty Ltd [1971] 2 QB 163, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, cited
Voli v Inglewood Shire Council (1963) 110 CLR 74, cited
Woolcock Street Investments v CDG Pty Ltd (2004) 216 CLR 515, followed

COUNSEL: M Stewart QC with D E Chesterman for the plaintiff
A Pomerenke QC with L P Clark for the defendant

SOLICITORS: Russells for the plaintiff
Allens Linklaters for the defendant

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[1] The 2010 sugar season was a difficult one for producers of sugar because of heavy and persistent rainfall at a critical time of year. Wilmar Sugar Australia Ltd (Wilmar) is a miller of sugar, and produces raw sugar. Queensland Sugar Ltd (QSL) is a corporation which markets and sells raw sugar. As a result of the weather conditions production fell dramatically leaving Wilmar exposed to meet supply arrangements[1] that had been entered into by QSL. By the terms of a contract between them, QSL passed the losses to Wilmar. Wilmar seeks damages against QSL in both contract and tort as compensation for the losses it suffered.

The facts

[2] QSL is a company limited by guarantee. It is what can be described as an "industry owned" corporation. Its members are sugar millers and representatives of sugar cane growers.[2]

[3] QSL has both a constitution and a charter.

[4] QSL's constitution[3] relevantly, provided:

> "**6. Objects**
>
> (a) The principal object of the company, without limiting its powers under the Law, is to promote the development of the sugar industry, assisted by the following objects:
>
> (i) to enhance the efficiency and competitiveness of the Queensland sugar industry;
>
> (ii) to provide access to markets for the Queensland sugar industry or the sugar industry elsewhere;
>
> (iii) to enhance the long term economy of the Queensland sugar industry and the benefits flowing from it to Growers and Mill Owners;
>
> (iv) to encourage initiative, innovation and value adding within the Queensland sugar industry or the sugar industry elsewhere and downstream processing of sugar;
>
> (v) to provide timely and relevant sugar market information to Growers and Mill Owners;
>
> (vi) to market raw sugar in the best interests of Growers and Mill Owners; and
>
> (vii) to act commercially in the discharge of its functions.
>
> (b) In carrying out its objects, and without limiting its powers under the Law, the company will seek to pursue the matters provided in the Charter."[4]

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1 A deliberately neutral term.
2 QSL constitution, trial bundle tab 75, cl 4.
3 At the time of the 2010 season.
4 QSL constitution, trial bundle tab 75.

[5] By QSL's charter:[5]

> "The company will seek to maximise the net returns in dollars per tonne of sugar to milling companies supplying it with sugar for export, and through such milling companies to their growers.
>
> To achieve this the company will seek to:
>
> - enter into rolling long term supply agreements to ensure continuing access to sugar for export;
> - minimise supply chain costs through economies of scale, operational efficiency and without duplicated management functions;
> - optimise the returns for export sugar to suppliers through the use of physical sales and derivative instruments;
> - optimise the net regional premium achieved each season;
> - provide flexible, innovative, transparent and/or independent pricing mechanisms for suppliers based on effective close out mechanisms for derivative instruments;
> - ensure long term access (by lease or other arrangements), and manage and operate the bulk sugar terminals;
> - operate in the forward freight market with a view to providing certainty of shipping availability for annual export programs and achieve preferential logistics arrangement and costs; and
> - foster export market relationships with refinery buyers and the international trade.
>
> The charter is intended to reflect the current view of the company's Members as to how the company's objects can best be achieved, and can be amended by an ordinary resolution of Members in general meeting under Article 19(a) if that view changes over time."[6]

[6] As is obvious from the raw sugar supply agreement,[7] QSL operates as a "not for profit" body. Its role is to price and sell the sugar supplied to it by the millers.

[7] Wilmar mills sugar cane to produce raw sugar. About 1,600 cane farmers supply sugar cane to Wilmar for that purpose.

[8] Wilmar has had various names over the years. Prior to 27 November 2009, it was called "CSR Sugar Pty Ltd". Between 27 November 2009 and 4 March 2010, it was "CSR Sugar Ltd". Between 4 March 2010 and 19 May 2013, it was "Sucrogen Ltd", before it changed on 19 May 2013 to "Wilmar Sugar Australia Ltd". The company is referred to consistently in these reasons as "Wilmar" even though it is described by its other various names in documents depending upon their vintage.

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5 QSL constitution, trial bundle tab 75.
6 QSL constitution, trial bundle tab 75, Schedule 1.
7 Identified and explained later; trial bundle tab 27, cl 22.

[9] Wilmar is not the only miller who supplies sugar cane to QSL. As will be explained, QSL entered into a number of agreements with other millers so that the raw sugar produced by all of them was pooled for export.

[10] Much of the raw sugar which is produced by the mills is exported to various overseas markets. QSL markets that raw sugar for export. Indeed, as will be seen, Wilmar, and the other millers who entered into agreements with QSL committed to QSL all the raw sugar they intended to export.

[11] Until 1 January 2006, the *Sugar Industry Act* 1999 (Qld) provided for all raw sugar produced in Queensland to be the property of QSL. QSL had the responsibility for pricing and selling the sugar and then distributing the proceeds to millers.[8]

[12] In 2006, the sugar industry was deregulated so that millers had a commercial choice to either enter into marketing contracts with QSL or market the sugar for themselves.

[13] Following upon the legislative changes, QSL developed "voluntary marketing agreements" with sugar millers.[9] An agreement was signed between QSL and Wilmar on 23 December 2005.[10] Similar agreements were made with other millers. Those agreements took effect from around 2006 and allowed sugar millers to undertake their own pricing for some of their sugar on the futures market.[11]

[14] In 2007, a working group met on three occasions to discuss new pricing options to be offered for supplies in the 2008 season.[12] The working group endorsed a particular model of pricing option by which the suppliers would have a fixed known level of exposure in the futures market.[13] This model was incorporated into the Wilmar/QSL voluntary marketing agreement in 2007.[14] By these agreements,[15] the sugar was divided into various pools and each pool was priced and sold separately to the other pools. One of the pools, the "Queensland discretionary pool" was the subject of a financial risk management policy promulgated by QSL. The effect of that policy was communicated to Wilmar in September 2007.[16]

[15] From 2008 onwards, the voluntary marketing agreements were replaced with "Raw Sugar Supply Agreements" (RSSAs).[17] The RSSA between Wilmar and QSL was signed on 25 September 2008 (the Wilmar RSSA).[18] The Wilmar RSSA was amended by written agreements on 19 March 2010,[19] and twice on 17 December 2010.[20]

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8 CSR-Sugar-mills financial risk management policy, 16 December 2009, exhibit 4 at 4.
9 Statement of Bryce Wenham filed 16 June 2016, CFI 33 at [11(a)].
10 Wilmar-QSL VMA, trial bundle tab 43 page 14.
11 Transcript at 6-32 ll 1-10.
12 Working group discussion paper February 2007, trial bundle tab 51 at 1; see also trial bundle tabs 54 and 56.
13 Working group discussion paper April 2007, trial bundle tab 54 at [6].
14 Trial bundle tab 70.
15 With Wilmar and other millers.
16 Email from QSL to Wilmar regarding the financial risk management policy, trial bundle tab 65; the financial risk management policy, trial bundle tab 66.
17 Wenham statement, CFI 33 at [11(c)].
18 Wilmar-QSL RSSA, trial bundle tab 27.
19 Amendment Deed, trial bundle tab 29.
20 Amendment Deed, trial bundle tab 30; Second Amendment Deed, trial bundle tab 30; Third Amending Agreement, trial bundle tab 31.

[16] As is clear from the terms of the Wilmar RSSA, Wilmar is not the only miller to enter into such an agreement. The Wilmar RSSA refers to "participants" in the marketing scheme, those participants being Wilmar and the other millers. By these agreements, raw sugar was to be allocated to various pools which were to be dealt with in different ways. The dispute here concerns the Seasonal Pool.

[17] Before the RSSAs were entered into, a discussion paper was issued by QSL on 8 February 2007.[21] Some important points from the discussion paper are as follows:

(i) "Initial production estimates are provided in late September in the year preceding the crushing season and monthly thereafter. The initial estimates provided by Suppliers are crucial in planning the amount of in-season sales required to manage the storage equation. <u>It can be seen on Chart 1 below, in the period covering the seasons from 2000 up until 2006 that there have been significant variances from the initial estimates compared to the quantity finally produced</u>";[22] (emphasis added)

(ii) Various charts attached to the discussion paper show variations between production estimates and actual production in various seasons between 2000 and 2006;

(iii) The discussion paper refers to various matters concerning exposure to futures markets.[23]

[18] Bryce Wenham is the Finance Manager - Supplier Relations at QSL. He began working in the sugar industry in 1986. He worked for Wilmar until 2010 when he joined QSL. He was involved in the development of the various schemes that ultimately resulted in the RSSAs. It is clear that the scheme which is underpinned by the RSSAs resulted from extensive industry consultation.[24]

[19] The discussion paper further provides:

> "It is not only the total amount of [ICE 11[25]] exposure that has been volatile, but also the portion against each futures position that is subject to change. A Supplier's exposure to each futures position is drawn from the expected shipment position of each sale in the marketing plan.
>
> It can be seen in Chart 4 below, <u>the actual tonnage available against each futures position at the start of crush in June can vary substantially from initial estimates in January preceding the crush.</u> The July position has the greatest variability and the March and May positions continue to vary until crushing has finished and all of the sugar is sold to customers."[26] (emphasis added)

[20] On 14 May 2009, QSL's Audit & Risk Committee met. An extract from the minutes of that meeting is:

> "Since the 2008 season, the QSL pricing platform has been introduced, which provides fixed futures exposures of 1:2:2:1 over each season and allows

21 Trial bundle tab 51.
22 Section 6.1.
23 Trial bundle tab 51, see ss 3, 4.3.1 and 5.
24 Wenham statement, CFI 33 at [51] and following.
25 A futures exchange.
26 Section 6.3.

> Suppliers to manage up to 70% of their price risk, without the complexity of having to manage production risk and marketing plan risk. The Seasonal Pool under this arrangement has become a residual Pool which absorbs all production risk and marketing exposure movements.
>
> The above changes increased the degree of risk that the Seasonal Pool is managing. However, our stakeholders still have the expectation that QSL will use its discretion to add value in this Pool. This expectation is reflected in the new Raw Sugar Supply Agreements."[27] (emphasis added)

[21] The differing pricing pools and the pricing scheme were notified to the millers by email on 8 October 2009.[28] In relation to the 2010 Seasonal Pool, that document provided:

"**What is it?**	The volume - in this pool is the balance of sugar not allocated to other pools or pricing schemes. It will be priced progressively by QSL against a defined average benchmark. This pool operates 2010 season only and absorbs all seasonal variations in production, sales and shipping. All suppliers are to have at least 30% of their sugar tonnage allocated to this pool.
How does it work?	The pool aims to achieve the optimal $A return for the current season. QSL aims to outperform the average benchmark within the constraints of volume and time. Pricing is undertaken over a 19 month period from 1st December 2009 until 30th June 2011. The amount of sugar tonnage allocated to this pool is not fixed. QSL undertakes the physical export marketing for sugar in this pool and all other pools and pricing schemes.
When will I receive payment?	Suppliers will receive advance payments from QSL in the season the sugar is delivered. The pattern of payments will include an initial delivery payment and periodic top-up payments. The final payment will be made in early July 2011.
What is QSL's starting strategy for this product?	QSL adopts a measured approach in pricing the Seasonal Pool to accommodate production variations. Tonnages are priced progressively over a 19 month period.
Expected Return	Broad market average return reflecting the inherent risk of production, shipping and marketing variations.

27 Trial bundle tab 95, page 3.
28 Trial bundle tab 104.

What are the potential risks associated with this product?	This pool absorbs all risks associated with production, shipping and marketing variations and is operated with a measured pricing profile to accommodate these inherent risks. The measured approach to pricing limits the ability of the Seasonal Pool to respond quickly to rapidly moving market situations.
How will these risks be managed?	Pool performance is reviewed against a defined average benchmark on a weekly basis and the pricing strategy refined accordingly.
Past Performance	Indicative $A per tonne IPS: 2006: A$368 2007: A$276 2008: A$334 2009: A$490 - 510 Comparing the Seasonal Pool with other pools is not meaningful. The Seasonal Pool is designed to address risks associated with production, sales & shipping so it has a variable futures exposure and outcome.
SUPPLIER REQUIREMENTS	
Min. Tonnage	All suppliers will have a minimum of 30% of forecast production tonnage in this pool.
Max. Tonnage	No maximum tonnage.
'Default Pool'	Any tonnage not elected to other pools or pricing schemes by 30th November 2009 will be allocated to this pool. If no pricing election is made, this pool is considered to be the 'default pricing pool'."[29] (emphasis added)

[22] QSL kept a risk register. In December 2009, that was updated as follows:

Risk Description (What could possibly happen)	**Existing Controls**	**Consequences ($)* 'M'=Million 'B'=Billion**	**Likelihood (1:y)* (eg 1 in 100 years)**	**Risk ($/y)***	**Risk Treatments Action (Treatments or Studies, Recommendations, ideas for Consideration)**
Production size and timing **Scenario 1:** Changes in client forecast causes hedging	- Information from mills and other sources on crop tonnage. - Education of mills:	(1) $260M	1:10	$26,000,000	- Seek independent crop estimates - Review maximum level of sales and pricing during periods of

29 Trial bundle tab 104, under the heading '2010 Seasonal Pool'.

Risk Description (What could possibly happen)	**Existing Controls**	**Consequences ($)* 'M'=Million 'B'=Billion**	**Likelihood (1:y)* (eg 1 in 100 years)**	**Risk ($/y)***	**Risk Treatments Action (Treatments or Studies, Recommendations, ideas for Consideration)**
and sales in excess of deliveries for a season (eg forecast moves down by 1Mt due to natural disaster, start up delays etc) **Scenario 2:** Changes in the forecast timing and quality of deliveries to QSL resulting in misalignment with sales program (cancellation of contract, demurrage costs etc - $1M)	(a) Working with mills on crop estimates to ensure they understand the importance and consequences of incorrect forecasts. (b) Assist mills in understanding their contractual obligations.	(2) $1M	1:5	$200,000	greatest delivery uncertainty [30]

(emphasis added)

[23] By the terms of the Wilmar RSSA, Wilmar was required to provide its estimates of supply of raw sugar for the 2010 season by 30 November 2009. This is called in the agreement the "initial SPE" which is shorthand for "supply of production estimate".[31] Wilmar, through its employee, David Burgess, provided an initial SPE of 1,710,107 tonnes.[32]

[24] On 14 December 2009, QSL delivered a presentation to the millers, including Wilmar, about its sales and pricing strategy for the 2010 season.[33] In that presentation, this appeared:

"**ICE NO 11 Strategy**

- Fundamental picture for Q1 2010 remains strong
- ICE No 11 July 10 strategy:
  - Track benchmark until Q12010
  - Move 10 - 15% overweight should values climb to US 24.00 c/lb

30 Trial bundle tab 122, at page 2.

31 Wilmar-QSL RSSA, trial bundle tab 27at [6.2].

32 In its Further Amended Defence and Counterclaim read and filed 15 February 2018, (referred to as "Defence and Counterclaim" throughout these reasons) at [15(b)(i)]; Amended Reply and Answer, CFI 30, (referred to as "Reply" throughout these reasons) at [12]; transcript 1-61, ll 31-32; Statement of Gregory John Beashel, exhibit 42, CFI 32 at [102(a)]; email from David Burgess to QSL-CSR sugars supply agreement estimate-2010 season, trial bundle tab 110.

33 Presentation-supplier customer meeting, 14 December 2009, trial bundle tab 118.

   - Combination of fixed and participating structures
- Strong emphasis on ICR No 11 July 10 given it is 2/3 volume of Seasonal pool
- Optionality <u>important to manage crop risk</u>" (emphasis added)

[25] On 16 December 2009, QSL adopted a financial risk management policy (the FRMP). There is dispute as to the legal status of the FRMP, which is canvassed later.

[26] QSL planned to price and sell sugar over the season in accordance with the FRMP. In the scheme of trading, there are three species of contract that are relevant: futures contracts, physical supply contracts and currency hedge contracts.

[27] The currency hedge contracts are not particularly relevant to the present proceeding. Commodities such as sugar are traded in US dollars. Domestic costs and prices occur in Australian dollars. Currency hedge contracts are entered into for protection against changing relative values of Australian and American currency.

[28] Futures contracts are, obviously enough, contracts entered into on a particular day for the delivery of sugar which has not yet been produced until sometime in the future. By these contracts, there are set delivery periods which, for the 2010 season were:

> "(a) the '**May 2010 Delivery Period**', for physical shipments of raw sugar to be delivered between 1 May 2010 and 15 July 2010;
>
> (b) the '**July 2010 Delivery Period**', for physical shipments of raw sugar to be delivered between 1 July 2010 and 15 September 2010;
>
> (c) the '**October 2010 Delivery Period**', for physical shipments of raw sugar to be delivered between 1 October 2010 and 15 December 2010;
>
> (d) the '**March 2011 Delivery Period**', for physical shipments of raw sugar to be delivered between 1 January 2011 and 15 May 2011; and
>
> (e) the '**May 2011 Delivery Period**', for physical shipments of raw sugar to be delivered between 1 May 2011 and 15 July 2011.
>
> (May, July, October, March and May above are each known as a '**Pricing Month**')"[34]

[29] Physical supply contracts are, perhaps also obviously, contracts for the supply of raw sugar. The ICE 11 price potentially moves constantly in response to market forces. The physical supply contracts, as a matter of practice, specify a price which equates to the ICE price.

[30] If an ICE futures contract is entered into and the value of the sugar rises so that the price which can be secured for it rises, then a physical sale contract can be entered into for the sale at the higher price and the futures contract is then bought out in a system known as "closing out" the futures contract. The aim of the exercise is to enter into futures contracts through the ICE to secure prices and then enter into currency hedging contracts to protect the value of the futures contracts against currency fluctuations. The price is secured by that strategy; if the price rises the extra profit can be taken.

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[34] Summarised in this fashion in Wilmar's submissions at [96]; see also Beashel statement, CFI 32 at [72].

[31] If futures contracts are entered into and production of the overall sugar is insufficient to meet the contracts then there is a problem; in the 2010 season it was a huge problem. In those circumstances, sugar has to be acquired in order to fulfil the obligations under the futures contracts.

[32] Australia, and Queensland in particular, is a major world producer of raw sugar. In the event of a major adverse episode (such as abnormally wet weather) which results in a significant fall in production in Queensland, that shortage will affect the international market and cause the price to rise as a result of the usual forces of supply and demand.[35] Consequently, if the fall in production results in a necessity to purchase sugar elsewhere to meet the futures contracts, there is a significant likelihood that the price at which the replacement sugar will have to be purchased will exceed the price achieved through the earlier ICE futures contracts. By that mechanism then, a loss will be suffered.

[33] QSL began pricing and selling raw sugar early in the season. This was done in accordance with the FRMP.[36] Wilmar and other suppliers from time to time lodged new production estimates. None of these anticipated the drastic fall in production which was ultimately experienced.

[34] In January 2010, the Wilmar estimate remained the same as the Wilmar Initial SPE,[37] and the aggregate estimate for all suppliers was the same as the Initial SPE.[38] By the end of January, QSL had entered into physical supply contracts in respect of 1,337,000 out of 2,937,020 estimated tonnes[39] (44 per cent) and had priced 206,522 out of 986,020 estimated tonnes in the Seasonal Pool[40] (21 per cent). The estimated supply and physical supply contracts progressed as follows:

	Production estimates		**QSL contracting activity**	
	Wilmar estimate	**Aggregate estimate (all suppliers)**	**Physical supply contracts**	**Pricing of Seasonal Pool**
February 2010	Same as Initial SPE[41]	Increased to 3,009,575 tonnes[42]	1,591,000 of 3,010,000 est. tonnes[43] (53%)	286,145 of 1,045,468 est. tonnes[44] (27%)

35 Gray report, exhibit 50, paragraph [131].
36 Although Wilmar disputes that the FRMP was followed, as there was departure from it as production was under threat.
37 Defence and Counterclaim at [15(b)(iii)]; Reply at [12]; Beashel statement at [102(c)]; Email from CSR to QSL – Supply estimate, 28 January 2010, trial bundle tab 132.
38 Further Amended Statement of Claim, CFI 68 (referred to as “Statement of Claim” throughout these reasons) at Annexure A. This figure is inconsistent with the figure at Forecast 2010 Season RSSA Supply, trial bundle tab 479.
39 Statement of Claim at Annexure A.
40 Defence and Counterclaim at [17(b)(i)]; Reply at [13A].
41 Defence and Counterclaim at [15(b)(iv)]; Reply at [12]; Beashel statement at [102(d)]; Email from CSR to QSL – Supply estimate, 1 March 2010, trial bundle tab 162.
42 Forecast 2010 Season RSSA Supply.
43 Statement of Claim at Annexure A.
44 Defence and Counterclaim at [17(b)(ii)]; Reply at [13A].

	Production estimates		QSL contracting activity	
	Wilmar estimate	**Aggregate estimate (all suppliers)**	**Physical supply contracts**	**Pricing of Seasonal Pool**
March 2010	Same as Initial SPE[45]	Decreased to 2,985,175 tonnes[46]	1,700,000 of 2,985,175 est. tonnes[47] (57%)	442,587 of 1,031,127 est. tonnes[48] (43%)
April 2010	No estimate provided[49]	Decreased to 2,963,798 tonnes[50]	1,831,000 of 2,964,000 est. tonnes[51] (62%)	564,001 of 1,009,750 est. tonnes[52] (56%)
May 2010	Increased to 1,711,358 tonnes[53]	Increased to 2,979,677 tonnes[54]	2,088,000 of 2,980,000 est. tonnes[55] (70%)	646,175 of 1,025,629 est. tonnes[56] (63%)
June 2010	Increased to 1,777,575 tonnes[57]	Decreased to 2,976,014 tonnes[58]	2,238,000 of 2,976,000 est. tonnes[59] (75%)	746,738 of 1,001,731 est. tonnes[60] (74.5%)
July 2010	Decreased to 1,714,700 tonnes[61]	Deceased to 2,881,652 tonnes[62] (under initial SPE)	2,547,000 of 2,882,000 est. tonnes[63] (88%)	778,711 of 877,682 est. tonnes[64] (88.7%)
August 2010	Increased to 1,729,068 tonnes[65]	Increased to 2,891,408 tonnes[66] (under initial SPE)	2,554,000 of 2,877,000 est. tonnes[67] (89%)	804,208 of 868,880 est. tonnes[68] (92.5%)

45 Defence and Counterclaim at [15(b)(v)]; Reply at [12]; Beashel statement at [102(e)]; Email from CSR to QSL – Supply estimate, 26 March 2010, trial bundle tab 172.
46 Forecast 2010 Season RSSA Supply.
47 Statement of Claim at Annexure A.
48 Defence and Counterclaim at [17(b)(iii)]; Reply at [13A].
49 Defence and Counterclaim at [15(b)(vi)]; Reply at [12]; Beashel statement at [102(f)].
50 Forecast 2010 Season RSSA Supply.
51 Statement of Claim at [27(a)] and Annexure A; Defence and Counterclaim at [18(a)].
52 Defence and Counterclaim at [17(b)(iv)]; Reply at [13A].
53 Defence and Counterclaim at [15(b)(vii)]; Reply at [12]; Beashel statement at [102(g)]; Email from CSR to QSL – Re Production Forecast, 27 May 2010, trial bundle tab 202.
54 Forecast 2010 Season RSSA Supply.
55 Statement of Claim at [27(b)] and Annexure A; Defence and Counterclaim at [18(a)].
56 Statement of Claim at [26(a)]; Defence and Counterclaim at [17(a)].
57 Defence and Counterclaim at [15(b)(viii)]; Reply at [12]; Beashel statement at [102(h)]; Email from CSR to QSL – Re Supply Agreement Estimate, 25 June 2010, trial bundle tab 220.
58 Forecast 2010 Season RSSA Supply.
59 Statement of Claim at [27(c)] and Annexure A; Defence and Counterclaim at [18(a)].
60 Statement of Claim at [26(b)]; Defence and Counterclaim at [17(a)].
61 Defence and Counterclaim at [15(b)(ix)]; Reply at [12]; Beashel statement at [102(i)]; Email from CSR to QSL – Re Supply Agreement Estimate, 2 August 2010, trial bundle tab 241.
62 Forecast 2010 Season RSSA Supply.
63 Statement of Claim at [27(d)] and Annexure A; Defence and Counterclaim at [18(a)].
64 Statement of Claim at [26(c)]; Defence and Counterclaim at [17(a)].
65 Defence and Counterclaim at [15(b)(x)]; Reply at [12]; Email from CSR to QSL – Re Supply Agreement Estimate, 2 August 2010, trial bundle tab 241. This figure is inconsistent with the figure in Beashel statement at [102(i)].
66 Forecast 2010 Season RSSA Supply.
67 Statement of Claim at [27(e)] and Annexure A; Defence and Counterclaim at [18(a)].
68 Statement of Claim at [26(d)]; Defence and Counterclaim at [17(a)].

	Production estimates		QSL contracting activity	
	Wilmar estimate	**Aggregate estimate (all suppliers)**	**Physical supply contracts**	**Pricing of Seasonal Pool**
September 2010	Increased to 1,749,068 tonnes[69]	Increased to 2,908,923 tonnes[70] (under initial SPE)	2,595,000 of 2,909,000 est. tonnes[71] (89%)	844,167 of 900,763 est. tonnes[72] (93.7%)
October 2010	Reduced to 1,700,321 tonnes[73] (under initial SPE)	Decreased to 2,718,499 tonnes[74] (under initial SPE)	2,595,000 (no change) of 2718,000 est. tonnes[75] (95%)	781,388 compared to 759,437 est. tonnes[76] (102.89%)
November 2010	Reduced to 1,404,141 tonnes[77] (under initial SPE)	Decreased to 2,317,563 tonnes[78] (under initial SPE)	Some futures contracts and physical supply contracts closed out.	

[35] In February 2010, QSL provided suppliers, including Wilmar,[79] with a Monthly Supplier Customers' Report,[80] which included details of the Sugar Price Strategy[81] and Marketing Strategy[82] to be undertaken by QSL. During the season, monthly reports were provided to Wilmar and the other millers concerning the Seasonal Pool. These showed (apart from information relevant to currency hedging) the lots priced, the price achieved and the lots unpriced.

[36] The 2010 harvesting and crushing season ran from late May or early June to around 24 December 2010.[83]

[37] On 24 June 2010, the Bureau of Meteorology published a media release that stated that that a La Niña event was "more likely than not" to occur in 2010.[84]

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69 Defence and Counterclaim at [15(b)(xi)]; Reply at [12]; Beashel statement as amended by Exhibit 43: Corrigenda to statement of Gregory John Beashel, 19 February 2018 at [102(k)]; Email from CSR to QSL – Re Sugar Australia Tonnage return, 15 September 2010, trial bundle tab 286.
70 Forecast 2010 Season RSSA Supply.
71 Statement of Claim at [27(f)] and Annexure A; Defence and Counterclaim at [18(a)].
72 Statement of Claim at [26(e)]; Defence and Counterclaim at [17(a)].
73 Defence and Counterclaim at [15(b)(xii)]; Reply at [12]; Beashel statement at [102(l)]; Email from CSR to QSL – Sucrogen Production Estimates, 27 October 2010, trial bundle tab 307.
74 Forecast 2010 Season RSSA Supply.
75 Statement of Claim at Annexure A.
76 Statement of Claim at Annexure A.
77 Defence and Counterclaim at [15(b)(xiii)]; Reply at [12]; Beashel statement at [102(m)]; Email from CSR to QSL – 2010 Crop Estimate, 24 November 2010, trial bundle tab 339.
78 Forecast 2010 Season RSSA Supply.
79 Transcript at 1-73 ll 15 to 18.
80 Trial bundle tab 161.
81 At 11.
82 At 16.
83 Statement of Claim at [19]; Defence and Counterclaim at [14].
84 Statement of Claim at [30]; Defence and Counterclaim at [21(a)].

[38] There is a QSL board meeting minute made on 22 July 2010 at which this was noted:

> "There has been considerable modelling done around how crop reductions (due to weather, disease or other events) would affect QSL - the modelling shows that there would need to be a reduction of 25 per cent across the whole market to impact on QSL, individual mill losses are sheeted home to the pools."[85]

[39] Mr Wenham, speaking after the RSSAs were first introduced, said in his statement:

> "73. As mills were carrying out their own pricing, the pool of sugar being priced by QSL had significantly reduced in volume. <u>Further, the mills' share of the seasonal pool was to be the first point of recourse if there was any variation in production.</u> This meant there was expected to be more volatility in the seasonal pool tonnages. As a result, it was decided by the Audit and Risk Committee that in order to create a more conservative approach to pricing the seasonal pool, three main changes were required:
>
> (a) pricing factors, which allowed an acceleration of pricing when market prices were strong, were removed;
>
> (b) there was a requirement to price the seasonal pool over a longer period (9 months from 6 months);
>
> (c) a value at risk concept was introduced.
>
> 74. The background and rationale for these changes is set out in two papers delivered to the QSL Audit and Risk Committee, dated 3 March 2009 and 14 May 2009, [QSL.500.004.0307] [QSL.500.004.0357] which I saw at the time.
>
> 75. These concepts were included in the updated 2009 season financial risk management policy. The 2009 season financial risk management policy is [QSL.500.016.0003]."[86] (Emphasis added)

[40] There was persistent and heavy rainfall from around September 2010 to the end of the harvesting and crushing season (around 24 December 2010).[87]

[41] It can be seen from the table set out above that notwithstanding the La Niña forecast by the Bureau of Meteorology on 24 June 2010, Wilmar's estimates, although decreasing in July, were increased in both August and September, but falling then in October 2010 only after the rain had set in. Wilmar's production estimate then fell again in November 2010 to 1,404,141 tonnes which was still well in excess of what Wilmar actually supplied which was 1,238,151 tonnes of raw sugar. The aggregate supply by all millers was 2,213,154 tonnes. Wilmar had produced and supplied about 72% of what it initially forecast and all millers together had produced and supplied about 75% of what was estimated.

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85 Trial bundle tab 235, page 7, s 6.1.
86 Statement, CFI 33.
87 Statement of Claim at [31]; Defence and Counterclaim at [22].

[42] Reductions in estimates began to arrive from millers in October and November 2010.[88]

[43] By October 2010 before, it seems, the revised estimates were received from the millers, it had been obvious to QSL that it could not meet the commitments it had made to supply raw sugar. From October 2010[89] QSL began closing out futures contracts and some physical sale contracts.

[44] Wilmar's case is that QSL's responsibility was to manage the Seasonal Pool as a "buffer" to protect against a fall in actual production as against estimates. It points to various statements and actions by QSL to support this case:

(i) Mr Gregory Beashel, Managing Director and Chief Executive Officer of QSL, swore to QSL performing "sense checking":

> "95. QSL did sense check the forecasts it received from millers. Of course, the main source of information was the mills themselves.
>
> 96. QSL did this because QSL was managing the customer relationship (including sales and logistics) and QSL wanted to be comfortable that it was proceeding to make those arrangements on a reasonable basis.
>
> 97. Sense checking the forecast estimates provided by millers was done in a very high level way because QSL did not have the extensive information available to it that millers did (for example, acres of cane, the maturity of cane, cut-out percentages etc). Rather, QSL just looked at the following:
>
> (a) the price of sugar - in years with low prices growers tend to reduce their costs by spending less on fertiliser and irrigation. Accordingly, if the previous season's sugar price was low, then there might be a smaller forecast estimate or reduced quality of cane for the coming season;
>
> (b) current/expected climatic influences such as rain, drought, temperature and cloud free days. QSL merely looked at the climatic influences affecting Northern Queensland, Central Queensland and Southern Queensland. It did not look at each specific growing region in detail;
>
> (c) any mention of suspected or known disease and/or pests;
>
> (d) the amount of tonnes the mills could crush;
>
> (e) once crushing commenced, mill performances (for example, amount of tonnes crushed and the quality of sugar produced);
>
> (f) discussions with millers about their crop forecasts and growers about their crops during the season. As well as the formal monthly forecast updates from millers, QSL occasionally had informal telephone conversations with mill staff as well; and

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[88] Wenham statement, CFI 33, paragraph [155] and following.
[89] Wenham statement, CFI 33, paragraph [162].

(g) other publicly available data, such as news and industry updates.

98. QSL would balance all of these factors to form its own view as to whether the total forecast estimate by the millers was reasonable."[90]

(ii) At its meeting on 22 April 2010, QSL's board papers included the following:

"**6 Marketing and Risk Management**

6.1 Monthly Report

- The Board noted the report. More information was provided on the following items.
- NT advised that QSL is not rushing to make sales at present, given the current market situation, which appears to be caused by speculation in the market about the European Union unexpectedly providing sugar onto the market, with the possibility of a further 1-2mmt being made available.
- The Board noted that at this time of the year any adverse weather could cause a swing to a deficit of sugar and increased volatility, prices should be watched closely."[91]

(iii) Mr Beashel provided a memorandum to the QSL board in these terms:

"**2.4 What can QSL do if it thinks the crop forecasts are not accurate?**

QSL relies on a number of external sources to give it confidence that the tonnage it is planning to place into the export market is as accurate as possible, as early as possible in the cycle. The main source of information is, of course, the mills themselves. Discussions are regularly had with milling staff over the weather conditions/forecasts for the region and the effect of this on their crop, cut-out percentages (i.e. actual verses (sic) forecast tonnes cane harvested) and CCS trends against forecast. Other sources include news and weather reports, internet, local people (contacts in different areas) and organisations such as Bureau of Sugar Experimentation Station (BSES) extension services and canegrower organisations.

From all the available information a view is formed as to whether the forecast supply is sound and what risks are associated with achieving that tonnage. It was this process that led QSL to the conclusion soon after the 2010 Season crushing commenced, that the mill forecasts should be marked down. It was acknowledged at that time that a wet season would not only reduce the supply but could also lead to an abrupt, early finish if flooding occurred late in the season.

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90 Beashel statement, CFI 32.
91 Trial bundle tab 186.

The table below details the markdowns that were made. Despite the markdowns being significant, the actual delivered tonnage was significantly lower than even our marked-down tonnages.

Forecast Month End	Mill Forecast	QSL Internal Forecast
November ‘09	2,937,020	same
December ‘09	2,937,020	same
January ‘10	2,937,020	same
February ‘10	3,009,575	same
March ‘10	2,985,175	same
April ‘10	2,963,798	same
May ‘10	2,979,677	same
June ‘10	2,976,014	same
July ‘10	2,881,652	2,700,000
August ‘10	2,891,408	2,500,000
September ‘10	2,908,923	2,500,000
October ‘10	2,718,499	2,300,000
November ‘10	2,317,563	2,300,000
December ‘10	2,213,292	2,213,000
January ‘11	2,213,154	

The inverse of the above situation has occurred in previous years where the supply has been thought to be higher than forecast. In those years, the focus has been on ensuring QSL maximises the tonnage being stored into the first half of the following year (to capture higher prices) without allowing the supply to exceed available storage capacity. Sometimes the crop has continued to grow on to a greater extent than anticipated and/or QSL has had the view that mills are factoring in too great an effect from prevailing drought conditions to arrive at their forecast supply. Whatever the case, through close monitoring of conditions along the coastline, QSL forms a view of supply and factors any perceived risks/benefits into its marketing, shipping and storage plans.

In determining the possible effect of the risks on the final outcome, QSL runs a series of ‘what if’ scenarios to see the position it is in should such conditions arise. This is especially important at the beginning of the season where delayed mill starts may mean insufficient supply to meet commitments. The scenarios continue to be run throughout the season.”[92]

[45] The shortfall, being the losses incurred in having to meet the supplier’s contracts and to close out the ICE contracts, was $105,544,126, of which Wilmar’s share of the loss was $60,860,546.65. There is no dispute as to that figure. The question is whether QSL is liable to Wilmar for the loss.

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[92] Trial bundle tab 436, page 70.

[46] After the heavy losses of the 2010 season, QSL revised its approach. In the 2011 season, QSL did not sell the Seasonal Pool sugar until it was produced. For the 2012 season, the Seasonal Pool was replaced by the "Harvest Pool". A proportion of the Harvest Pool, which like the Seasonal Pool represented about 30% of the expected harvest, was not priced until 70% of the estimated sugar production for the season had in fact been delivered.[93]

The dispute

[47] Wilmar claims[94] that:

1. there was an implied term in the Wilmar RSSA which can be broadly described as an obligation to take reasonable care in the management of the Seasonal Pool;[95]

2. a duty arose which can be broadly described as one to take reasonable care in the management of the Seasonal Pool;[96]

3. the FRMP was not an appropriate policy to discharge the contractual obligation or the tortious duty;

4. Wilmar's loss was caused by the breach of the implied term, and, or, the breach of duty.

[48] QSL, in essence, says:

1. no term as alleged ought to be implied into the Wilmar RSSA;

2. no duty of care as alleged arose;

3. QSL complied with its contractual obligations by marketing the raw sugar pursuant to the Wilmar RSSA and the FRMP;

4. Wilmar contributed to its own loss by negligently preparing production estimates;

5. if all else fails, any losses suffered constitute a "cost" under the terms of the Wilmar RSSA which can be passed back to Wilmar. Declarations to that effect are sought by counterclaim.

[49] Against that very broad description of the dispute, which belies its complexity, it is necessary to consider the following:

1. the terms of the Wilmar RSSA and the FRMP;

2. the pleadings in the breach of contract case;

3. consideration of the contractual claim;

4. the pleadings in the negligence case;

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[93] Transcript 6-41 ll 10-31; see also exhibit 44.
[94] Statement of Claim.
[95] The pleadings in their exact terms of the alleged implied terms are discussed in detail later.
[96] Again, the exact terms of this as pleaded are considered in detail later.

5. consideration of the negligence case;

6. consideration of breach, causation and loss;

7. consideration of QSL's contributory negligence claim;

8. consideration of QSL's counterclaim.

The terms of the Raw Sugar Supply Agreement and the Financial Risk Management Policy

[50] Before turning to the particular provisions, it is necessary to make some general observations about the structure of the Wilmar RSSA. Wilmar and other millers entered into RSSAs with QSL to supply raw sugar to QSL for export. QSL's function was to market and sell the raw sugar for export. That is achieved by the sugar being sold and delivered to QSL to whom title in the sugar passes. QSL, though, as will be explained in some detail later, is intended neither to make a profit nor suffer a loss. All revenues and costs are passed back to Wilmar.[97]

[51] The Wilmar RSSA consists of a set of provisions in what could be regarded as the body of the agreement and there are then four schedules:

(i) Schedule 1 concerns the quality of sugar to be produced by Wilmar to QSL.[98] There is no complaint here by QSL;

(ii) Schedule 2 concerns the pooling and payment for sugar supplied. Schedule 2 contains various provisions concerning the various pools and of particular importance here, provisions concerning the Queensland Seasonal Pool;

(iii) Schedule 3 concerns reports to be delivered by QSL. Schedule 3 actually provides the form which the reports were to take. The obligations of each party to deliver information to the other during the term of the contract assumes some importance and various versions of the reports were received into evidence;

(iv) Schedule 4 concerns a draft operational improvement plan. The draft operational improvement plan describes targets and key performance indicators. What was proposed by cl 5.3 of the Wilmar RSSA was for the draft operational improvement plan to be in operation until a more permanent operational improvement plan was developed. The draft operational improvement plan is of some significance to the QSL in particular. The plaintiff's case is that given that QSL had notice of the impending adverse weather conditions it should not have sold any of the Queensland Seasonal Pool sugar until the sugar had been physically produced. QSL on the other hand says that the Wilmar RSSA contemplates progressive sale of the sugar across the season. The defendant points to the draft operational improvement plan as containing indications in support of that argument. As will be seen, then, Schedule 4 does have some importance.

[52] A major plank in QSL's defence of the claim is that, on a proper construction of the Wilmar RSSA, it was Wilmar that took the production risk and QSL marketed the

97 Wilmar RSSA cl 22.
98 See cl 11.1.

Queensland Seasonal Pool within strict criteria primarily governed by the FRMP. A starting point is the recitals to the Wilmar RSSA.

[53] The recitals are as follows:

"**Recitals**

A. Queensland Sugar[99] currently markets the majority of raw sugar manufactured by Queensland mills to export markets, which it acquires pursuant to a number of supply agreements with Queensland mill owners.

B. The Supplier[100] carries on the business of manufacturing raw sugar in Queensland.

C. The Supplier and other Queensland mill owners who currently supply sugar to Queensland Sugar have requested Queensland Sugar restructure its board of directors and director selection process to put it in the best position to continue to be the body responsible for marketing the majority of Queensland's export sugar.

D. In conjunction with that restructure, the Supplier and Participants[101] have also undertaken to provide the growers who supply them with access to long term pricing agreements by September 2008.

E. The Supplier and Queensland Sugar have negotiated the terms on which the Supplier will sell raw sugar to Queensland Sugar for marketing and sale for export following the restructure.

F. Queensland Sugar will manage the export of raw sugar under a pooling arrangement where sales revenues, and the associated costs and risks, are allocated on a shared basis between all participants which have entered Supply Contracts, as detailed in the attached terms and conditions.

G. In carrying out this Agreement, Queensland Sugar will actively promote contact and market signals between the Suppler and existing and potential export customers; and consult with the Supplier in relation to export marketing strategy setting, tonnage allocations to markets and other key marketing decisions.

H. Queensland Sugar will work together with the Supplier with the objective of optimising returns to the Supplier.

I. The Supplier will supply bulk raw sugar and regular advice to Queensland Sugar, such as tonnage estimates, in order to support Queensland Sugar's marketing efforts."

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[99] A reference to QSL.

[100] Under the Wilmar RSSA, this is Wilmar.

[101] Wilmar and other millers who have entered into RSSAs.

[54] Several things should be noted about the recitals.

[55] Firstly, the recitals assume that the Wilmar RSSA is not the only agreement between a miller and QSL. Reference to "Participants" is seen in recital F. The term "Participants" and the term "Supply Contracts" are defined as follows:

> "***Participant(s)*** means those milling companies contracted with Queensland Sugar via the Supply Contracts.
>
> ***Supply Contracts*** means the supply agreements for the supply of Queensland bulk raw sugar to Queensland Sugar by contracted milling companies."[102]

[56] Secondly, while the role of QSL is to market the sugar, this is done by QSL purchasing and obtaining title to the sugar. This is hinted at in recital A which refers to sugar which QSL "acquires" and is made clear by cll 1.1 and 10 which are as follows:

> "1.1 The Supplier agrees to supply bulk raw sugar to Queensland Sugar in accordance with the attached terms and conditions.
>
> …
>
> 10.1 Title and risk for raw sugar supplied under this Agreement will pass on completion of weighing at the receival station of the bulk sugar terminal or such other facility nominated in Clause 9.
>
> 10.2 Queensland Sugar will insure the product from the point where it takes title."

[57] Thirdly, the pooling arrangement is designed to share revenues "and the associated costs and risks" between the "participants" namely the millers, including Wilmar. This is made clear by Recital F.

[58] Fourthly, although in much of the evidence the pools were spoken about as if they were pools of sugar, in reality the pools are not collections of physical sugar but are money sums being the net proceeds of the sale of the sugar notionally allocated to the pool. The term "pool" is defined as follows:

> "***Pool*** means an aggregation of revenue and costs that are attributed to a quantity of sugar under rules established in Schedule 2."

[59] Fifthly, recital H records that the objective of the Wilmar RSSA is to "optimis[e] returns to the Supplier". Although that might seem innocuous enough, as will be later explained the case largely developed into an argument as to whether the obligation upon QSL was to manage only what was called "price risk", namely fluctuations in the market, or whether the obligation included managing "production risk", being variations between the volume of sugar estimated and that actually produced. The essential theme in QSL's defence of the claim is that it was to manage price risk, but any risk that production might fall was a risk borne by the millers, here Wilmar.

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[102] Clause 2.

[60] Clauses relevant to the supply of information or advice by Wilmar to QSL, and vice versa, include cll 6 and 20.[103] They are as follows:

> "6.1 The Supplier agrees to supply 100% of its production (and that of any of its Subsidiaries operating a mill in Queensland) intended for bulk export, during any Season while this Agreement remains in force, to Queensland Sugar for delivery to the Lucinda, Townsville and Mackay bulk sugar terminals or such other facility nominated in Clause 9. For the avoidance of doubt, if the Supplier intends to sell production to a trader or other intermediary and has reason to believe that trader or intermediary may intend to supply the sugar by way of bulk export that production will be deemed to be intended for bulk export.
>
> 6.2 The Supplier will advise by 30 November, in the calendar year preceding delivery the quantity which it is estimated will be supplied under this Agreement in that Season by way of a schedule specifying weekly deliveries to each bulk sugar terminal (the ***Initial SPE***).
>
> 6.3 The Supplier's advice in relation to the quantity of sugar to be supplied is not binding on the Supplier, although a departure from that amount may result in a price change pursuant to Clause 6.6.
>
> 6.4 The Supplier will then advise Queensland Sugar of:
>
> (a) any change of quantity to be supplied under this Agreement; and
>
> (b) the reasons for that change (including the extent to which it was due to natural seasonal variations, or due to the Supplier's using sugar for other commercial purposes);
>
> by a written declaration on the Wednesday preceding the last Friday of each calendar month; or on the prior working day if the Wednesday is a public holiday, or more regularly if requested by Queensland Sugar or if there is a significant change from the quantity previously advised.
>
> 6.5 The Supplier will not make any change to the quantity notified under Clause 6.2, other than to the extent the variation relates to natural seasonal variations in crop size, without the prior consent of Queensland Sugar. Queensland Sugar's consent is not to be unreasonably withheld.
>
> 6.6 If consent is given pursuant to clause 6.5 and the Supplier proceeds with the change in quantity from that notified, Queensland Sugar will determine the financial effect in accordance with the procedure set out in Schedule 5. The financial effect will be for the Supplier's account.[104]
>
> …

[103] And also cl 5 referred to later.
[104] Amended by Amendment Deed cl 2(d).

20.1 The Supplier and Queensland Sugar warrant to each other that they are respectively duly formed under the laws of its places of formation and have power and authority to enter into and perform their obligations under this Agreement, and each person executing this on their behalf has full power and authority to execute it on behalf of the Supplier or Queensland Sugar as the case may be.

20.2 The Supplier acknowledges that:

(a) Queensland Sugar has not and does not intend to provide advice (including financial advice) to the Supplier as to participation in this Agreement or otherwise;

(b) it has sought and obtained advice (including financial advice) about its decision to participate in the pricing and payment options in this Agreement and to otherwise manage the financial and other risks associated with their participation in this Agreement and more generally its business activities with respect to sugar;

(c) participation in the pricing and payment options (and for that matter, other means of seeking to manage commodity price and foreign exchange volatility) each involve risks and that the decision as to whether and as to how to manage those risks are those of the Supplier and not of Queensland Sugar;

(d) it has not relied upon anything that Queensland Sugar (or its directors, officers, employees or agents) have represented (whether by words, conduct, silence or otherwise) in relation to the pricing and payment options or any other matter in deciding whether to participate in this Agreement or other activities; and

(e) in the absence of any manifest error, any certificate given by Queensland Sugar with respect to a matter under this Agreement is taken to be prima facie evidence of the matter certified."

[61] Also relevant in identifying the nature of the relationship between the parties is cl 22. That clause provides:

"**22. Queensland Sugar Not Intended to Make Profit or Loss**

22.1 The parties intend that Queensland Sugar is to make no profit or loss in performing its obligations under this Agreement or the other Supply Contracts. To achieve that intention this Agreement enables Queensland Sugar to pass on to all Participants all costs and revenues of any nature that it incurs or receives in performing its obligations under the Supply Contracts, including overhead and administrative costs.

22.2 To the extent that provisions of the Schedules to this Agreement would otherwise result in a situation where in performing its obligations under the Supply Contracts:

(a) Queensland Sugar would incur a cost it was not entitled to recover from Participants; or

(b) Queensland Sugar would receive revenue that Participants were not entitled to receive a share in;

Queensland Sugar can allocate that cost or revenue to the Participants to which, in the reasonable opinion of Queensland Sugar, that cost or revenue is attributable."

[62] Clause 4, which I needn't set out, makes it clear that the Wilmar RSSA applied to the 2010 sugar season. Clause 5 assumes some importance as it is the clause which deals with the draft operational improvement plan which appears in Schedule 4 and which has already been mentioned. Clause 5 is in these terms:

"**5. Service and Liaison**

5.1 Queensland Sugar will maintain good communication with the Supplier, particularly in terms of issues related to sugar marketing.

5.2 Queensland Sugar will maintain regular written (at least monthly), face to face or phone contact with the Supplier regarding market developments in all aspects of the sugar market of interest to the Supplier, including, but not limited to:

(a) customer by customer updates;

(b) pricing issues;

(c) competitor behaviour;

(d) futures market activity;

(e) operational issues including changes in shipping market and vessel availability, sugar quality and logistical matters; and

(f) other aspects of the sugar market as reasonably requested by the Supplier.

5.3 Queensland Sugar in consultation with the Supplier and other Participants will develop an operational improvement plan by 31 March 2009 to cover the period until 30 June 2012. Pending the development of the operational improvement plan as required by this Clause 5.3, the draft operational improvement plan included in Schedule 4 will apply and Queensland Sugar agrees to seek to operate in accordance with its terms. It is acknowledged that the draft operational improvement plan in Schedule 4 will be further developed and will change as a result of consultation with the Supplier and other Participants, and additional analysis and input from the Queensland Sugar board of directors.

5.4 The operational improvement plan will involve Queensland Sugar reviewing its operations and developing business improvement strategies. Those strategies will be measured by

KPIs, which will be reported to the Supplier and other Participants on a monthly basis in the reporting format identified in Schedule 3.

5.5 Queensland Sugar will meet with the Supplier and other Participants on a quarterly basis. During the term of the operational improvement plan, at each such quarterly meeting Queensland Sugar and the participants will discuss and consult in relation to the progress Queensland Sugar is making against the operational improvement plan.

5.6 Queensland Sugar will consult with the Supplier and other Participants:

(a) at each quarterly meeting - about its marketing strategy for the Season including tonnage allocations to markets, competitive issues and other key market planning decisions; and

(b) at the March quarterly meeting - about its operating and capital budget for the following financial year;

(c) at the June quarterly meeting - regarding the suitability of this Agreement to future market and industry structural circumstances.

and agreed to give proper consideration to any changes requested by the Supplier and other Participants."

[63] Clause 7 provides for special arrangements if the supplier (here Wilmar) nominates to supply less than 25,000 tonnes of sugar in the season. Wilmar did not so nominate. Clause 8 contains a warranty by Wilmar as to the origin of the sugar, namely that it was the product of a Queensland raw sugar mill and cl 9 concerns the obligation of delivery. Clause 9 has to be read in conjunction with cll 1, 6 and 10[105] which have already been set out. Clause 9 is as follows:

"**9. Delivery**

9.1 The quantity of raw sugar defined at Clause 6, above, will be delivered by and at the expense of the Supplier, to the Lucinda, Townsville and Mackay bulk sugar terminals or, subject to Clause 9.2, to another facility as nominated by Queensland Sugar from time to time. The weight of sugar delivered by a mill shall be determined by a certified weigher at the Lucinda, Townsville and Mackay bulk sugar terminals or a certified weigher at such other facility as nominated by Queensland Sugar. Deliveries are to be completed within 7 days of the Supplier ceasing crushing operations for the Season.

9.2 Where Queensland Sugar nominates an alternative facility for delivery and weighing, Queensland Sugar will reimburse the Supplier for any transport and port charges costs that the Supplier

[105] Clauses 1 and 10 are, relevantly at paragraph [56] and cl 6 is at paragraph [60] of these reasons.

may incur that are in excess of those which would have been incurred had the delivery been made to the bulk sugar terminal specified in Clause 9.1. At the time of nomination of the other facility, Queensland Sugar and the Supplier will agree as to the additional costs to be reimbursed."

[64] Clause 13 concerns payment by QSL to Wilmar but must be considered in light of cl 12 and the definition of "pool" in cl 2.[106] Clauses 12 and 13 are as follows:

"**12. Price**

12.1 The Supplier's production supplied under this Agreement will be allocated to Pools for the purposes of pricing in accordance with Schedule 2.

13. Payment

13.1 Queensland Sugar will determine a scheme for advance payments under this Agreement, which will be communicated in the format set out in Report 2 in Schedule 3. Queensland Sugar will review the advance payments schedule each month.

13.2 The initial advance rate will not exceed 60% of Queensland Sugar's weighted average forecast final price of all pools at the time of setting the initial advance rate.

13.3 The final payment for each Season will be made within 30 days of the completion of that Season."

[65] Clause 14 deals with GST and is of no moment here. Clause 15 concerns termination of the Wilmar RSSA. While neither party alleged that they had terminated the contract under cl 15, cl 15 is relevant to the construction of the Wilmar RSSA which QSL presses. The clause is as follows:

"**15. Termination**

15.1 This Agreement shall have a rolling term of three years, with automatic extensions of a further 12 months on each 30 June in accordance with Clause 4, until terminated in accordance with the provisions of Clauses 4 or 15.

15.2 If either party is in breach of the provisions of this Agreement, the other party may give notice in writing of the breach to the party in breach requesting that such breach be remedied within 28 days of the date of receipt of the notice. If such breach is not remedied within 28 days from the date of receipt of such notice, or if other arrangements satisfactory to the party giving notice are not made in such time, the party giving the notice may (but shall not be obliged to) terminate this Agreement; **provided that** this Agreement shall remain in full force and effect until:

[106] The definition of "pool" appears at paragraph [58] of these reasons.

(a) if notice of termination was given prior to the Supplier's notification of quantity for the next Season being given pursuant to Clause 6.2, the next 30 June; or

(b) if notice of termination was given after the Supplier's notification of quantity for the next Season being given pursuant to Clause 6.2 the 30 June constituting the end of that Season;

<u>in recognition of the fact that once the notification of quantity is given Queensland Sugar will contract for the sale of the sugar to be supplied by the Supplier during that Season in advance,</u> and that a termination part way through the Season would cause significant disruption to the pooling arrangement.

15.3 If a majority of Grower Representative Members vote in favour of appointing a selection panel for election of Grower Directors in accordance with Article 29B of Queensland Sugar's constitution (other than in response to a prior appointment of Mill Owner Directors, or a vote by Mill Owner Members in favour of considering a nomination for election of Mill Owner Directors in accordance with Article 29B), Queensland Sugar will notify the Supplier, and either party may (but is not obliged to) terminate this Agreement by providing written notice to the other party of such termination within 10 days of Queensland Sugar's initial notification; **provided that** this Agreement shall remain in full force and effect until:

(a) if notice of termination was given prior to the Supplier's notification of quantity for the next Season being given pursuant to Clause 6.2, the next 30 June; or

(b) if notice of termination was given after the Supplier's notification of quantity for the next Season being given pursuant to Clause 6.2, the next 30 June constituting the end of that Season;

<u>in recognition of the fact that once the notification of quantity is given Queensland Sugar will contract for the sale of the sugar to be supplied by the Supplier during that Season in advance,</u> and that a termination part way through the Season would cause significant disruption to the pooling arrangements.

15.4 A party may terminate this Agreement immediately by written notice to the other party if the other party:

(a) stops or suspends or threatens to stop or suspend payment of all or a class of its debts;

(b) is insolvent within the meaning of section 95A of the Corporations Act;

(c) is presumed insolvent by a court by reason of section 459C(2) of the Corporations Act;

(d) fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act);

(e) has an administrator appointed over all or any of its assets or undertaking or any step preliminary to the appointment of an administrator is taken;

(f) has a controller within the meaning of section 9 of the Corporations Act or similar officer appointed to all or any of its assets or undertaking; or

(g) has an application or order made, proceedings commenced, a resolution passed or proposed in a notice of meeting or an application to a court or other steps taken for its winding up or dissolution or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them.

<u>In the event of termination pursuant to this Clause 15.4, Queensland Sugar will have a right to off-set any losses incurred as a result of the early termination, including losses incurred as a result of closing out sugar future trades entered on the basis of future production contracted to be supplied by the Supplier, against any money owed to the Supplier under this Agreement at the time of termination.</u> Any gains on closing out such sugar futures trades will be deducted from any other losses incurred as a result of the early termination or other amounts owing to Queensland Sugar, and to the extent such gain is greater than any such losses or amounts owing, the excess will be payable to the Supplier." (emphasis added).

[66] Clause 16, 17, 18 and 19 deal with confidentiality, the nominated governing law, the method of giving notices and assignment respectively. They are of no direct relevance to the present dispute.

[67] Schedule 2 deals with the pooling arrangements and it is critical. The pools are categorised into either "ICE 11 Pools" or "Non ICE 11 Pools". They are defined as:

"***ICE 11 Pools*** means Pools where the Pricing Mechanism is directly related to the ICE 11 Contract.

Non ICE 11 Pools means Pools where the Pricing Mechanism is not directly related to the ICE 11 Conract."

[68] The terms "ICE" and "ICE 11 Contract" are defined as:

"***ICE*** means ICE Futures US, Inc (formerly the New York Board of Trade).

ICE 11 Contract means a sugar futures contract (known as a ***world sugar No 11***) offered for sale or purchase by ICE."

[69] Clause 2 of Schedule 2 identifies three pools as "Non ICE 11 Pools". These are the pools called the "US Quota Pool", the "EU Quota Pool" and the "LTC Pool". "LTC" is defined as:

> "***LTC*** means long term contract."

[70] Two pools are "ICE 11 Pools". These are the "Pricing Platform Pool" and the "Queensland Seasonal Pool". The "Pricing Platform" is defined as:

> "***Pricing Platform*** has the meaning given in Clause 2.4.1 of Schedule 2."

[71] Clause 2.4.1 of Schedule 2 concerns the Pricing Platform Pool. It provides, relevantly:

> "**2.4.1.1 General**
>
> The Pricing Platform is a mechanism to provide a simple framework within which Pool Participants can manage a significant portion of their sugar price risk.
>
> The Pricing Platform will consist of a number of Pools which are managed by a Risk Manager whose basic responsibility is to price the ICE 11 price component and the AUD USD exposure represented by that ICE 11 price component committed to the Pool. The Risk Manager will be either Queensland Sugar, the Supplier or with the approval of both Queensland Sugar and the Supplier, an external Risk Manager.
>
> Currently the costs and benefits of variations from the Pricing Platform 1:2:2:1 fixed pricing month allocations are for the account of the Seasonal Pool. Should the total tonnage allocated by all Participants to the Pricing Platform pools at the Pricing Declaration Date be greater than 50% of the total tonnage allocated to all ICE 11 pools, Queensland Sugar and Participants will determine whether it would be fairer to distribute these costs and benefits to the Shared Pool.
>
> In the interim, to mitigate any conflict in marketing strategy between Seasonal Pool and Pricing Platform pool tonnages, in the event that the total long futures position generated from Queensland Sugar sales is less than the total short futures position arising from all Pricing Platform pools for any pricing month, the identifiable cost or benefit in remedying this situation will be distributed equally, based on tonnage, to the pricing Platform pools.
>
> **2.4.1.2 A Pricing Platform Pool can be established in three ways**
>
> 1. By Queensland Sugar. Examples of Pricing Platform Pools likely to be offered by Queensland Sugar are the Aggressive Pool and the Long Term Target Pool.
>
> 2. By the Supplier. Examples of Pricing Platform Pools likely to be established by the Supplier are Pools under which the Supplier manages its price risk.
>
> 3. By an external Risk Manager. With the approval of both Queensland Sugar and the Supplier, an agreement may be entered into under which an external Risk Manger is authorised to act as the Risk Manager of a Pricing Platform Pool. Examples of a Pool likely to be offered by an external Risk

Manager is a Pool comprising a number of Suppliers but with a common specialist Risk Manager.

2.4.1.3 Requirements for Queensland Sugar Pricing Platform Pools offered to Growers

If a product that Queensland Sugar is offering under its own name on the Pricing Platform is offered by the Supplier to Growers (for the purpose of managing price risk involved with their cane supply), then Queensland Sugar's description of that product will be given to those Growers at the time the offer is made.

2.4.1.4 Pricing Declaration Date

In order that Queensland Sugar can determine the sugar that it is responsible for pricing and what sugar other Risk Managers are responsible for pricing, it is necessary to establish a Pricing Declaration Date. The Pricing Declaration Date for any Season is 30 November prior to the year of that Season. For example, for the 2009 Season the Pricing Declaration Date is 30 November 2008. The Pricing Declaration Date for a Season may be changed by Queensland Sugar to a maximum of 3 months either side of 30 November, but only after consultation with Participants.

2.4.1.5 Commitment to Pricing Platform

Applications to commit tonnage to a Pricing Platform Pool must be made by the Supplier as per Form A to this Agreement. Applications can be made at any time up to the Pricing Declaration Date. Queensland Sugar must confirm each Application and once confirmed it becomes Committed Sugar.

The only grounds that Queensland Sugar has to refuse an Application are

1. That acceptance of the Application would result in the Supplier exceeding its limit of Committee Sugar as determined by Clause 2.4.1.6 of this Schedule.

2. That acceptance of the Application is likely to result in the Supplier exceeding its Credit Limit as established through Clause 3 of this Schedule.

3. That the Pool will not meet the minimum tonnage requirement specified in Clause 2.4.1.9 of this Schedule.

2.4.1.6 Limit on Committed Sugar

In order to minimise the risk of Participants not supplying sufficient sugar to meet their obligations and to restrict the financial impact on Queensland Sugar of the commitment of sugar by Participants to the Pricing Platform, there will be a Commitment Limit on the amount of Committed Sugar.

The Commitment Limit will be 70% of SPE for the current Season and 50% of the Supplier's supply estimate for two Seasons forward and 30% of the Supplier's supply estimate for three Seasons forward.

Should the Supplier elect to participate in the Long Term Target Pool, they will provide a non binding supply estimate for those Seasons beyond the current Season for which they wish to use the Long Term Target Pool. The Supplier has an obligation to inform Queensland Sugar of changes of more than 10% of these future Seasons estimates. Where Queensland Sugar is concerned that the Supplier's estimate of future Seasons supply is overestimated, the Supplier's actual delivered tonnage under this agreement for the latest completed crushing will be used as the estimate of future Seasons supply for the purpose of setting these limits.

These limits may be changed by Queensland Sugar at its absolute discretion but only after consultation with all Participants. …"

[72] The definition of "Queensland Seasonal Pool" has been referred to earlier but the full definition is:

> "***Queensland Seasonal Pool*** is a Pool operated by Queensland Sugar to which the balance of all Supplier's sugar not allocated to other Pools will be allocated and priced in accordance with Queensland Sugar's board-approved risk management policy."

[73] Of some importance is the definition of "Committed Sugar". That is:

> "***Committed Sugar*** means the tonnage of sugar that the Supplier must supply under this Agreement. It is the total of the Supplier's Pricing Platform tonnages and Non ICE 11 tonnages."

[74] In essence then, the Queensland Seasonal Pool represents sugar not committed to the other pools. By cl 2.4 Wilmar may allocate sugar to other pools up to a limit of 70% of its raw sugar export production. A participant such as Wilmar may therefore price up to 70% of its production itself with a minimum of 30% falling to the Queensland Seasonal Pool. Wilmar or any other miller may of course elect not to allocate sugar to the other pools or may allocate less than 70%. Whatever is not allocated falls to the Seasonal Pool.[107]

[75] Schedule 2 of the RSSA only contains a couple of provisions which deal exclusively with the Queensland Seasonal Pool. These are contained within cl 2.6 which is as follows:

> "**2.6 Queensland Seasonal Pool**
>
> **2.6.1 Queensland Seasonal Pool Tonnage**
>
> The total tonnage of sugar allocated to this Pool will be the total of all Participants sugar less the total of all Participants sugar allocated to all other Pools.
>
> The Supplier's tonnage allocated to this Pool will be the Supplier's total tonnage less the total of the Supplier's sugar allocated to all other Pools.
>
> The Supplier's Tonnes IPS sugar allocated to this Pool will be the Supplier's total Tonnes IPS sugar less Tonnes IPS sugar allocated to all other Pools.

[107] An explanation is provided by Mr Wenham, CFI 33, paragraph [71].

2.6.2 Queensland Seasonal Pool Price

The Queensland Seasonal Pool will be allocated with the balance of returns of all ICE 11 sales not allocated to other Pricing Platform Pools. The futures gain or loss will be based on the residual ICE 11 exposure which is Queensland Sugar's bought futures from all ICE 11 sales less the exposure managed by Platform Pricing Pools. Seasonal Pool pricing will not commence until the day after the Pricing Declaration Date.

Any foreign currency net returns for Queensland Seasonal pool sales for a Season will be converted to AUD at the rate hedged by Queensland Sugar for Queensland Seasonal pool sugar in accordance with the guidelines provided in the Queensland Sugar board-approved financial risk management policy. Queensland Sugar will not commence pricing and risk management activities of this Pool for the Season until after the Pricing Declaration Date.

The price of the Queensland Seasonal pool in AUD/tonne of IPS sugar will be determined by dividing Queensland Seasonal Pool returns by the total Tonnes IPS sugar in the pool. The price for the Queensland Seasonal Pool will be adjusted by the relevant Allocation for ICE 11 sales from the Shared Pool to give the net price."

[76] Therefore, the Queensland Seasonal Pool represents sugar not committed to other pools.

[77] The status of the FRMP[108] is highly contentious. However, the document is potentially relevant to both Wilmar's contract and breach of duty claims. QSL submits that compliance with the terms of the FRMP discharges its obligations under the RSSA.

[78] Clause 1 of the FRMP is as follows:

"**1.0 INTRODUCTION**

This policy relates to the management of sugar price and foreign currency risk that arises from the pricing alternatives offered and operated by Queensland Sugar Limited (QSL) under the Raw Sugar Supply Agreements (Supply Agreements) with contracted Milling Companies. This policy does not need to address the price and foreign exchange risk associated with Long Term Contracts (LTC's). Suppliers who elect to participate in future LTC's will be responsible for physical supply and the resulting financial obligations under their principal agreements with QSL. Should agreements between the supplier and QSL cease during the term of such LTC's, all remaining rights and obligations will be novated from QSL to the respective supplier. A supplier's willingness to participate in an LTC will largely be a function of returns that can be generated over future seasons at the time of negotiation and participation.

This policy outlines the operational requirements of the following pricing alternatives currently offered by QSL:

1. Seasonal Price Pool

[108] Trial bundle tab 28.

2. Actively Managed Pool

3. Forward Fixed Price Contract

4. In-Season Fixed Price Contract

While management of credit risk, liquidity risk and operational risk is covered by other policy documents of QSL, it is recognised that margin calls and out of the money hedging losses may affect QSL credit and liquidity."

[79] It can be seen that cl 1 of the policy, at least on its face, deals with pricing alternatives including those for the "Seasonal Price Pool" which is clearly a reference to the Queensland Seasonal Pool. Clause 2 describes QSL as "essentially a 'pass-through' organisation" and that it is the millers and growers who ultimately take all risks. This follows the theme of cll 20 and 22 of the RSSA. Clause 2 of the FRMP is as follows:

"**2.0 FINANCIAL RISK MANAGEMENT PHILOSOPHY**

QSL is essentially a 'pass-through' organisation. This means that all millers and ultimately growers essentially take all price and foreign exchange risk, allocated to different pools. QSL takes very limited risk on its own balance sheet and does so within clearly defined limits and delegations.

The Supply Agreements require sugar suppliers to provide a seasonal pricing declaration to QSL by the 30 November preceding the crop year, committing a proportion of forecast deliveries to various pricing alternatives and services offered by QSL. Sugar suppliers can also elect to undertake their own sugar pricing and foreign exchange risk management independently of QSL, with QSL providing an effective closeout mechanism (Pricing Platform)."

[80] Clause 2.1.1 of the FRMP contains a recognition of sugar price risk in these terms:

"**2.1.1 Recognition of Risk**

Sugar Price risk is an inherent feature of the sugar market. By its very nature, sugar price risk cannot be totally eliminated. It is however manageable to some extent in the short to medium term only to the extent that it provides millers and growers with a degree of price certainty. In the longer term , the cost competitiveness of the industry will determine its viability.

For financial risk management purposes, sugar price risk is defined as exposure to sugar price movements on actual and anticipated sugar sales for a season that have not been price fixed or price protected."

[81] Clause 2.1.2 identifies measures which are available to QSL to manage sugar price risk and then states:

"The predominant focus of QSL's sugar price risk management activities for all pricing alternatives relates to the use of futures and options on the ICE, and Over-the-Counter arrangements whose price is related to, or derived from, ICE values."

[82] There are provisions concerning foreign currency risk[109] and then persons within QSL are identified as having the various areas of responsibility nominated in Schedule B. It is not necessary to consider those provisions further.

[83] Clause 4 relevantly provides:

> "**4.0 ICE NO.11 PRICING POOLS**
>
> This section details the framework and operational limits for each of the ICE No.11 pricing pools offered by QSL. Whilst it is difficult to quantify the degree of inefficiency in the sugar and foreign exchange markets, the operational framework for each pool is designed to provide the opportunity for QSL staff to utilise their commercial judgement in the management of financial risk within defined Value at Risk (VAR) limits. At the same time the framework maintains an appropriate degree of discipline and rigour. The balance between discipline and the opportunity for staff to add value to the financial risk management process is reflected in the degree of operational limits granted to Management compared to benchmarks for the respective pools.
>
> **4.1 Seasonal Price Pool**
>
> The objective of this pool is to maximise the price achieved for the season's production allocated to this pool within operational authority. A philosophy of active sugar price risk management is encouraged within the VAR limit for this Pool.
>
> **4.1.1 Operational framework (Seasonal Price Pool)**
>
> - An overriding VAR limit of 9 percent of the Seasonal Price Pool Benchmark Return (as per Schedule D) is set for this pool. As long as the overall performance (as calculated as per Schedule C) of this pool falls within this VAR limit, then the operational limits in Sections 4.1.2 and 4.1.3 will be available to the Pool Manager.
> - Should the VAR limit of 9 percent be exceeded, the Executive Management team will determine what action is to be taken whilst performance remains within a VAR range of 9 to 13 percent of Seasonal Price Pool Benchmark Return.
> - Should VAR exceed 13 percent of the Seasonal Price Pool Benchmark Return, the QSL Board of Directors, under advice from the Audit & Risk Committee will determine the corrective action to be taken.
>
> **4.1.2 Sugar price operating limits (Seasonal Price Pool)**
>
> - Operational authority of +20/-20 percentage points from the pricing percentage indicated at any point in time by the Neutral Benchmark (Neutral Sugar Price Hedge Ratio) for the applicable season at that point in time, subject to underweight positions not exceeding the unpriced portion of the Neutral Benchmark for the pool.

[109] Clause 2.2.

- Reversal of existing ICE No. 11 trades is permitted within the above operational authority limit, subject to individual approval of each reversal by the Chief Executive as per Schedule B.
- Calculation of the Neutral Benchmark for a season is specified in Schedule A.
- The Actual Sugar Price Hedge Ratio for a season is defined in Schedule F.
- Permitted sugar price hedging activities include all types of ICE No. 11 based limiting structures (as defined in Schedule E) and option transactions (both on the ICE and Over-the-Counter) that allow participation in favourable sugar price movements, but exclude all limiting structures and option transactions that create exposure to unfavourable sugar price movements.
- All transactions are subject to the requirements set out in Schedule E."

[84] Clause 4 concerns ICE No 11 Pricing Pools. Of course the Queensland Seasonal Pool is an "ICE 11 Pool".

[85] Clause 4.1 concerns the "Seasonal Price Pool" which is the Queensland Seasonal Pool. Clause 4.0 mentions QSL staff exercising judgement within a band of "Value at Risk" (VAR) limits. Clauses 4.1.1 and 4.1.2 concern the "operational framework" and "sugar price operating limits" for the Queensland Seasonal Pool.

[86] Clauses 4.1.1 and 4.1.2 refer to various schedules. Schedules A, C and D are as follows:

"SCHEDULE A

Neutral Benchmark – Current Season or Seasons

The purpose of this schedule is to detail the methodology and calculation of the Neutral Benchmark for sugar price and foreign exchange risk management for an applicable season. As sugar suppliers make seasonal pricing elections by the 30 November preceding the crop year, there is an overlap in pricing a season's production for each of the in-season pools. Consequently, two seasons can be current at the same time for financial risk management purposes. Such seasons are managed separately for pricing and reporting purposes within the total VAR limit approved by the Board for those pools and season.

In addition to establishing the parameters for the operational limits, the Neutral Benchmark also defines QSL's accepted risk profile for each pool.

Sugar Price Risk Management – Neutral Benchmark

For the calculation of the Neutral Benchmark for a pricing pool, individual futures contracts are included for a period of 9 months prior to expiry except for the July futures position of a season, which has a pricing horizon of 7 months. The shorter pricing horizon for the ICE No.11 July position reflects the pricing declaration date of 30 November under Supply Agreements. This results in a season becoming current from 1 December of the year preceding the crop year for financial risk management purposes.

The Neutral Benchmark is designed to provide a reference point to the Pool Manager regarding the amount of sugar pricing to be undertaken for a Pricing Pool.

Foreign Exchange Risk Management – Neutral Benchmark

The determination of the Foreign Currency Neutral Benchmark is derived from the USD exposure that would have resulted had foreign exchange management been conducted in accordance with the Actual Sugar Price Hedge Ratio for the relevant pool (i.e. conducted back to back with sugar pricing)."

"SCHEDULE C

Performance Measurement and Benchmark Pool Return

Performance measurement concentrates on assessing the performance of the utilisation of operational limits for sugar pricing and foreign exchange under the Seasonal Price and Actively Managed Pools. Actual results, both for sugar and foreign currency risk, are compared to the results that would have been obtained if no operational limits had been granted and hedging had followed the relevant benchmark.

For sugar price risk management this requires that the Actual Sugar Price Hedge Ratio and corresponding returns resulting from sugar pricing decisions be compared to the Neutral Sugar Price Benchmark return for the Seasonal Price and Actively Managed Pools respectively.

For foreign exchange risk management, this requires that the Foreign Currency Hedge Ratio and corresponding returns resulting from foreign exchange decisions be compared to the Foreign Currency Neutral Benchmark return for the Seasonal Price and Actively Managed Price Pools.

For performance measurement purposes, calculation of Benchmarks for sugar price and foreign exchange for a pool is determined as follows:

- **ICE Sugar Price**
  Closing ICE No.11 futures values weighted against tonnage generated from Benchmark pricing for the Pool.

- **Foreign Exchange**
  Closing A$ forward exchange rates, as at 5.00 p.m. Sydney time, weighted against USD exposures generated from actual pricing for the Pool.

For VAR limits measurement purposes a Benchmark Return will be calculated. This measure determines what a pool's return would have been had ICE No. 11 pricing and foreign exchange activities both been conducted in strict accordance with the Neutral Benchmark. The Benchmark Return for a pool will be determined as follows:

- Closing ICE No.11 futures values weighted against tonnage generated from Benchmark pricing for the Pool converted to AUD at closing A$ forward exchange rates reflective of the respective futures position, as at 5.00 p.m. Sydney time each day.

All Benchmarks are calculated on a weekly basis using a Friday cut-off. For monthly reporting to the Board the Benchmarks and VAR limits reported for each pool will reflect the results as calculated for the last Friday of the month to be consistent with the financial reports. Detailed procedures for the calculation of all Benchmarks are contained in the Treasury procedures manual.

SCHEDULE D

Value at Risk Limits for Pools

Seasonal and Actively Managed Pools managed under this policy will be governed by a Value at Risk (VAR) Limit. The VAR limit is the maximum allowable percentage of **under performance** against Benchmark Return that QSL will be exposed to before discretionary limits are suspended for a Pool Manager.

Whilst most corporations appreciate that value creation is difficult without taking on risk, VAR limits remain crucial in ensuring control over risk taking behaviour. QSL's approach in applying VAR limits centres around the maximum percentage loss Management and the Board are prepared to accept against Benchmark Return values.

To quantify this percentage loss threshold, QSL Management reviewed the volatility of weekly returns on continuous prompt ICE No.11 AUD values over four years, or 208 data samples (November 2005 to November 2009). The data suggested that with 95 percent confidence, weekly returns would not exceed -9.0 percent. Furthermore, with a 99.0 percent confidence level, average weekly returns would not exceed -13.0 percent.

Using the data outcomes as per above, QSL Management and Board have decided to apply an 9.0 percent and a 13.0 percent VAR limit for the Seasonal Price Pool and Actively Managed Price Pool respectively. This largely reflects the different risk appetites and approaches of the pools.

A review of VAR limits for each of QSL pools will take place annually to coincide with the annual review of this policy and the initial pricing declaration for a season. The sample size of historical returns to be used will be a minimum of 208 weekly observations (four years of weekly observations). Extra observations may be included depending (sic) Management's view on the observed structure of the market over the sample period. VAR limits may be reviewed during the year should the QSL Board view market circumstances warrant such a review."

[87] What can be seen is that the FRMP establishes a framework where obligations are performed and then marketing decisions are made within the limits thereby established. The FRMP is designed to deal with "price risk", as the parties have identified that concept, not the risk of fall in production.

Pleadings in the breach of contract case

[88] Wilmar pleads:[110]

> "14. Each of the following was an implied term of the Wilmar RSSA:
>
> (a) that QSL must take reasonable care when entering into Physical Supply Contracts to maintain at all times a sufficient amount of unsold tonnes of raw sugar in the Seasonal Pool to accommodate variations from the Initial SPEs and any Updated SPEs, including variations related to adverse weather conditions impacting the harvesting and crushing of the sugar cane and therefore the production of raw sugar to be delivered to QSL by the Raw Sugar Suppliers.
>
> (b) that QSL must take reasonable care when exercising the Seasonal Pool Hedging Discretion to maintain at all times a sufficient amount of unpriced tonnes of raw sugar in the Seasonal Pool to accommodate variations from the Initial SPEs and any Updated SPEs, including variations related to adverse weather conditions impacting the harvesting and crushing of the sugar cane and therefore the production of raw sugar to be delivered to QSL by the Raw Sugar Suppliers.
>
> (c) [deleted by amendment]
>
> (d) that QSL was required while managing the Seasonal Pool, including the sugar price and foreign exchange exposure of the Seasonal Pool, and while exercising (or not exercising) the Seasonal Pool Hedging Discretion ~~or the Ratio Varying Discretion~~, or entering into Physical Supply Contracts, to exercise the care, skill and diligence of an ordinary skilled manager of the pricing of agriculture products intended for future international sale in a foreign currency.
>
> **Particulars**
>
> These terms are implied in fact as necessary to give business efficacy to the terms of the Wilmar RSSA, and further and in the alternative by operation of law.
>
> Wilmar also relies on the further and better particulars of this paragraph dated 31 July 2015."

[89] The Statement of Claim refers to further and better particulars dated 31 July 2015. Those particulars were delivered pursuant to a request. In relation to each of the paragraphs alleging implied terms, QSL sought particulars in these terms:

> "(i) state each and every fact relied on in support of the allegation that the alleged term is to be implied to give business efficacy to the Wilmar RSSA;

[110] Statement of Claim.

(ii) to the extent it is alleged that the term is to be otherwise implied in fact, state each and every fact relied on in support of the allegation; and

(iii) identify the source of law relied on as operating to give rise to the alleged term; … "[111]

[90] The particulars which were delivered are:

"6. As to paragraph 14 of the statement of claim and paragraph 6 of the request:

(a) with respect to subparagraphs 6(a)(i), (b)(i) and (d)(i) of the request, the facts relied on in support of the allegation that the terms are to be implied to give business efficacy to the Wilmar RSSA are as follows:

(i) the matters pleaded at paragraphs 1, 2, 3, 6, 7, 8, 9, 12, 13 and 19 of the statement of claim;

(ii) the terms of the RSSA pleaded at paragraph 5 of the statement of claim;

(iii) in particular:

A. Schedule 2 to, and clause 22 of, the RSSA, by which QSL was able to pass on to Wilmar all of the costs and losses it incurred in performing its obligations under the Wilmar RSSA;

B. clause 2.4.1.1 of Schedule 2 to the RSSA;

(iv) QSL was the only entity marketing and selling the sugar in the Seasonal Pool;

(v) the objects of QSL, as stated in its constitution, included that QSL would market raw sugar in the best interests of growers and mill owners (including Wilmar), and would act commercially in the discharge of its functions;

(vi) QSL's charter, which is at schedule 1 to its constitution, provided that QSL would seek to maximise the net returns in dollars per tonne of sugar to milling companies supplying it with sugar for export (such as Wilmar);

(vii) QSL's charter further provided that it would achieve these maximum net returns by, inter alia, optimising the returns for export sugar to suppliers through the use of physical sales and derivative instruments and provide flexible, innovative, transparent and/or independent pricing mechanisms for suppliers based on effective close out mechanisms for derivative instruments;

(viii) QSL was, by the Wilmar RSSA, appointed by Wilmar to exclusively market and sell the raw sugar Wilmar produced

[111] Trial bundle tab 2, at [6].

for export in a manner consistent with QSL's objects and its charter. As part of that appointment QSL was required to manage the sugar price and foreign exchange exposure of the Seasonal Pool;

(ix) as provided by Schedule 2 to the RSSA, the results of QSL's marketing and sale activities for the Seasonal Pool affected the price the Raw Sugar Suppliers, including Wilmar, received for the sugar they provide for sale through that pool and (via the Shared Pool) all other pools. These results and the effect on the prices are shown in little detail in the various pool reports provided by QSL to the Raw Sugar Suppliers during a given season;

(x) if the terms were not implied the Wilmar RSSA would be commercially ineffective. QSL's management of the Seasonal Pool (and the risks it was intended that pool account for) could be conducted without any care, and the consequences passed on to Wilmar (and the other Raw Sugar Suppliers) pursuant to Schedule 2 to, and clause 22 of, the RSSA, without any commercial or financial consequences for QSL;

(b) with respect to subparagraphs 6(a)(ii), (b)(ii), (c)(ii) and (d)(ii) of the request:

(i) the plaintiff repeats and relies on the particulars set out at paragraph 6(a) above;

(ii) for the avoidance of doubt, those matters also demonstrate that the implied terms are reasonable and equitable, obvious, capable of clear expression, and do not contradict the express terms of the RSSA;

(c) with respect to subparagraphs 6(a)(iii), (b)(iii), (c)(iii) and (d)(iii) of the request, the source of law is the common law of Australia. The terms are to be implied by reason of the nature of the RSSA, pursuant to which QSL was appointed to act as a professional seller and marketer of raw sugar for export in a manner consistent with its objects and charter contained in QSL's constitution, namely to maximise the net returns for the Raw Sugar Suppliers (including Wilmar);

(d) further particulars may be provided upon the completion of the interlocutory processes."[112]

[112] CFI 4.

[91] The particulars refer back to various allegations in the Statement of Claim, although one of the paragraphs (13) was omitted by amendment. Paragraphs 1, 2, 3, 6, 7, 8, 9, 12 and 19 in the Statement of Claim are as follows:

> "1. The plaintiff (Wilmar):
>
> (a) at all material times was a company duly incorporated according to law;
>
> (b) from 19 May 2013 has been registered with the name 'Wilmar Sugar Australia Limited';
>
> (c) between 4 March 2010 and 19 May 2013 was registered with the name 'Sucrogen Limited';
>
> (d) between 27 November 2009 and 4 March 2010 was registered with the name 'CSR Sugar Limited';
>
> (e) prior to 27 November 2009, was registered with the name 'CSR Sugar Pty Ltd';
>
> (f) at all material times was engaged in the business of milling sugar cane supplied to it by various cane growers to produce raw sugar.
>
> 2. The defendant (QSL):
>
> (a) at all material times was a company duly incorporated according to law, limited by guarantee;
>
> (b) at all material times has had as its members various Queensland sugar mill owners (Mill Owner Members) and various grower representative members;
>
> (c) at all material times had Wilmar as a Mill Owner Member;
>
> (d) had Mr Neil Taylor as its managing director and chief executive officer from 3 August 2009 until 16 November 2011;
>
> (e) has had Mr Gregory John Beashel as its managing director and chief executive officer from 1 February, 2012;
>
> (f) had Mr Alan Winey as its Chairman for the 2010 season; and
>
> (g) had Mr Guy Cowan as head of Audit and Risk Management for the 2010 season and as Chairman from 1 January, 2015; and
>
> (h) at all material times was engaged in managing the marketing for export and the export of raw sugar produced by Queensland sugar mills, and as part of those activities engaged in the pricing of raw sugar.
>
> **THE RAW SUGAR SUPPLY AGREEMENTS**
>
> 3. Throughout the period from 30 November 2009 to 30 June 2011 (the 2010 Season), QSL was a party to seven separate Raw Sugar Supply Agreements (each an RSSA) with Queensland sugar; mill owners (Raw Sugar Suppliers), including Wilmar (the Wilmar RSSA).

Particulars

A. Each RSSA was a written agreement executed around September 2008 and amended by an Amendment Deed around March 2010, a second Amendment Agreement dated around December 2010 and a third Amendment Agreement dated around December 2010.

B. The Wilmar RSSA was executed around 28 September 2008 and amended by the Amendment Deed executed around and dated 19 March 2010, the second Amendment Agreement executed around and dated 17 December 2010 and the third Amendment Agreement executed around and also dated 17 December 2010.

C. The Raw Sugar Suppliers during the 2010 Sugar Season were Wilmar, Mossman Central Mill Company Limited, Tully Sugar Limited, Proserpine Co-operative Sugar Milling Association Limited, Isis Central Sugar Mill Company Limited, Mackay Sugar Limited and Bundaberg Sugar Limited.

…

THE SEASONAL POOL AND THE I.C.E.

6. The Seasonal Pool, together with the Pricing Platform Pools, were defined as 'ICE 11 Pools' by the Wilmar RSSA (schedule 2, clause 2.4).

7. The Seasonal Pool existed so as to allow for the management of the risks associated with natural or seasonal variations to the production, sales and shipping of the raw sugar to be supplied under the RSSAs, relevantly, for the 2010 Season.

Particulars

A. This is to be inferred from the operation of clause 2.3 and schedule 2, clause 2.4.l.6 of the Wilmar RSSA. Sugar allocated to the Seasonal Pool was not Committed Sugar.

B. QSL presentation to Raw Sugar Suppliers dated August 2007 stating on a slide entitled 'Seasonal Price Pool': 'Absorbs production and marketing variability' and 'Will cater for VMA declared production variation without any direct consequence', where VMA refers to 'Voluntary Marketing Arrangement', the predecessor agreement to the RSSAs.

C. The QSL Disclosure Statement for the Pools for the 2010 Sugar Season regarding the 2010 Seasonal Pool published by QSL to Wilmar and Raw Sugar Supplies on 8 October, 2009 (QSL Seasonal Pool Disclosure), which states, in response to the question, posed rhetorically, 'What is it?':

> 'The volume of this pool is the balance of sugar not allocated to other pools or pricing schemes … This pool operates for the 2010 season only and absorbs all seasonal variations in production, sales and shipping.'

D. The QSL Seasonal Pool Disclosure, which further states under the heading 'Past Performance':

> 'Comparing the Seasonal Pool with other pools is not meaningful. The Seasonal Pool is designed to address risks associated with production, sales & shipping so it has a variable futures exposure and outcome.'

E. Wilmar also relies on the further and better particulars of this paragraph dated 31 July 2015.

8. At all material times during the 2010 Season, QSL managed the Seasonal Pool including the sugar price and foreign exchange exposure of the Seasonal Pool.

Particulars

A. QSL's appointment and responsibilities as the manager of the Seasonal Pool is contemplated by Recital F of, and clauses 2.4 and 2.6 of Schedule 2 to, the RSSA.

B. Wilmar also relies on the further and better particulars of this paragraph dated 31 July 2015.

9. In managing the sugar price and foreign exchange exposure of the Seasonal Pool, QSL:

(a) negotiated the terms of and entered into contracts for the physical delivery for export of all the raw sugar supplied to it by the Raw Sugar Suppliers including that allocated to the Seasonal Pool (Physical Supply Contracts);

(b) could, at its discretion (Seasonal Pool Hedging Discretion), enter into and close out derivative contracts to fix or hedge a price so as to optimise the returns for the Raw Sugar Suppliers for the Seasonal Pool, including the following types of derivative contracts:

(i) futures or options contracts for raw sugar bought and sold on the Intercontinental Exchange (ICE), known as 'ICE 11 Futures Contracts', which are traded in US dollars; and

(ii) foreign exchange futures or options contracts to hedge the exchange rate between the Australian dollar and the US dollar (Currency Hedge Contracts) (clause 2.3 and schedule 2, clauses 2.4 and 2.6.2 of the Wilmar RSSA).

Particulars

Wilmar relies on the further and better particulars of this paragraph dated 31 July 2015.

(c) in doing so was required by the Charter to its Constitution to maximise the net returns in dollars per tonne of sugar to the Raw Sugar Suppliers and to optimise the returns for export sugar to the

Raw Sugar Suppliers through the use of physical sales and derivative instruments;

(d) therefore was required to manage, or alternatively to take account of:

(i) the risk that sugar production could vary;

(ii) the risks associated with natural or seasonal variations to the production, sales, and shipping of raw sugar.

Particulars

Wilmar relies on the further and better particulars of this paragraph dated 31 July 2015.

12. The Seasonal Pool was to be allocated the balance of returns of all ICE 11 sales not allocated to the Pricing Platform Pools (schedule 2, clause 2.6.2 of the Wilmar RSSA)."

[92] It can be seen that paragraph 14 of the Statement of Claim:

(i) alleges the implication of the terms;

(ii) alleges that the terms are implied both in fact and as a matter of law;

(iii) refers to the particulars delivered 31 July 2015.

[93] The particulars of 31 July 2015 point to various express provisions of the RSSA, QSL's constitution and charter, and then to various allegations made in the Statement of Claim, as set out above. These allegations include some matters beyond the terms of the RSSA itself.

[94] However, in Wilmar's final submissions, this was said:

> "In this proceeding, both parties have conducted their cases on the bases that any constructional debates are to be resolved by reference to the text and structure of the contract. This is not a case where the parties rely on any events, circumstances and things external to the contract."[113]

[95] It is evident, though, from Wilmar's written submissions, that Wilmar relies upon QSL's constitution and charter.[114] The relevant provisions of the constitution and charter appear at paragraphs [4] and [5] of these reasons.

[96] Wilmar is a member of QSL. QSL therefore relies upon s 140(1) of the *Corporations Act* 2001 (Cth). That provision is in these terms;

"**140 Effect of constitution and replaceable rules**

(1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

(a) between the company and each member; and

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113 Wilmar's submissions, paragraph [41]. QSL has approached the case on that basis; QSL's written submissions, paragraphs [137]-[158].

114 Wilmar's submissions, paragraph [83].

(b) between the company and each director and company secretary; and

(c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person."

[97] However, Wilmar does not plead that the terms of the constitution and charter form part of any contract between Wilmar and QSL. The constitution and charter are pleaded as a basis upon which a term is to be implied in the Wilmar RSSA.

[98] QSL pleads[115] to paragraph 7 of the Statement of Claim in these terms:

"6. QSL denies the allegations made in paragraph 7 of the statement of claim because:

(a) the expression 'Seasonal Pool' was defined in cl. 2.4 of the Wilmar RSSA as pleaded in Annexure A to this pleading;

(b) the Seasonal Pool thus existed so that all Supplier's sugar not allocated to other pools would be allocated and priced in accordance with QSL's board approved 2010 Season financial risk management policy (the '**Risk Management** Policy');

(c) the Risk Management Policy materially provided as pleaded in Annexure B to this pleading;

(d) upon the proper construction of the Wilmar RSSA and the Risk Management Policy:

(i) QSL was responsible for the management of sugar price risk and foreign currency risk in respect of the Seasonal Pool;

Particulars

The 'sugar price risk' to be managed by QSL was defined by cl. 2.1.1 of the Risk Management Policy as follows:

'For financial risk management purposes, sugar price risk is defined as exposure to sugar price movements on actual and anticipated sugar sales for a season that have not been price fixed or price protected.'

The 'foreign currency risk' to be managed by QSL was defined by cl. 2.2.1 of the Risk Management Policy as follows: 'For financial risk management purposes, foreign currency risk is defined as exposure to exchange rate movements on all foreign currency flows for an ICE No. 11 pricing alternative that have not been hedged.'

115 In its Defence and Counterclaim.

(ii) QSL's management of the said risks was to be based upon:

(A) the estimates provided to QSL by the Participants as to the quantity of raw sugar to be delivered by the Participants pursuant to the applicable RSSA (the **'Participants' Estimates'**); and

(B) each Participant's election as to the pricing pools to which the raw sugar was to be allocated pursuant to the applicable RSSA;

(iii) QSL's management responsibility did not extend to management of the risk that the Participants' Estimates would turn out to be:

(A) wrong;

(B) further or alternatively, wrong to the extent that they were in the 2010 Season."

[99] In paragraphs 7, 8, 8A and 8C QSL makes some admissions but generally it asserts its view of its obligations under the RSSA, namely to manage price risk but not to manage the risk of any fall in production.

[100] As to the allegation of the implied terms, QSL pleads:

"10. QSL denies the allegations made in paragraph 14 of the statement of claim because:

(a) the conditions for the implication of terms in fact have not been satisfied;

(b) neither the nature of the contract nor any other fact pleaded in the statement of claim is such as to give rise to the implication of terms in law."

Consideration of the contractual claim

[101] In their respective submissions, the parties have drawn a distinction between "price risk" and "production risk". The RSSA does not draw that distinction. The drawing of such distinction tends to cloud the real issues which are;

(i) what were the express obligations upon QSL; and

(ii) what were the implied obligations (if any).

[102] In essence, Wilmar says that the contractual obligation upon QSL was to manage "the risks associated with natural or seasonal variation".[116] QSL says that the obligation upon it was no wider than to form and follow a risk management policy, and no duties, at least as alleged, are implied.[117]

[103] Wilmar's pleading raises an issue as to the status of the FRMP.

[116] Wilmar's written submissions, at [13].

[117] Defence and Counterclaim paragraph [6].

The status of the FRMP

[104] Wilmar submits that the FRMP has no legal effect. QSL submits that its only obligation is to "allocate and price" the Seasonal Pool Sugar in accordance with "Queensland's Sugar Board Approved Risk Management Policy" which is the FPMP. It bases this submission upon the definition of "Queensland Seasonal Pool" which is found in cl 2.4 of the RSSA.[118]

[105] The FRMP had not been approved by QSL's Board as at the date of the execution of the RSSA. QSL does not plead that the FRMP was adopted in any way by Wilmar. It does not expressly plead that the FRMP was approved by the QSL's Board, although that is implied in subparagraphs 6(b) and (c) of the Defence and Counterclaim.[119]

[106] QSL submits that the FRMP is incorporated into the contract. It relies upon cases such as *Metal Roofing and Cladding Pty Ltd v Amcor Trading Pty Ltd*,[120] and *McBride v ASK Funding Ltd*.[121] Of course, these cases are consistent with the line of authority sometimes referred to as the "ticket cases" where standard conditions are either printed on, or referred to, in a ticket or receipt delivered to the consumer upon entering into simple commercial transactions such as a drycleaning,[122] car parking,[123] and contracts of bailment.[124] In all those cases, there was an existing set of terms and conditions and the question was whether they had been, by agreement, included as terms in the contract. There is no suggestion in those cases of any doubt or uncertainty as to the terms of what was being sought to be incorporated. The cases did not involve the incorporation of terms to be either decided upon in the future by agreement between the parties or to be nominated by one of the parties.[125] Here, at the time of the execution of the RSSA, the FRMP was not in existence.

[107] QSL does not actually expressly plead that the FRMP does not have contractual force. To paragraph 6 of the Defence and Counterclaim, Wilmar pleads by way of reply:

"**5. As to paragraph 6 of the Defence, Wilmar;**

(a) joins issue with the denial therein and repeats and relies on the matters pleaded at paragraph 7 of the Statement of Claim;

(b) admits that the expression "Seasonal Pool" is defined in the Wilmar RSSA in the way set out at paragraph 10(k) of Annexure A to the Defence;

(c) denies as untrue the allegations in subparagraph 6(b) as to the reasons for the existence of the Seasonal Pool. Wilmar's reasons for believing the allegation to be untrue are pleaded at paragraph 7 of the Statement of Claim;

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118 Set out at paragraph [72] of these reasons.
119 And paragraph 8A.
120 [1999] QCA 472.
121 [2013] QCA 130; see also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.
122 *Causer v Brown* [1952] VLR 1.
123 *Thornton v Shoelane Parking Pty Ltd* [1971] 2 QB 163.
124 *Parker v South Eastern Railway Co* (1877) 2 CPD 416.
125 Which of course raises other problems; *Masters v Cameron* (1954) 91 CLR 353.

(d) denies as untrue the allegations in subparagraph 6(c) because there are other material provisions of the Risk Management Policy not pleaded in Annexure B to the Defence. The Risk Management Policy is Annexure A to this pleading;

(e) denies as untrue the allegations in subparagraph 6(d). Wilmar's reasons for believing the allegation to be untrue are pleaded at paragraph 7 of the Statement of Claim, and that:

(i) the management of the sugar price risk and the foreign currency risk by QSL is inextricably linked to production risks and the other risks associated with natural or seasonal variations to the production, sales, and shipping of raw sugar (as is apparent from the matters pleaded at paragraphs 6(d)(ii)(A) and 29(b)(ii) of the Defence);

(ii) even if QSL was responsible only for the management of the sugar price risk and the foreign currency risk in respect of the Seasonal Pool (which is denied) the management of those risks required QSL to manage, or alternatively to take account of, the production risks and the other risks associated with natural or seasonal variations to the production, sales, and shipping of raw sugar."

[108] No point is taken by QSL as to the pleading and clearly, the status of the FRMP was an issue at the trial.[126] No party pleaded or argued that by the fact that the RSSA (at least arguably) defined the obligations of QSL by reference to a non-existent document, the RSSA was rendered void for uncertainty.[127]

[109] Mr Pomerenke QC for QSL, in oral submissions, equated the FRMP to other commercial arrangements where one party is left to determine something relevant to the other party's obligations.[128] He gave an example of variable interest rate loans, where the interest rate is the bank's variable rate published from time to time. Even assuming that the RSSA operates so that QSL's obligations can be effectively defined by a policy it creates, the policy it creates would have to be a policy as contemplated by the RSSA. If the policy did not contain measures to deal with the risk which the RSSA obliges QSL to manage then it could not be a "risk management policy" for the purposes of the RSSA. Therefore, if Wilmar is correct when it says there was an obligation upon QSL to manage production risk then a policy such as the FRMP which does not deal with that risk could hardly protect QSL from liability.

[110] The notion of a "Queensland Sugar Board Approved Risk Management Policy" (which is now the FRMP) only appears in the RSSA as part of the definition of "Queensland Seasonal Pool". There are no covenants in the RSSA:

(i) obliging QSL to produce such a policy;

(ii) obliging QSL to follow such a policy; or

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[126] Wilmar's submissions, paragraphs [151]-[160]; QSL's submissions, paragraphs [112], [113], [116], [129]-[134].

[127] *Masters v Cameron* (1954) 91 CLR 353; *Niesmann v Collingridge* (1921) 29 CLR 177.

[128] Transcript 11-63.

(iii) binding the parties to the policy.

[111] All the definition does is:

(i) identify the Seasonal Pool as the pool of sugar not allocated to other pools;

(ii) recognises that the pool will be allocated and priced by QSL; and

(iii) recognises that QSL will promulgate a policy.

[112] It follows then that the FRMP has no contractual force and does not define or limit the contractual obligations of QSL, and does not bear upon the construction of the RSSA.

What is said to give rise to the implication?

[113] As the analysis[129] of the pleadings and submissions show, the parties have fought the case on the basis that no extrinsic facts are relevant to the construction of the RSSA. While Wilmar has in its case proved, for instance, that QSL was aware of the threats to sugar production,[130] had contemplated taking steps to meet that threat, had represented that the Seasonal Pool had the purpose of being a "buffer" against, among other things, a fall in production, none of that is relied upon to construe the RSSA or, particularly, to raise the implication of the alleged terms. Also, none of these facts are raised in any other way to affect the operation of the RSSA; there is no allegation of an estoppel, or a variation of the RSSA arising from these facts, or of a contract arising collaterally to the RSSA.

Term implied by law

[114] A term will be implied by law where the nature of the contract demands it. In *Esso Australia Resources Ltd v Plowman,*[131] Mason CJ stated the principles in this way:

> "The implication of a term as a matter of law is made by reference to 'the inherent nature of the contract and of the relationship thereby established', to use the words of Lord Wilberforce [in *Liverpool City Council v Irwin* [1977] AC 239, 254]. As Deane J pointed out in *Hawkins v Clayton*, his Lordship focused on the nature of the contract and formulated the relevant test in terms of what is necessary or required in the circumstances on the footing that 'such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less."[132]

[115] The term will be implied into the particular class of contract where the implication is necessary to make the contract effective. The principles were described by French CJ, Bell and Keane JJ in *Commonwealth Bank of Australia v Barker*:[133]

> "An implication in law may have evolved from repeated implications in fact. As Gaudron and McHugh JJ observed in *Breen v Williams*, some implications in law derive from the implication of terms·in specific contracts of particular descriptions, which become 'so much a part of the common understanding as to be imported into all transactions of the particular description'. The two kinds of implied terms tend in practice to 'merge

[129] Paragraphs [88]-[132] of these reasons.
[130] The facts found are referred to in paragraphs [19]-[22] and [24] of these reasons.
[131] (1995) 183 CLR 10, 30; see also *Byrne v Australian Airline Ltd* (1995) 185 CLR 410, 488.
[132] At 30, citations omitted.
[133] (2014) 253 CLR 169, at [28].

imperceptibly into each other'. That connection suggests, as is the case, that the 'more general considerations' informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of 'necessity', which was acknowledged by both parties to this appeal. The requirement that a term implied in fact be necessary 'to give business efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what 'the contract actually means'.

In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' or the contract would be 'deprived of its substance, seriously undermined or drastically devalued'. The criterion of 'necessity' in this context has been described as 'elusive' and the suggestion made that 'there is much to be said for abandoning' the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to co-operate. Implications which might be thought reasonable are not, on that account only, necessary. The same constraints apply whether or not such implications are characterised as rules of construction."[134]

and later by Kiefel J (as her Honour then was):

> "The majority in the Full Court did not answer the question whether the implication of a term requiring the appellant to take steps to redeploy the respondent was necessary to give efficacy to the Employment Agreement. The respondent, by notice of contention, seeks to support the conclusion of the majority on this basis. Clause 8 again provides the answer. A term cannot be said to be necessary in this sense if the contract is effective without it. A contract clearly is effective where it already contains a term to the effect sought. The only difference is that the compensation which the respondent would receive under the clause is more limited than the damages sought, but that is not a matter to which the requirement of necessity is addressed. In the Employment Agreement, the parties provided for the very circumstance now sought to be made the subject of an implication."[135]

and later by Gageler J:

> "Determination by a court of whether or not a new term should be implied in 1aw into a particular class of contracts as often itself been described as involving the application of a 'test' of 'necessity'. The sense in which

[134] Citations omitted.

[135] At [90], citations omitted.

> 'necessity' is used in this context is that of 'something required in accordance with current standards of what ought to be the case, rather than anything more absolute'. The requisite inquiry is informed by a consideration of what is needed for the effective working of contracts of that class. But the inquiry is not exhausted by that consideration; it does not exclude considerations of 'justice and policy. Couching the ultimate evaluation in terms of necessity serves usefully to emphasise this and no more: that a court should not imply a new term other than by reference to considerations that are compelling."[136]

[116] There were arguments between the parties as to how to classify the RSSA. Mr Stewart QC for Wilmar sought to classify the contract as one for the provision of services. It is well recognised that contracts for services contain a term implied by law (subject to contrary intention in the agreement)[137] that the services will be performed with reasonable care and skill. Mr Pomerenke QC for QSL submitted that the RSSA is not a contract for the provision of services at all. It is a contract for the sale of sugar.

[117] While the RSSA is indeed a contract for the sale of goods, it is far from a standard or usual sale of goods transaction. While property in the sugar passes from Wilmar to QSL and the money which comes back to Wilmar is the "price" of the sugar that it sold, the underlying intention of the transaction is that QSL takes the sugar and sells it for Wilmar and remits the proceeds back to it.[138] Wilmar must submit at least 30% of its production to the Seasonal Pool which is under the management of QSL. It follows then that although the sugar has been sold by Wilmar to QSL and property in the sugar has passed to QSL, the sum payable under the contract back to Wilmar is directly affected by the decisions made by QSL to allocate and price the sugar which Wilmar and other participants have supplied.

[118] While the RSSA is not a contract for services in the traditional sense, in a broad practical sense QSL performs acts designed to optimise returns to Wilmar.[139] It follows then that any shortcomings in QSL's management will impact negatively upon Wilmar. The RSSA is a type of contract that would impose (subject to contrary intention being demonstrated) the exercise of reasonable care, skill and diligence in the performance of its obligations to allocate and price the Seasonal Pool. That though gives rise to a consideration of what those obligations are.

[119] By cl 6 of the RSSA, there is a fairly complicated system whereby Wilmar must advise QSL about production. By 30 November 2010, Wilmar must advise QSL of the estimated quantity of sugar to be delivered.[140] Other clauses contemplate that the estimate may be changed by Wilmar.[141]

[120] Clause 6.3 provides that the estimate given pursuant to cl 6.2 "is not binding on [Wilmar]". However, that does not mean that the estimate has no effect. Clause 6.4(a) obliges Wilmar to advise of changes to the estimate. Clause 6.4(b) obliges Wilmar to

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[136] At [114], citations omitted.

[137] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 448-450; *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468, 490-493.

[138] Recital F, cl 5, 12, 13. 22; Schedule 2 cl 2.4.1.1.

[139] Recital H to the RSSA.

[140] Clause 6.2.

[141] Clauses 6.3, 6.4, 6.5 and 6.6.

explain the reason for the change. Clauses 6.4(b) and 6.5 contemplate that the change of estimate is based on factors including "natural seasonal variations", which would include the drop in production caused by the unusually wet weather conditions encountered in the 2010 season. Indeed, cl 6.5 provides that the only change in estimate which can be made by Wilmar without QSL's consent is a change necessary because of "natural seasonal variations in crop sizes".

[121] Those provisions in cl 6 very much suggest that the prediction of seasonal variations is a matter for Wilmar and not for QSL and that QSL's obligations are to price and allocate the quantities specified to it by the Participants, rather than to engage in an exercise of attempting to predict production and then making its decisions based on those predictions.

[122] Other provisions of the RSSA reinforce this. Clause 22.1 entitles QSL to pass onto Wilmar "all costs … of any nature that it incurs … in performing its obligations." Those costs would include expenses which have been incurred where QSL has contracted to sell sugar and where Wilmar is unable to deliver the sugar it has estimated. By cl 20.2(c), the risk is with Wilmar. By cl 20.2(a), QSL does not provide advice to Wilmar.

[123] By cl 5.2, QSL will be in contact with Wilmar "regarding market developments in all aspects of the sugar market". Nothing there specified in the non-exhaustive list of the topics in cl 5.2 mentions production or any risks associated therewith. Consistently with the other provisions, the specific topics that are listed as being relevant to QSL are those relevant to the marketing and sale of the sugar, not its production.

[124] Clause 15 of the RSSA, which concerns termination, contemplates that QSL will contract for the sale of sugar which Wilmar estimates will be produced.

[125] A commercial contract must, of course, be construed commercially. Here, it is Wilmar who is producing the sugar. Even though strictly QSL is the purchaser of the sugar, it is in practical terms charged with allocating and pricing it for the benefit of Wilmar. QSL is not engaged in the production of the sugar. Its role is to sell the quantities of sugar which Wilmar estimates will be produced. The risk of a failure in the production is that of Wilmar.[142]

[126] Any terms to be implied in law must be consistent with the obligations of QSL and Wilmar under the RSSA. The law will imply a term that QSL fulfils its obligations with reasonable skill and care. There would therefore be implied by law a term that the allocation and pricing of the quantities of sugar estimated from time to time under cl 6 should be done with reasonable care, but would not imply an obligation to make those decisions by having regard to the potential that production of the sugar might not reach the level of the estimates given by Wilmar pursuant to its contractual obligations.

[127] I should deal specifically with a particular submission made by Wilmar. Wilmar relies heavily in its submissions on recital H of the RSSA which refers to the object of the RSSA as to "optimising returns" to Wilmar. The submission is that the notion of "returns" encompasses more than just "price". It is submitted that to optimise "returns", it is necessary not only to manage price, but also to manage all other components which result in "returns"; including of course risk of a failure in production and exposure to the futures market. That much can easily be accepted. From that point though Wilmar's submission

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[142] Clauses 20(c) and 22.

is that it is QSL which bears the obligation to manage those other components. That submission should be rejected.

[128] The RSSA casts obligations and rights upon QSL and upon Wilmar. What is recorded in recital H is the hope of the parties that the performance of the covenants in the RSSA (upon both parties) will result in "optimising returns to Wilmar". That says nothing though to identify the party upon whom particular obligations fall. The obligation upon Wilmar is to estimate production and the obligation upon QSL is to market the sugar in the amount estimated.

Term implied in fact

[129] In order for a term to be implied in fact, the conditions identified by the High Court in *BP Refinery (Westernport) Pty Ltd v The Shire of Hastings*,[143] must be met. There, the court said that for any condition to be implied:

(i) it must be reasonable and equitable;

(ii) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(iii) it must be so obvious that it "goes without saying";

(iv) it must be capable of clear expression; and

(v) it must not contradict any express terms of the contract.[144]

[130] On the proper construction of the RSSA, as I have already said, the obligation to estimate production is not that of QSL but of Wilmar and the obligation of QSL is to price and allocate the sugar which it is estimated will be produced. The structure of the various obligations is inconsistent with terms sought to be implied and there is no basis upon which these additional obligations can be impliedly imposed upon QSL.[145]

[131] Once it is understood that the RSSA works in that way, none of the pre-conditions for the implications of the terms are met. There is no necessity to give business efficacy to the agreement by effectively shifting the obligation to estimate production from Wilmar to QSL. The imposition upon QSL of such conditions is hardly reasonable and equitable. On the proper construction of the agreement, the implications of the term are not "so obvious that [they go] without saying."[146]

[132] The terms alleged are not implied into the RSSA and the contractual claim therefore fails.

Pleadings in the negligence case

[133] Wilmar pleads:

> "**QSL'S DUTY OF CARE**
>
> 15. Further, at all material times

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[143] (1977) 52 ALJR 20.

[144] At 26; followed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 347.

[145] *Codelfa Construction v State Rail Authority of New South Wales* (1982) 149 CLR 337, 346 per Mason J (as his Honour then was).

[146] *Hospital Product Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 66 per Gibbs CJ.

(a) QSL was aware, or ought reasonably to have been aware, that (as was the case) Wilmar relied on QSL to manage the sugar price and foreign exchange exposure of the Seasonal Pool and to do so acting with reasonable care, skill and diligence so as to prevent Wilmar suffering economic loss;

Particulars

[Deleted in these reasons]

(b) It was reasonably foreseeable that unless QSL exercise that reasonable care, skill and diligence in managing the sugar price and foreign exchange exposure of the Seasonal Pool, Wilmar might suffer loss and damage (by being exposed to economic loss);

Particulars

[Deleted in these reasons]

(c) Wilmar was unable to protect itself from any failure by QSL to exercise reasonable care in managing the sugar price and foreign exchange exposure of the Seasonal Pool;

Particulars

Wilmar relies on the further and better particulars of this paragraph dated 31 July 2015:

16. In the premises of paragraph 15 above, QSL owed Wilmar a duty to exercise reasonable care, skill and diligence in managing the sugar price and foreign exchange exposure of the Seasonal Pool."

[134] Subparagraph 15(c) alleges that Wilmar was vulnerable to the consequences of QSL's management of the Seasonal Pool. There is reference to the particulars of 31 July 2015.

[135] It is unnecessary to set out the particulars given of the allegations in subparagraphs 15(a) and 15(b) of the Statement of Claim. It is obvious that the risk of loss to Wilmar due to QSL's management of the Seasonal Pool was foreseeable; so much was admitted by QSL in submissions at the trial.[147] It is also obvious that the risk of loss caused by a drop in production was actually foreseen by QSL.[148]

[136] The particulars which were provided of the allegations in paragraph 15(c) are as follows:

"9. As to paragraph 15(c) of the statement of claim and paragraph 9 of the request:

(a) the "material times" were in the period from 30 November 2009 to 30 June 2011 (i.e. the 2010 Season, as defined in the statement of claim);

(b) Wilmar was unable to protect itself from the financial consequences of QSL's management of (sic) Seasonal Pool

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[147] Transcript 11-70 ll 40-47.
[148] The facts found are referred to in paragraphs [19]-[22] and [24] of these reasons.

including the loss and damage it suffered which was occasioned by QSL's failures;

(c) Wilmar relies on the following facts to support the allegation that it was not able to protect itself from any failure by QSL to exercise reasonable care in the manner alleged:

(i) the matters pleaded at paragraphs 7, 8, 9, 12, 19 and 30 of the statement of claim;

(ii) the particulars set out at paragraph 7(b) above;

(iii) crucially, by the terms of the Wilmar RSSA, QSL's performance in managing the Seasonal Pool affected the price received by Wilmar for its raw sugar sold by QSL in that pool and (via the Shared Pool) in the other pools;

(d) further particulars may be provided upon the completion of the interlocutory processes."

[137] It is not necessary to record the matters set out at subparagraph 7(b) of the particulars. Paragraphs 7, 8, 9 and 12 of the Statement of Claim are set out earlier in these reasons.[149] Paragraph 19 alleges dates for the 2010 crushing season. Paragraph 30 alleges that the Bureau of Meteorology published a statement on 24 June 2010 warning of the risk of a La Niña event in 2010.

[138] All that need be observed about the particulars delivered in support of the allegation in subparagraph 15(c) of the Statement of Claim is that:

(i) particulars of vulnerability amounted to vulnerability to suffering financial loss consequent upon QSL's management of the Seasonal Pool;

(ii) particulars of inability of Wilmar to protect itself from loss were to the effect that it had no control over the management of the Seasonal Pool;

(iii) there was no allegation in the Statement of Claim or the particulars that Wilmar could not have bargained an agreement which gave it protection from loss.

[139] QSL pleaded to paragraphs 15 and 16 of the Statement of Claim in these terms:

"11. QSL denies the allegations made in paragraph 15 of the statement of claim because:

(a) QSL did not have the state of mind alleged in paragraph 15(a);

(b) by the Wilmar RSSA (particularly cl 22), the risk of losses associated with, inter alia, the operation of the Seasonal Pool was allocated to Wilmar;

(c) the harm alleged by Wilmar is harm associated with the fact that the Participants' Estimates turned out to be wrong;

[149] Paragraph [91].

Particulars

Particulars of the Participants' initial crop estimates and actual production for the 2010 Season are provided in Annexure C to this pleading.

(d) the Participants (including Wilmar) and not QSL were able to exercise control over their estimates, and thus over the risk of the harm alleged; because in the 2010 Season:

(i) each of the Participants other than Wilmar; and

(ii) Wilmar:

(A) received information from growers (under or pursuant to agreements with growers) as to the estimated cane production by growers for the season;

(B) made their initial estimate of the total amount of raw sugar that would be produced from such cane and delivered to QSL based on the growers' estimated cane production or on satellite imagery undertaken by the Participant of the total area under cane to be farmed by the growers that were to supply cane to the Participant;

(C) made the estimate referred to in (B) above based on a 'yield factor' applied to the total area under cane to be farmed by the growers that were to supply cane to the Participant;

(D) determined the 'yield factor' referred to in (C) above by having regard to matters that included the following:

(aa) data that showed how much sugar cane was typically produced per hectare of cane in respect of the growers that would be supplying cane to the Participant;

(ab) further or alternatively, current and expected climatic influences such as rain, drought and temperature in respect of:

(abi) the total area under cane to be farmed by the growers that were to supply cane to the Participant; and

(abii) further or alternatively, the location of the Participant's mill or mills;

(ac) further or alternatively, any suspected or known crop diseases or pests: and

(ad) further or alternatively, cane maturity testing, being testing which measured the sugar content of the cane in respect of the growers that were to supply cane to the Participant;

(E) monitored the accuracy of then initial production estimate and any revised production estimates delivered to QSL during the 2010 Season by:

(aa) causing their staff or representatives to physically inspect cane farms or blocks farmed by growers that were to supply cane to the Participant, to assess whether the cane was growing as expected;

(ab) further or in the alternative, undertaking further cane maturity tests in respect of the growers that were to supply cane to the Participant;

(ac) further or in the alternative, reviewing the yield factor each Participant had determined, based on the conditions that existed throughout the 2010 Season; and

(ad) further or in the alternative, by determining a 'cut-out percentage' during the crushing season derived by comparing the harvested tonnage of the cane from individual blocks to the individual forecasts that had been made by the relevant grower in respect of each block;

(iii) QSL was not in possession of the information pleaded in paragraphs (A) to (E) above;

(e) QSL did not assume responsibility to Wilmar for management of the risk that the Participants' Estimates would turn out to be wrong;

(f) Wilmar had the capacity to take steps to protect itself against the harm alleged; because, at all material times:

(i) Wilmar knew of the total production estimates that had been given to QSL by the Participants (including Wilmar);

Particulars

That Wilmar had this knowledge is an inference to be drawn from the fact that it was advised of the total production forecast during a Supplier Customer Meeting held by QSL on 14 December 2009 by its power point presentation delivered during the meeting under the headings Progress Report' and '2010 Volume by Product' and, thereafter by the QSL Monthly Customers' Reports delivered to Wilmar in the period February 2010 to September 2010.

(ii) Wilmar knew of the decisions that had been made by QSL regarding its physical sales and marketing activities; and

Particulars

That Wilmar had this knowledge is an inference to be drawn from the matters pleaded at paragraphs 29(b)(iii)(B) below.

(iii) Wilmar was a publicly listed company engaged in the business of:

(A) milling sugar cane supplied to it by growers; and

(B) trading in financial instruments including ICE 11 Futures Contracts.

(g) in the premises of paragraphs (b)-(f) above:

(i) QSL ought not reasonably to have had the state of mind pleaded in paragraph 15(a);

(ii) Wilmar did not rely on QSL to manage the risk that the Participants’ Estimates would turn out to be wrong;

(iii) in the alternative to (ii), any such reliance by Wilmar was unreasonable;

(iv) it was not reasonably foreseeable that if QSL failed to exercise reasonable care, skill and diligence in managing the sugar price risk and the foreign exchange risk, Wilmar would suffer the harm alleged (viz. harm associated with the fact that the Participants’ Estimates turned out to be wrong).

12. QSL denies the allegations made in paragraph 16 of the Statement of Claim because:

(a) of the matters pleaded in paragraph 11 above;

(b) the alleged duty of care would be inconsistent with the contractual allocation of:

(i) responsibility pleaded in paragraph 6 above;

(ii) risk pleaded in paragraph 11(b) above;

(c) in the premises of paragraphs (a)-(b) above:

(i) QSL did not owe Wilmar a duty of care as alleged;

(ii) further and in the alternative, QSL did not owe Wilmar a duty of care in respect of the harm alleged in the statement of claim.”

Consideration of the negligence case

[140] Wilmar's claim is one for pure economic loss. It is well established that while a duty of care usually arises upon proof of foreseeability of loss, more than foreseeability is required to raise a duty of care to prevent economic loss.[150]

[141] No set formula or test can be laid down to determine when such a duty of care arises. In *Caltex Refineries (Qld) Pty Ltd v Stavar*,[151] Allsop P (as his Honour then was) after analysing the authorities, said this:[152]

> "This rejection of any particular formula or methodology or test the application of which will yield an answer to the question whether there exists in any given circumstance a duty of care, and if so, its scope or content, has been accompanied by the identification of an approach to be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty and, if so, in identifying its scope or content. If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the 'salient features' or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.
>
> These salient features include:
>
> (a) the foreseeability of harm;
>
> (b) the nature of the harm alleged;
>
> (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
>
> (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
>
> (e) the degree of reliance by the plaintiff upon the defendant;
>
> (f) any assumption of responsibility by the defendant;
>
> (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
>
> (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;

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[150] *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 per Gibbs J (as his Honour then was) at 555 and Stephen J at 574 and 576; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Bryan v Maloney* (1995) 182 CLR 609; *Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 & Anor* (2014) 254 CLR 185.

[151] (2009) 75 NSWLR 649.

[152] At [102]-[103]. And see the comments of Basten JA at [172] and the agreement of Simpson J with both Allsop P and Basten JA at [241].

(i) the nature of the activity undertaken by the defendant;

(j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;

(k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;

(l) any potential indeterminacy of liability;

(m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;

(n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;

(o) the existence of conflicting duties arising from other principles of law or statute;

(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and

(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law."

[142] Wilmar relies heavily upon this list of considerations and submits:

"293. The following features of the relationship between Wilmar and QSL demonstrate why a duty of care should be recognised by the law:

(a) QSL and Wilmar were not typical commercial participants in an arm's length transaction where each were looking after their own best interests. To the contrary, QSL was an industry owned corporation, and its constitution and charter expressly recognised obligations to the millers (including Wilmar). The relevant provisions of those documents are set out at paragraphs 80 and 81 above;

(b) the recitals to the Wilmar RSSA also expressly recognised that the objective of the agreement was to optimise returns for the millers;

(c) the millers met all of QSL's costs, including paying its (professional) staff;

(d) by the Wilmar RSSA, Wilmar was required to supply QSL with 100% of the raw sugar it produced intended for export. It did not have another avenue by which to sell raw sugar to the export market;

(e) that raw sugar was in aggregate very valuable - but precisely how valuable - and indeed, in respect of the Seasonal Pool, whether substantial losses would be realised upon the sale of sugar - turned on the outcomes of QSL's marketing efforts;

(f) upon suppling the raw sugar which it had produced at its mills, Wilmar's title to the raw sugar was transferred to QSL. It therefore lost control of the commodity which it had produced;

(g) in exchange Wilmar had an entitlement to receive payment from QSL at a price determined by the application of a mechanism (ie Schedule 2 and clause 22) which perfectly exposed Wilmar to QSL's decisions in its marketing of the raw sugar;

(h) indeed, the RSSA was exceptional in that the price to be paid for the good was determined - not by the supplier (as might be considered orthodox) - but by the recipient. This circumstance in and of itself demonstrates that there was a special relationship involving both reliance and vulnerability;

(i) thus, the financial consequences of QSL's decisions were to be visited upon Wilmar (and the other suppliers);

(j) Wilmar therefore relied on QSL to market the raw sugar supplied to it with due care and skill to maximise its returns;

(k) given the quantity and value of the raw sugar under QSL's management the potential losses were economically significant;

(1) whilst Wilmar was informed by monthly supply reports published by QSL of its marketing activities, those reports were expressed in general terms and did not communicate all of the specifics or details of QSL's marketing program. For example, it is not obvious from the supply reports what instruments QSL was using to lock in favourable prices. It might have been using instruments such as options contracts which gave it a right but not an obligation to sell a certain quantity of raw sugar at a specified price at a specified time in the future. But this was not communicated to Wilmar;

(m) raw sugar notionally allocated to the Seasonal Pool was not 'Committed Sugar'. So, unlike for the other pools which did contain 'Committed Sugar', there was no obligation on Wilmar (or other millers) to supply the sugar allocated to the Seasonal Pool, and no direct financial consequences from a failure to supply that pool were specified in the Wilmar RSSA. Thus, as distinct from a failure to supply sugar to the other pools containing 'Committed Sugar', the contract does not specify that the financial consequences for QSL of a failure by Wilmar to supply raw sugar to the Seasonal Pool are for Wilmar's account. That is, Wilmar did not accept responsibility for its failure to deliver all or some of its forecast supply to the Seasonal Pool;

(n) the harm incurred was foreseeable (and was in fact foreseen by QSL). It is notorious that the improper or imprudent use of financial instruments can occasion serious financial losses. In the context of the future sale of agricultural products, production risk is relevant. QSL knew this.

Its own 'Risk Register', as at 17 December 2009, identified at 'Risk ID 3' a risk from 'Production size and timing', and specifically referred to the risk of '[c]hanges in client forecast causes hedging and sales in excess of deliveries for a season (eg forecast moves down by 1 Mt due to natural disaster ...)'. The 'Risk Register' identified a 1 in 10 year likelihood of this risk being realised, and the financial consequences at $260,000,000. The identified 'Risk Treatments Actions' were to (A) 'seek independent crop estimates' and (B) 'review maximum level of sales and pricing during periods of greatest delivery uncertainty';

(o) QSL recognised that the risk management policy for the Seasonal Pool was so important that it was to be approved by its highest organ of management; the board of directors;

(p) because QSL could 'pass through' to Wilmar any and all costs or expenses it incurred in carrying out its obligations under the RSSA, the manifestation of this recognised risk would be of financial consequence to Wilmar (and other millers);

(q) moreover, with respect to the Seasonal Pool, QSL managed the aggregate production of the millers as a collective. It did not, say, operate and manage some seasonal pool for Bundaberg Sugar separate from another seasonal pool for Wilmar. There was one Seasonal Pool into which all millers tipped some of their production. Accordingly, if one miller's production estimates turned out to be inaccurate the other millers could be financially affected;

(r) yet, a miller had no control or influence over the production estimates provided by any other miller, or insight into the reliability of those estimates. Only QSL could, in its stewardship of the Seasonal Pool, protect the millers from the financial consequences of the production risks (and thereby protect Wilmar from the alleged harm).

294. These elements align with some of the 'salient features' identified by Allsop P in *Caltex*. Their existence demonstrates that Wilmar:

(a) relied on QSL to manage the pricing of the Seasonal Pool; and

(b) was vulnerable to QSL's management of the Seasonal Pool."

[143] In the submissions of Wilmar, "reliance" and "vulnerability" are closely aligned concepts. By the terms of the RSSA, it was QSL who was to market the raw sugar. In that sense, by the terms of the RSSA Wilmar was relying upon QSL to market the sugar. It is submitted by Wilmar that Wilmar was vulnerable in the sense that the economic result of the marketing of the raw sugar was dependent upon actions taken or not taken by QSL.

[144] Vulnerability has been identified as a significant consideration in determining whether a duty arises. Wilmar was clearly vulnerable in the sense that the actions of QSL were capable of adversely impacting upon Wilmar.

[145] The factual assertions made in those submissions[153] can be accepted as can the assertions as to the legal effect of the RSSA.

[146] However, vulnerability in the context of the casting of a duty to avoid economic loss does not simply equate to a vulnerability to loss or damage. Where it is alleged that a duty arises in the context of a contractual arrangement, the question arises as to the ability of the party to whom the duty is said to arise to protect itself from the risk of loss; by negotiating a different contract for instance.[154] This means that the terms of the contract will become critical. This was explained by the High Court in *Bryan v Maloney*,[155] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[156] and *Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 & Anor*.[157]

[147] In *Maloney*,[158] a builder constructed a dwelling under a contract with a developer where there was no exclusion or limitation of liability. After the house was purchased by a third party, cracks appeared in the walls of the house which were attributed to inadequate footings. Of course there was no privity of contract as between the purchaser and the builder so she sued in tort alleging that the builder owed a duty to subsequent purchasers of the house to construct it using reasonable care and skill. The purchaser's loss was said to be the diminution in value of the home by reason of the latent defects in the footings; a purely economic loss.

[148] Over a strong dissent from Brennan J (as his Honour then was), a majority (Mason CJ, Deane and Gaudron JJ) found for the purchaser. The majority considered proximity in the context of the relationship between the builder and client, and in the relationship between builder and subsequent buyer. This was said:

> "Ultimately, it seems to us that, from the point of view of proximity, the similarities between the relationship between builder and first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significance than the differences to which attention has been drawn, namely, the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both relationships are characterized, to a comparable extent, by assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationships in so far as the foreseeability of the particular kind of economic loss is concerned: it is obviously foreseeable that that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footings becomes manifest. In the absence of competing or intervening negligence or other causative event, the causal proximity

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[153] With the exception of those made in the second sentence of subparagraph (h) and those made in subparagraphs (j) and (m).
[154] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [31] and [96].
[155] (1995) 182 CLR 609.
[156] (2004) 216 CLR 515.
[157] (2014) 254 CLR 185.
[158] (1995) 182 CLR 609.

between negligence on the part of the builder in constructing the footings and consequent economic loss on the part of the owner when the inadequacy of the footings becomes manifest is the same regardless of whether the owner in question is the first owner or a subsequent owner. In the case of both relationships, the policy considerations which ordinarily militate against the recognition of a relationship of proximity and a consequent duty of care with respect to pure economic loss are insignificant. Moreover, there are persuasive policy reasons supporting the recognition of a relationship of proximity between the builder and a subsequent owner of an ordinary dwelling house with respect to the particular kind of economic loss. As Wright J pointed out, at first instance, a number of those policy considerations were identified in the judgment of the Supreme Court of New Hampshire, delivered by Thayer J, in *Lempke v. Dagenais*. They include the consideration that, by virtue of superior knowledge, skill and experience in the construction of houses, it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the financial risk posed by latent defect in the structure of a house. In all the circumstances, the relationship between builder and subsequent owner as regards the particular kind of economic loss should be accepted as possessing a comparable degree of proximity to that possessed by the relationship between builder and first owner and as giving rise to a duty to take reasonable care on the part of the builder to avoid such loss."[159]

[149] The majority's comparison of the relationship between the builder and client on the one hand and builder and subsequent owner on the other necessarily brings into play the consideration of the significance of the contract. After consideration of *Voli v Inglewood Shire Council*[160] where concurrent liability in both contract and tort was recognised,[161] the majority said:

> "It follows that, in the circumstances of this case where the contract between Mr. Bryan and Mrs. Manion was non-detailed and contained no exclusion or limitation of liability, neither the existence nor the content of the contract precluded the existence of liability to Mrs. Manion or Mrs. Maloney under the ordinary law of negligence."[162]

[150] *Maloney* was considered in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[163] This was another case involving a claim by a purchaser of land and buildings resulting from structural defects in the building. In *Woolcock* the purchaser sued the engineer who had designed the building which was structurally failing. In the contract where the ultimate owner purchased the property, there was no assignment of the benefit of any warranties given by the engineer and no warranty given by the vendor that the building was free from defect.

[151] While in *Maloney* there was no disconformity between the duty owed to the party who contracted with the builder and any alleged duty owed to subsequent purchasers, the question was left open whether disconformity would be fatal to any alleged duty owed to

[159] Pages 627-628; citations omitted.
[160] (1963) 110 CLR 74.
[161] At page 84.
[162] *Maloney* at 622.
[163] (2004) 216 CLR 515.

the subsequent owner.[164] However, conformity or otherwise is clearly a relevant factor. It was considered in depth by the majority in *Maloney* and Toohey J in that case observed that the appellant's case was "uncomplicated by anything arising from the contract between the appellant and Mrs Manion [the original owner]".[165]

[152] In *Woolcock,* while not determining finally whether disconformity is conclusive against the existence of the duty, the court observed:

> "However, as Windeyer J said in *Voli v Inglewood Shire Council*, the terms of the contract between the original owner and the builder (or, in this case, the respondents) 'is not an irrelevant circumstance' in considering what duty a builder or engineer owed others. At the least, that contract defines the task which the builder or engineer undertook. There would be evident difficulty in holding that the respondents owed the appellant a duty of care to avoid economic loss to a subsequent owner if performance of that duty would have required the respondents to do more or different work than the contract with the original owner required or permitted."[166]

[153] On the topic of vulnerability, the court in *Woolcock* observed:

> "Neither the facts alleged in the statement of claim nor those set out in the Case Stated show that the appellant was, in any relevant sense, vulnerable to the economic consequences of any negligence of the respondents in their design of the foundations for the building. Those facts do not show that the appellant could not have protected itself against the economic loss it alleges it has suffered. It is agreed that no warranty of freedom from defect was included in the contract by which the appellant bought the land, and that there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claim for defects in the building. Those facts describe what did happen. They say nothing about what could have been done to cast on the respondents the burden of the economic consequences of any negligence by the respondents. The appellant's pleading and the facts set out in the Case Stated are silent about whether the appellant could have sought and obtained the benefit of terms of that kind in the contract."[167]

[154] The line of cases culminating (at that time) in *Woolcock* were analysed by Allsop P (as his Honour then was) in *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*[168] with his Honour saying:

> "The duty is to prevent or avoid economic loss, beyond that which it is reasonably necessary to cause in the proper administration of the *Protection of the Environment Operations Act*. The circumstances in which the common law will impose a duty of care to avoid causing pure economic loss have been the subject of considerable debate and uncertainty in Australia since *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529. Since then, in a series of cases in the High Court culminating in

[164] *Maloney* at 624-625.
[165] *Maloney* at 665.
[166] At [28], citations omitted.
[167] At [31].
[168] (2008) 74 NSWLR 102.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (*Bryan v Maloney* (1995) 182 CLR 609; *Hill v Van Erp* (1997) 188 CLR 159; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241; *Pyrenees Shire Council v Day*; and *Perre v Apand*) the High Court has identified an approach based on the presence, in the particular circumstances, of 'salient features' that, when combined, constitute or reflect a sufficiently close relationship to give rise to a duty of care. Such salient features include the inherent likelihood of the production of economic loss (*Caltex Oil (Australia)* (at 576)) and assumption of responsibility and known reliance (*Bryan v Maloney* and the negligent misrepresentation cases). The most important of these features, however, is vulnerability, in the sense discussed in the joint reasons of Gleeson CJ, Gummow J, Hayne J and Heydon J in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (at 530 [23]):

> '[23] … 'Vulnerability', in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, 'vulnerability' is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequence of loss on the defendant.'''[169]

[155] *Precision Products* was decided before *Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288 & Anor*.[170] There a builder built strata title units under a contract with a developer. The developer sold the units to purchasers subject to a lease of the units to a hotel chain. By force of legislation in New South Wales governing strata title, the body corporate was formed and vested with title to the common property upon registration of the strata title plan. Defects in the buildings on the common property became apparent and the body corporate sued the builder in reliance upon an alleged duty owed to it.

[156] The contract between builder and developer contained a series of provisions which defined the builder's liability for defects. These provisions had been complied with by the builder.

[157] The body corporate's claim failed. Four judgments were delivered in the High Court; French CJ; Hayne J and Kiefel J (as her Honour then was); Crennan, Bell and Keane JJ; and Gageler J. French CJ, following both *Woolcock* and *Maloney* held that whether a duty arose "requires consideration of the salient features of the relationship between the Corporation and Brookfield, including whether Brookfield owed Chelsea a relevant duty of care and whether the Corporation was vulnerable in the sense discussed above".[171]

[158] French CJ, after observing that proximity has not been the determinative test for a duty of care at least since *Sullivan v Moody*,[172] identified the salient features of the case as vulnerability and any assumption of liability by the builder.[173] By the terms of the

[169] At [105].
[170] (2014) 254 CLR 185.
[171] At [30].
[172] (2001) 207 CLR 562 at [48]; also see *Brookfield* at [22].
[173] At [30] and [32]-[34].

contract between builder and developer, the liability clause meant that the builder had not assumed liability to subsequent purchasers. His Honour noted that vulnerability relevantly here "refers to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct".[174] Here, his Honour found there was no such vulnerability.

[159] Hayne and Kiefel JJ held that the vulnerability or otherwise of the body corporate was determinative; on the facts of the case, determinative against it.[175] As to the concept of vulnerability, their Honours said:

> "It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests. The builder did not owe the Owners Corporation a duty of care."[176]

[160] Crennan, Bell and Keane JJ recognised vulnerability as a relevant consideration to whether a duty arises in any particular circumstances. However, by reference to *Woolcock* their Honours explained vulnerability in these terms:

> "Further in this regard, the plurality in *Woolcock Street Investments* noted that in decisions such as *Perre v Apand Pty Ltd*, *Hill v Van Erp* and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, the concept of vulnerability could be invoked as the rationale explaining the exceptions to the general rule. Vulnerability, in this field of discourse, is concerned not only with the reasonable foreseeability of loss if reasonable care is not taken by the defendant, but also, and importantly, with the inability of the plaintiff to take steps to protect itself from the risk of the loss. Their Honours held that the concept of vulnerability did not afford a basis for holding the defendant liable in that case because the facts of the case did:
>
> > 'not show that the appellant could not have protected itself against the economic loss it alleges it has suffered. It is agreed that no warranty of freedom from defect was included in the contract by which the appellant bought the land, and that there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claim for defects in the building. Those facts describe what did happen. They say nothing about what could have been done to cast on the respondents the burden of the economic consequences of any negligence by the respondents.'

[174] At [22], citing *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [118] per McHugh J.
[175] At [57].
[176] At [58], citations omitted.

To similar effect McHugh J said:

> ‘The first owners and subsequent purchasers of commercial premises are usually sophisticated and often wealthy investors who are advised by competent solicitors, accountants, architects, engineers and valuers. In the absence of evidence, this Court must assume that the first owner of commercial premises is able to bargain for contractual remedies against the builder. I must also assume that a subsequent purchaser is able to bargain for contractual warranties from the vendor of such premises.’

These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.”[177]

[161] Gageler J decided the case on this basis:

> “Absent any application that *Bryan v Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock Street Investments*, the view expressed by McHugh J in *Woolcock Street Investments* should in my opinion be accepted. The continuing authority of *Bryan v Maloney* should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder’s want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.”[178]

[162] The three decisions of the High Court analysed above all concern the liability of a party to a third party with whom the party said to be liable has no contractual obligations. Here of course the parties have contracted with each other. The RSSA identifies the respective obligations of the parties in a detailed way.

[163] The features submitted by Wilmar as indicating the assumption of a duty shows its vulnerability to financial loss if QSL acts in particular ways or fails to act in particular ways during the performance of the RSSA.

[177] At [130]-[132], citations omitted.
[178] At [185].

[164] That is how the case was pleaded. In subparagraph 15(c) of the Statement of Claim, vulnerability is pleaded in terms of an inability of Wilmar "to protect itself from any failure by QSL to exercise reasonable care, skill and diligence in managing the sugar price and foreign exchange exposure of the Seasonal Pool …". The particulars which are provided of that allegation are the facts alleged in the further and better particulars of 31 July 2015. All those particulars concern the way in which the actions of QSL could impact upon the financial position of Wilmar. There is no mention in the pleadings or the submissions of the relevant "vulnerability"; reasons why Wilmar could not have negotiated terms to protect itself.

[165] There is no plea or evidence to support a conclusion that Wilmar could not take steps to protect itself by negotiating contractual terms. Wilmar submits in its reply submission that the issue ought to have been raised by QSL in its pleadings;[179] if QSL wanted to allege that Wilmar could have taken steps to negotiate contractual terms, that ought to have been pleaded. Wilmar though has sought to set up and prove "vulnerability". The "vulnerability" that it has pleaded and sought to prove is not the type of "vulnerability" which would in this case give rise to the duty.

[166] Also, of course no duty will arise which is inconsistent with the rights and obligations of the parties under the RSSA.

[167] These principles can be considered, for example, by reference to the point made in subparagraphs 293(q) and (r) of Wilmar's submissions, set out at [142]. These are the submissions which rightly say that the raw sugar of all the millers is mustered as a pool, and Wilmar has no control over production estimates lodged with QSL by other millers.

[168] The submissions must be considered in the context of the RSSA. The object of the RSSA is to establish "a pooling arrangement where sales revenues and the associated costs and risks are allocated on a shared basis between all participants who have entered supply contracts".[180] That is achieved by a series of RSSAs with various millers so that the sugar for export is marketed together. Part of that arrangement is for the millers to give estimates of production which can be revised from time to time so the size of the raw sugar crop can be determined and marketed. The contractual obligation upon QSL is to market the sugar in terms of its obligations under the RSSA.

[169] If a tortious duty of the sort advocated by Wilmar is superimposed upon the parties' contractual relationship, the contractual obligations must change in order to accommodate the duty. By the RSSA, all the millers have an expectation that the pool, of the size estimated, will be marketed; but the duty may require some smaller amount to be marketed, or perhaps a larger amount depending upon prevailing agricultural conditions. What is marketed then is not the amount estimated either originally or by amended assessments by the millers (as contemplated by the RSSA), but an amount which QSL itself estimates.

[170] The parties have agreed on a mechanism (estimates which can be revised) to quantify the sugar expected to be produced and which is to be marketed by QSL. As observed by Crennan, Bell and Keane JJ in *Brookfield*: "The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by

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[179] Reply at [28].

[180] Recital F.

supplementing or supplanting the terms of the contract by duties imposed by the law of tort".[181]

[171] There is no relevant vulnerability here. Had the parties wished to agree to different terms, placing obligations upon QSL to itself estimate the size of the sugar crop and take steps to market that crop, they could have done so. QSL may have agreed to accept that responsibility but may then have insisted on other terms. Under the terms of the RSSA (the contract that the parties did agree to), QSL did not assume an obligation to market a crop the size of which was estimated by QSL. It undertook to market a crop estimated by the mechanism specified in the RSSA.

Basis clauses

[172] I should consider a particular submission made by QSL. QSL relies upon cll 20 and 22 of the RSSA and submits that those provisions establish the "basis" upon which the parties have contracted. In other words, so submits QSL, the parties have agreed that no matter what occurred during the term of operation of the RSSA and the performance of the obligations which fall upon the respective parties, QSL is not to bear any loss.

[173] QSL relies on a number of English decisions and in particular *JP Morgan Chase Bank v Springwell Navigation Corporation*.[182] That was a case where a company (called in the judgment "Springwell") invested heavily in various stocks through its broker (referred to in the judgment as "Chase") relying, amongst other things, upon a duty said to be owed to it by Chase to advise in relation to the investments. In the course of dismissing the tortious claim, this was said:

> "I also accept Chase's primary submission that it is not necessary, at least for the purposes of the general advisory claim, to undertake a detailed textual analysis of the precise ambit, extent and legal effect of each individual clause because the contractual documentation, taken as a whole, has the broader evidential significance of negating the assumption of any general advisory duty or obligation on the part of Chase. Thus I accept that the contractual documentation presented a consistent, and commercially coherent picture; namely that Springwell's trading through the Investment Bank, whether in emerging markets instruments or otherwise, was not intended to give rise to, or impose upon the Private Bank or the Investment Bank, investment advisory obligations or responsibilities, either in relation to the particular securities purchased or sold, or more generally, in relation to Springwell's financial position in the light of its emerging markets portfolio; in other words, that the relationship between Springwell and the Private Bank, and between Springwell and the Investment Bank, was one where neither the Private Bank nor the Investment Bank had an obligation to give any investment advice, and, moreover, was one where, even if any such advice was given, Springwell acknowledged that the Chase entities had no responsibility for any such advice, (a) because Springwell acknowledged that it had not relied upon any such advice in making its investment decision, and (b) because it had agreed that the Chase entities were not liable for any

[181] *Brookfield* at [132], citing *Downsview Nominees Ltd & Russell v First City Corporation Ltd* [1993] AC 295 at 316 and *Hill v Van Erp* (1997) 188 CLR 159 at 179, 223, 231-234.

[182] [2008] EWHC 1186.

> loss caused as a result of any investment decision by Springwell (save in the case of gross negligence or wilful default.)"[183]

[174] QSL also referred to a number of cases to similar effect but where the contractual terms agreed between the parties established what was described as a "contractual estoppel"[184] seemingly approved in *Hawley Partners Pty Ltd v Commissioner of Stamp Duties*[185] and *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*.[186]

[175] Neither "contractual estoppel" nor "basis clauses" seem to have gained traction in Australia. That is understandable because the High Court has, in cases such as *Maloney*, *Woolcock* and *Brookfield*, examined the circumstances in which a duty to avoid pure economic loss arises in the context of contractual arrangements. The common law of Australia is as stated by the High Court in those authorities. The principles to apply are the principles which emerge from those cases. I have applied those principles here.

[176] There is no utility in analysing the present case in terms of either "basis clauses" or "contractual estoppel".

[177] The claim in tort fails.

Consideration of breach, causation and loss

[178] I have found that QSL did not breach its contractual obligations and no tortious duty as alleged actually arose. Wilmar's claim therefore fails. I should though deal with the issues which arose concerning the alleged breaches, causation and loss.

[179] Wilmar points to two failures of QSL to meet its contractual obligations and to discharge its tortious duty:

1. Overcommitting the crop too early in the season; and

2. Failing to reverse the ICE 11 position it had adopted in May 2010 once the volatility in the market increased at that time.

[180] Wilmar submits that there was no breach because there were high prices on offer and they should have been accepted.[187]

[181] However, QSL's case was that it complied with the FRMP. QSL did not seriously press that compliance with the FRMP constituted compliance with the alleged contractual obligations or tortious duty. Its case of course was there was no such obligation or duty. The FRMP adopted a formula to maximise price. It did not factor in a risk that the estimates of production provided by the millers might not be accurate.

[182] The experts called by Wilmar (Professor Carter and Mr John Kidd) both assumed that the obligation was upon QSL to guard against a risk of a drop in production. Upon that

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183 At [478], affirmed on appeal [2010] 2 CLC 705, and to similar effect see *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland* [2011] 1 Lloyd's Rep 123 at [313]-[318] *Crestsign Limited v National Westminster Bank PLC* [2014] EWHC 3043 at [99]-[117].

184 *Colchester Borough Council v Smith* [1991] Ch 448.

185 (1996) 96 ATC 4847.

186 [2006] 2 Li R 511.

187 Wilmar's submissions are made in some detail at paragraph 258 and following of its written submissions.

assumption, both opined that the FRMP did not address that risk.[188] Neither of Professor Stephen Gray nor Mr Martin Dougall (called as experts by QSL) said that the FRMP took account of a risk in a drop in production. For reasons I later explain, I do not accept the evidence of the third expert called by QSL, Mr Richard Lee.

[183] The *Civil Liability Act* 2003 (Qld) relevantly provides:

> "**9 General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
>
> (d) the social utility of the activity that creates the risk of harm.
>
> **10 Other principles**
>
> In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—
>
> (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
>
> (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
>
> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk."

[184] I have previously held that the risk of production fall due to the weather was foreseeable, and indeed, foreseen, by QSL.[189] Once the risk is foreseeable, the person upon whom the duty falls must make "precautions".

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[188] Carter report, exhibit 21, paragraph [55], Kidd report, exhibit 30, paragraphs 5.6, 5.7.

[189] Paragraphs [19]-[22] and [24] of these reasons.

[185] In *Reed v Warburton*,[190] Basten JA[191] said:

> "Section 5B [of the NSW equivalent of section 9 of the *Civil Liability Act* 2003 (Qld)] appears to be directed to a case where a person who has, or should have, identified a risk of harm, must then take 'precautions' against it, as opposed to simply exercising reasonable care in going about his or her activities. For example, in the present case, it makes sense to speak of the use of a heat shield or ensuring the availability of buckets of water as 'precautions': the need to take care not to allow the flame too close to inflammable material is less helpfully described as taking a precaution. The latter simply involves taking reasonable care. The infelicity of the expression of s 5B need not be problematic, but it may be necessary to avoid an unconscious tendency to look for identifiable 'precautions' instead of considering whether the responsible party has simply failed to exercise reasonable care."[192]

[186] QSL took no precautions against the risk of a drop in production. Of course, I have found that it was under no obligation to do so, but if it was, then it was in breach of those obligations.

[187] Wilmar's case was that the obligations dictated that none of the sugar to be produced in the 2010 season should have been committed until it was physically produced. Wilmar accepted that if it could not establish that, then its claim failed; there was no middle ground.[193] In its reply submissions Wilmar clarified the concession it had made.[194] There was, though, no basis of calculating loss if Wilmar established that too much sugar had been committed, but failed to establish that no sugar should have been committed until it was physically produced.

[188] On this question both parties relied on expert evidence.

[189] As already observed, Wilmar called two experts, Professor Carter and Mr Kidd. QSL called three, Professor Gray, Mr Dougall and Mr Lee.

[190] With the exception of Mr Lee, I thought all the expert witnesses were properly qualified to give the evidence they did and except where I preferred a contrary opinion expressed by another expert, their evidence ought to be accepted. I am not though persuaded to accept the evidence of Mr Lee except where his evidence is either uncontentious or is supported by other evidence.

[191] An expert gives opinion evidence as an exception to the general rule that opinion evidence is not admissible. The opinion, to be admissible, must be based on a factual foundation in the field of expertise within which the witness is an expert.[195] Mr Lee did not seem to understand those basic concepts. On various occasions, he expressed views and was unable to point to proper factual foundations for the opinion he expressed.[196]

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[190] [2011] NSWCA 98.
[191] With whom Hodgson JA and Handley AJA agreed.
[192] At [21].
[193] Transcript 11-11 to 11-12.
[194] Paragraph [33] and following.
[195] *Clarke v Ryan* (1960) 103 CLR 486; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at [138]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [66].
[196] Transcript 7-63 to 7-64, transcript 10-22 - 10-25.

[192] A lack of independence of an expert may lead to the exclusion of the expert's evidence,[197] although doubts have been expressed as to the legal basis for exclusion of relevant opinion evidence on the ground of bias in a civil case.[198] Lack of independence of the expert certainly goes to the weight of the evidence.

[193] Mr Lee is not relevantly independent. In particular:

(i) Mr Lee is heavily involved in a company, Australian Cane Farms Limited, which has as its expressed ambition to become "the largest sugar cane farmer in the country";[199]

(ii) Mr Lee was involved with a group who in 2015 made submissions to a Queensland Parliamentary Inquiry into the sugar industry where the submissions were contrary to the position adopted by Wilmar;[200]

(iii) an associate of Mr Lee's, being a fellow director of Australian Cane Farms Limited, or the entities that preceded its incorporation, was elected to the board of QSL as a "grower director"; in other words someone whose interests do not align with the miller groups' (including Wilmar) and his eligibility to election was proven through his involvement with businesses, interests in which he shared with Mr Lee;[201]

(iv) Mr Lee's business interests, in their dealings, preferred QSL's interests over Wilmar's.[202]

[194] Mr Lee was cross-examined for a considerable period about his business interests and his alleged bias in favour of QSL. I found him evasive and his evidence on those topics unimpressive. Much of his time in the witness box was spent unconvincingly trying to fend off a very effective cross-examination.

[195] The problem which pervaded the evidence of all the expert witnesses to some extent was that they were influenced by instructions given to them as to the obligations which fell (or did not fall) upon QSL.

[196] Examples of this are littered through the expert evidence. Professor Carter, for instance, concluded that the Seasonal Pool was designed to protect against production risk which then led to the opinion that the FRMP is flawed and steps should have been taken to guard against a fall in production through management of the Seasonal Pool.[203] Professor Gray criticised Professor Carter's opinion based, at least partially, on the ground that QSL's responsibilities did not extend to the management of production risk.[204]

[197] Neither the evidence of Mr Kidd nor the evidence of Mr Dougall is of any real assistance.

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197 *Fox v Percy* (2003) 214 CLR 118 at [151]; *R v Butler* [2010] 1 Qd R 325 at [127] and [128].
198 The Hon DJ Heydon ACQC, *Cross on Evidence*, Australian Edition, paragraph [29080].
199 Transcript 7-83.
200 Transcript 7-86 to 7-99.
201 Transcript 7-101 to 7-102.
202 Transcript 7-105 to 7-106.
203 Carter report, exhibit 21, page 3 paragraph (a) under the heading of "Summary of Key Findings" and paragraph [56].
204 Gray report, exhibit 50, paragraph [43] onwards.

[198] Mr Dougall is a well-credentialed chartered accountant whose expertise I unreservedly accept. However, his opinion was sought on a narrow issue as to whether the FRMP adequately addresses the risks that it was designed to manage.[205]

[199] Mr Kidd, on the other hand, starts from the assumption that production risk should be managed by QSL.[206] Against that background, he then criticised the FRMP for not appropriately managing production risk.[207] Of course the issue is not, in reality, the appropriateness or otherwise of the FRMP. The question is whether or not there is an obligation upon QSL to put in place measures to guard against a fall in production.

[200] If that obligation was upon QSL, then, as already observed, the sole question was whether QSL was obliged, in discharge of those obligations, to wait until sugar had been physically produced before pricing it. That is because that is the only case advanced. There is no other basis upon which some loss could be calculated.[208] The resolution of that question is determined by the evidence of Professor Carter and Professor Gray.

[201] Professor Carter is a professor of agricultural and resource economics at the University of California, Davis. He is an economist with particular expertise in agricultural economics. There are certainly no doubts about his qualifications to give the evidence which he did.

[202] Professor Carter identified three risks confronting the Seasonal Pool:

(a) production risk;[209]

(b) price risk;[210]

(c) foreign currency risk.[211]

[203] Much of Professor Carter's efforts were engaged in criticism of the FRMP. Of course, establishing valid criticism of the FRMP would not lead Wilmar to succeed in establishing the loss claimed, even if it established the contractual obligation or tortious duty pleaded. It needed to establish that none of the Seasonal Pool should have been committed until the sugar was produced. Professor Carter reached that view by finding that the "optimal pre-harvest hedge ratio" (the sugar pre-committed before production) of the entire Queensland crop for the 2010 season was 51%.

[204] Professor Carter explained his reasons for this conclusion as follows:

> "**5.2.2 The optimal pre-harvest hedge ratio for the Seasonal Pool was zero**
>
> 76. Although it is unclear from the terms of the 2010 Financial Risk Management Policy, empirical evidence obtained from Monthly Supplier Customer Reports show that QSL employed a hedge ratio of close to 1.0 for the Seasonal Pool. This strategy is puzzling.

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205 His report, exhibit 53, paragraphs 5-7.
206 Kidd report, exhibit 30, paragraph 4.3.
207 Kidd report, exhibit 30, paragraphs 4.5, 5.6, 5.7.
208 *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 36-37 per Gibbs J (as his Honour then was) with Aickin J agreeing at 38.
209 His report, exhibit 21, paragraphs 32-40.
210 His report, exhibit 21, paragraph 40.
211 His report, exhibit 21, paragraphs 25 and 31.

77. Because of the inter-relationship between the Seasonal Pool and QSL's other pools, QSL should not have hedged any expected sugar in the Seasonal Pool. QSL documentation and the design of the Seasonal Pool clearly demonstrate the inherent inter-relationship between the Seasonal Pool and QSL's other Pools. Under the terms of their RSSA's (sic), suppliers were prevented from assigning more than 70% of their crop to the fixed tonnage pools. All excess sugar was marketed under the Seasonal Pool. The maximum commitment to fixed tonnage pools means that the Seasonal Pool was designed to serve as a buffer against seasonal fluctuations in production for other pools.

78. Yet, in the course of its trading activities, QSL apparently managed sugar in all pools together and did not assign individual sugar sales and hedge decisions to specific pools until after trading decisions had been made. The Weekly Marketing Plans and Pricing Exposure Reports, which monitored the share of production that was sold and unsold by customer, foreign exchange, and ICE contract, show that QSL treated all of its sugar the same (for purposes of tracking sales), irrespective of what pool the sugar would ultimately be tied to. In other words, the Weekly Marketing Plans and Pricing Exposure Reports did not explicitly recognize and account for the fact that the final volume in the Seasonal Pool was dependent on the realized harvest.

79. As discussed above in sections 4.1 and 4.2, hedging the expected volume of sugar in the Seasonal Pool reduced that Pool's ability to manage production risk for other pools. A hedge ratio of 1.0 eliminated the Seasonal Pool's role as a production buffer because all expected sugar production across all Pools was committed before total production was known. QSL's trading strategy left no margin for error.

80. It is widely known in the academic literature and in industry that in the presence of both price and quantity risk an agricultural producer should typically commit less than 100% of expected production prior to harvest. Rolfo (1980) developed a model to calculate the optimal pre-harvest futures market hedge for a producer who is subject to both price and quantity risk. In this section I apply the Rolfo mean-variance model to determine QSL's optimal pre-harvest commitment of sugar across all Pools and discuss the implications for the Seasonal Pool during the 2010 Season.

81. In any given year, the expected revenue generated by the Queensland crop depends on the expectation and historical variance of prices and production, the pre-harvest price, and the number of futures contracts or other commitments entered into prior to harvest (i.e., the hedge). Denote the expected revenue for QSL Suppliers in any given year as $\mathrm{E}(\tilde{W})$, where:

$$\mathrm{E}(\tilde{W}) = \tilde{P}\tilde{Q} + n(f - \tilde{P}_f) \tag{1}$$

In the above equation $\tilde{P}$, $\tilde{Q}$, and $\tilde{P}_f$ are stochastic (or uncertain) variables that represent the cash price at the time of harvest, the quantity of sugar, and the futures price at harvest. f is the pre-harvest futures price and n is the number of futures contracts or other commitments that QSL enters prior to harvest.

82. As the marketing agency, QSL's responsibility is to maximize the expected utility to its suppliers by hedging against price and production risk. In Rolfo's mean-variance framework this task is specified mathematically as follows:

$$\max_n EU = E(\tilde{W}) - m\text{var}(\tilde{W}) \qquad (2)$$

where m represents the degree of risk aversion. The optimal hedge, n^*, is determined by taking the first-order conditions of equation (2) with respect to n and is calculated according to the following expression:

$$n^* = \frac{f - E(\tilde{P}_f)}{2m\text{var}(\tilde{P}_f)} + \frac{\text{cov}(\tilde{P}\tilde{Q}, \tilde{P}_f)}{\text{var}(\tilde{P}_f)} \qquad (3)$$

83. I use historical data from 1964/65-2009/10 to determine QSL's optimal pre-harvest commitment strategy. Because large supply shocks of the 2010 season magnitude are relatively infrequent (1-in-10 according to QSL), a long time horizon is needed to model the true characteristics underlying the market. I combine July ICE futures price data with annual cane sugar production data for Australia obtained from the Foreign Agricultural Service of the United States Department of Agriculture. Exchange rate data were obtained from the World Bank. I emphasize that all of the information I use in this analysis is publicly accessible and would have been available to QSL at the time it received its initial estimates from suppliers.

84. I calibrate P_f, the futures price distribution, as the July ICE futures price on the first trading day in December of the previous year. The 2010 Season pre-harvest futures price, f, is the futures price for July 2010 delivery quoted on December 1, 2009. I represent the cash price as the July futures price on the last trading day of June in the same year. For instance, for the 2010 crop the cash price would be the July 2010 futures settlement price on the last trading day in June 2010. These prices were converted to AUD. I assume a risk aversion coefficient of 1, but results are only sensitive to extreme values of m.

85. The Rolfo (1980) framework yields an optimal hedge ratio of 0.51 for QSL's expected sugar supply. In other words, QSL should have pre-committed (through forward sales) no more than 51% of its expected supply prior to harvest. These results are a striking contrast to QSL's actual marketing strategy. QSL allocated 70% of estimated production - or 19% more than the optimal pre-harvest commitment-to the Committed Sugar pools. Given this strategy, QSL should have hedged none of the sugar allocated to the Seasonal Pool. QSL over-hedged the

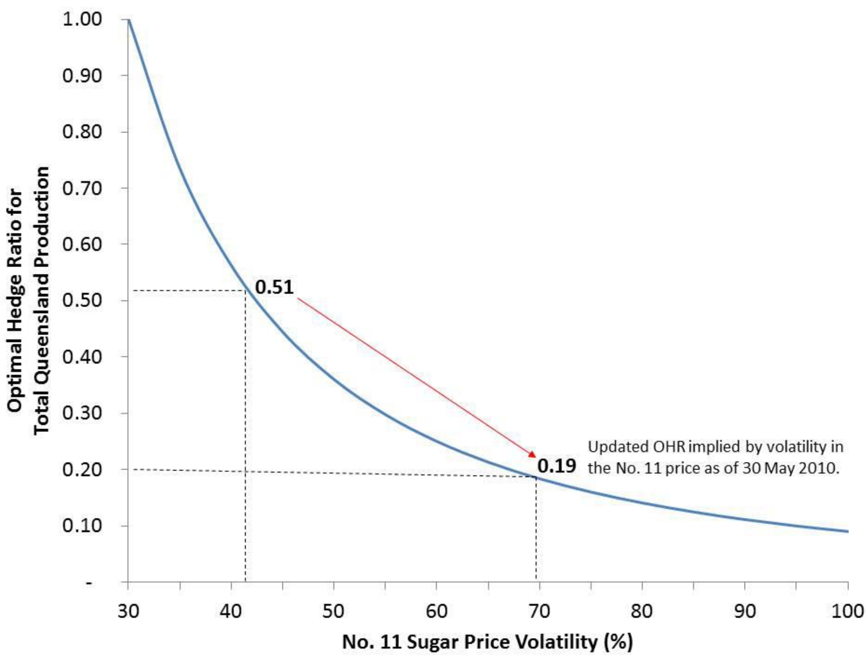
Seasonal Pool by 100% and was over-hedged across all pools by close to 50% of expected production.

86. I test the sensitivity of my findings by calculating the optimal hedge ratio for alternative time horizons with start dates ranging from 1965/66 to 1979/80. The optimal pre-commitment for these alternative time horizons takes a minimum value of 21% and is never higher than 56% of total expected production. For all reasonable time periods of analysis, my findings indicate that QSL should not have hedged any of the sugar allocated to the Seasonal Pool prior to harvest.

87. Moreover, the behaviour of the ICE No.11 futures price signaled that QSL should have reduced its hedge in the Seasonal Pool months before it received the revised production estimates from its suppliers. Static application of the Rolfo (1980) framework would have resulted in a massive reduction in the losses generated by QSL; however, the approach is relatively simplistic and ignores the ever-changing dynamics of the marketplace. As discussed above and shown in Figure 4, volatility in the ICE No.11 futures price was increasing rapidly at the time QSL was acquiring futures positions. By 30 May 2010, the four-week volatility in ICE No.11 futures price for July delivery was 69.5%. A prudent hedger would have adjusted its futures position to account for this increased volatility. Figure 8 shows how the increased volatility would have affected the optimal hedging strategy for QSL's total expected supply.

88. The volatility in the ICE No.11 price on 30 May reduces the optimal pre-commitment

Figure 8: Price Volatility and the Dynamics of Optimal Hedging



Information on price volatility taken from the ICE No.11 price data underlying Figure 4.

> from 51% of total expected production to just 19%. If QSL had accounted for the evolving dynamics of the ICE No.11 market in its trading strategy, it would have reversed its positions in light of the substantial volatility and reduced or even eliminated its losses in the 2010 Season. This dynamic trading strategy would have likely resulted in positive revenue when QSL sold un-hedged sugar for the higher prices reached during the end of harvest."[212]

[205] Professor Carter's view was not that no sale should occur until the entire harvest was complete. His view was that raw sugar, once produced, could be sold but that no part of the crop should be sold until that part was actually produced. Therefore, there would be various sales across the season. This point was made clear by him in cross-examination:

> "Yes, I can. Your view ultimately is that there should have been no hedging of sugar allocated to the seasonal pool until the harvest was complete?---Not necessarily not until the harvest was complete. Until there was some production that was allocated to the seasonal pool.
>
> I'm sorry. Say that again?---I don't agree with the last part of your question.
>
> Yes?---You said 'until the harvest was complete'.
>
> Yes?---That's - that's not my argument. It's once the sugar is in the shed. Then it could be sold, and the harvest continues over several months.
>
> And if we're looking at paragraph 2(c) then - I'm just looking at your sentence which commences:
>
> > *Once harvest was complete in the physical market, QSL could have sold the seasonal pool sugar in equal monthly increments.*
>
> I had read that as you suggesting that it was only once harvest was complete, that QSL would go and sell the sugar in the physical market?---It wasn't my intention, to imply the - the entire harvest. If you read the rest of the paragraph, I think you'll see that it comes through, that my argument is they could sell sugar throughout the harvest season.
>
> Throughout the harvest season?---Yes.
>
> So you would not commence selling until after the harvest had started, but perhaps at the point that sugar started to hit the sheds?---Correct."[213]

[206] Professor Carter's opinion can be simply summarised. He says that application of the Rolfo model results in an optimum hedge of 51%. As the Seasonal Pool constitutes only 30% of the total market, it follows that by force of the RSSA and the structure of the various pools, up to 70% would be committed with the result that none of the Seasonal Pool should be hedged; that is, committed before the sugar to be committed is physically produced.

[207] As explained in Professor Carter's report,[214] the model he adopted was formulated by an economist (Jacques Rolfo) in a paper published in 1980. The paper was admitted as

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[212] His report, exhibit 21, Part 5.2.2, paragraphs [76]-[88].
[213] Transcript 3-6 to 3-7.
[214] Exhibit 21, paragraph 80, set out at paragraph [204] of these reasons.

exhibit 29. The paper hypothesises that by application of a mathematical formula, optimum hedging rates can be calculated.

[208] Professor Gray is an economist who has worked for Fountain Economics. That firm has no particular practice in agricultural economics. Professor Gray has been Professor of Finance at the University of Queensland since 2000 but his particular expertise is not in agricultural economics.[215] It is obvious that Professor Carter's experience in agricultural economics is superior to that of Professor Gray.

[209] However, Professor Gray has studied and published in the field of futures contracts and has been involved in agricultural projects.[216] I accept Professor Gray's expertise to give the evidence he did.

[210] Professor Carter and Professor Gray approached the preparation of their reports from different starting positions. Professor Carter assumed that the role of QSL was to manage production risk by use of the Seasonal Pool as a "buffer". Professor Gray approached the problem on the basis that QSL's function was to manage price risk not production risk. Indeed, that assumption led Wilmar to object to the evidence of Professor Gray as his evidence, it was submitted, proceeded on what they submitted was an erroneous assumption.

[211] In my judgement of course, the assumption of Professor Gray is correct at least to the extent that QSL's obligation did not extend to allocating sugar upon a consideration that production might fall below that estimated by the millers pursuant to the terms of the RSSA.

[212] There was objection to Professor Gray's evidence on other grounds. Those objections were made late in the trial and were the subject of written submissions. The central objection was that QSL had failed to call evidence from a number of witnesses, the effect of such failure being that no factual basis was established for Professor Gray's opinions.

[213] Professor Gray gave evidence about the appropriateness of the Rolfo model. Those opinions were not based on the factual assumptions which Wilmar says were not proved by QSL. The only basis upon which Professor Carter opines that none of the Seasonal Pool sugar should have been allocated until being physically produced is upon the application of the Rolfo model.[217] Professor Gray's evidence on that topic is clearly admissible.

[214] There was also objection taken to Mr Lee's evidence. That was also dealt with in the written submissions. However, for the reasons I have given, I have not relied on his evidence so there is no utility in considering those objections.

[215] The real issue is whether in the contest between Professor Carter's opinion and Professor Gray's, it is found that the Rolfo model ought to have been applied so that no sugar (from the Seasonal Pool) should have been allocated until it was physically produced. If so, then, assuming either a contractual obligation or tortious duty to manage production risk, QSL has failed to do so and has caused the loss claimed.

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[215] Transcript 8-13 to 8-16.
[216] Transcript 8-19.
[217] Carter report, exhibit 21, paragraph [80].

[216] Of course there is nothing in the RSSA which suggests that no part of the Seasonal Pool should be sold until it is physically produced. For instance, various terms of the RSSA contemplated there would be communication from Wilmar (and other millers) to QSL about what will be produced and that is what is to be marketed.[218]

[217] If the correct approach or expectation was to price no part of the Seasonal Pool until it was physically produced, then that is a position that was not understood by either party during the 2010 season. Marketing meetings were contemplated pursuant to cl 5.6 of the RSSA.[219] There were monthly reports produced showing the contracts entered into by QSL and there was no objection raised by Wilmar or any of the millers.[220]

[218] Professors Carter and Gray conferred before trial and a joint report was prepared.[221] While there was agreement about various things, there is also substantial disagreement. However, much of the disagreement stems from differences of opinion as to the legal obligations of QSL in managing the Seasonal Pool. It is only necessary to consider the evidence of the two experts as it pertains to the central question, namely whether the application of the Rolfo model is appropriate.

[219] There was dispute between Professors Carter and Gray as to the application of the Rolfo model. This arose in a number of ways including:

(i) whether the data of the 1975 and 1981 seasons, where there were extraordinary conditions, should be included in any Rolfo consideration;

(ii) a risk aversion coefficient had to be decided upon for the purposes of the Rolfo model. Professor Carter settled on the risk aversion coefficient of 1. Professor Gray opined that there was no evidence upon which such a coefficient could be settled upon given that the relevant risk was the risk of a group of individual millers;

(iii) whether in calculating price variance, inflation ought to be considered;

(iv) whether the Rolfo model, assessing as it does the selling of futures at a particular point in time, applies where there are various allocations across a season;

(v) whether the Rolfo model was appropriate for application to a body like QSL.

[220] In the end, the issue as to whether the 1975 and 1981 years ought to be included in the calculation makes no difference to the result of Professor Carter's opinion. This is because if the 1975 and 1981 years are removed from the calculations, the optimum hedge ratio rises to 63%. That is below the 70% which is the maximum which can be allocated by millers to the other pools. Professor Carter would say that 37% must be retained which is more than the 30% constituting the Seasonal Pool.

[221] To my mind though, the debate about whether or not to include the data from the years 1975 and 1981 somewhat demonstrates the subjective nature of the Rolfo model. Professor Carter was prepared to concede that it was reasonable to discount the data from those two years thus leading to a very significant alteration in the optimal hedge ratio.[222]

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[218] See recitals G and H and cll 5.6 and 6.
[219] QSL's submissions at [37(d)]
[220] Burgess statement, CFI 21, at [16]; transcript 1-67 to 1-69 and 1-71 to 1-75.
[221] Exhibit 24.
[222] Transcript 3-43 to 3-45.

Wilmar's case though is that QSL were effectively obliged to apply the model notwithstanding its vulnerability to disagreements about its application.

[222] Professor Carter applied a risk aversion coefficient of 1. The risk aversion coefficient ought to reflect a value that is representative of the millers as a group.[223] That must logically be so because the RSSA is one of a number of sugar supply agreements and the object of the exercise is the pooling of sugar. Under cross-examination Professor Carter said this:

> "I see. So if QSL is sitting down and applying this Rolfo formula, it should adopt a value of M that's representative of the millers as a group?---Yes.
>
> And what if the different millers have different risk aversion?---That wouldn't change my opinion.
>
> But I'm just interested in the value of M, you understand, not the outcome, just the value of M. If different millers within the group have different risk aversion, how does QSL come up with a value for M?---Well, their focus should be on what - what their job is, and their job is to manage the revenue from the sugar in the seasonal pool, and as far as I understand it, that pretty much comprises their portfolio. So that would be the decision-making steps that they would take. And that would be their focus. They wouldn't be focused on certain aspects of individual mills.
>
> Well, if we're trying to replicate the risk aversion of the millers as a group, we do have to look at the millers; don't we?---Well, the millers have turned the sugar over to QSL. So that's when I say 'as a group'. So it's - if there's certain unique characteristics of a certain mill - that would not play a role.
>
> All right. If QSL is not trying to replicate the risk aversion of any particular mill but, rather, trying to come up with a figure loosely based on all the mills together - is there some sort of formula or equation they could apply to do that?---Well, I think it would be reasonable, for them to establish that they're averse to risk, that they have risk aversion, and proceed accordingly. And if - following up on your question - if they're using the Rolfo framework or something similar, they could then see how a change in that assumption affected the optimal hedge ratio.
>
> Sure. So if I'm following you, you're saying they should make an assumption that the millers in the group are risk-averse?---Yes.
>
> And how risk-averse?---That would be their choice. They could be highly risk-averse or less risk-averse.
>
> Sorry?---As they said - - -
>
> When you say it would be their choice -whose choice?---QSL.
>
> Right. And how is QSL to choose?---As I said - - -
>
> What criteria does it apply to choose?---Yes. As I said, they could make that decision and then conduct some sensitivity analysis to see how that choice affected the outcome, and given the nature of the sugar market, it's not going

[223] Transcript 3-53.

to have a huge effect on the optimal hedge ratio, because the contribution of Rolfo is to show that, when you have output variability and price variability, the optimal hedge is going to be less than one.

Now, did you undertake an exercise like that yourself when you were applying the Rolfo model?---I did comment on alternative values for the risk-aversion parameter.

In the sense that you said that the risk-aversion value didn't make any difference to the result that was - - -?---In the end, it did not make a huge difference. That's right.

Did you seek to replicate the risk aversion for the millers as a group?---No. I assumed a risk-aversion co-efficient of one."[224]

[223] In the end, as Professor Carter explained, the risk aversion coefficient had no real impact on the application of the formula. That is because the value of some of the other integers were such as to render the risk aversion figure as having little impact in the application of the mathematical formula. The fact remains though that the selection of the appropriate risk aversion coefficient became arbitrary. In my view, this highlights the problems with applying the Rolfo model in a complicated structure such as that established by the RSSA and similar agreements entered into by other millers.

[224] Professor Gray thought that inflation ought to be taken into account. Professor Gray plotted a "trend line" which he said would give a better indication of increase in prices including reflecting inflation. Under cross-examination Professor Carter said this:

"What Professor Gray has done in figure 5 is plot out the price data and identified the mean, which is, in effect, the mean that you have adopted without fitting a trend line; is that right?---Without fitting a trend line for the purpose of calculating the variance?

Yes?---Yes. That's correct.

So if we don't fit the trend line, that's what the figure looks like?---Yes.

And Professor Gray's point is that, if we look at the actual prices, we can actually see a trend over the long term of the average increase in price?---Right.

And that's in accordance with expectations, if for nothing else, because of inflation?---I think that's part of his argument. Yes.

Yes. And do you agree that at least we can discern that trend, just from looking at the prices themselves? It's observable; isn't it?---Yes. Yes.

So there is that trend. There's no doubt about that?---Correct.

And the debate between you and Professor Gray is, really, whether when you're assessing the variance from the mean you should fit a trend line to the mean?---That was his suggestion.

Yes?---It's not something that's in Rolfo, but - yes. Yes. That was his suggestion.

224 Transcript 3-53 to 3-54.

Yes. And we can see it makes a difference, if we look over on page 31- - -?---Correct.

- - - because what we've got in figure 6 is Professor Gray having fitted a trend line, and the variance is, obviously, less, should you fit the trend line; do you agree?---That's correct. And It's addressed in our joint report.

Yes?---It does change the hedge ratio from 51 to 63 per cent.

And do you suggest that it's inappropriate, to fit a trend line?---1 think it's a reasonable suggestion by Professor Gray.

Yes.

HIS HONOUR: How do you reflect inflation, if you don't?---You don't, your Honour.

MR POMERENKE: And just while we're on that figure, figure 6, we can see the influence of these two data points for '75 and '81. They're very high; aren't they?---Yes.

So is the upshot of this trend line that you agree that it's reasonable, to fit one, and that's, probably, better because it reflects inflation?---I agree it's reasonable, and that's why I recalculated the optimal hedge ratio and found that it did increase slightly to 63 per cent.

So - - -?---It's not an unreasonable suggestion.

Yes. So what is your opinion now as to the optimal hedge ratio?---Fifty-one per cent.

So you adhere to the 51 per cent without fitting the trend line?---Right, because I followed Rolfo.

Right, except - we'll come back to this in a moment. Except in relation to the difference between expectation and actual?---And that was a data issue. Yes.

Yes. So you thought it's, probably, reasonable, to fit a trend line, but because Rolfo didn't do it, you didn't do it; is that right?---I didn't say that. I followed the Rolfo methodology the best I could.

Yes?---And that's the result I obtained. Professor Gray suggested a modification of that, and I looked into that and found it did change the ratio somewhat, but still didn't affect the bottom line with regard to the optimal ratio for the seasonal pool.

Which is the preferable approach, in your opinion, to fit the trend line or not?---1 think it's reasonable, to give a range. So you could - you could provide a range, and - then that would be up to the hedger to decide.

I'm sorry. I don't understand. Do you fit the trend line or not?---You could do both.

And no preference as between the two?---That would be up to the hedging organisation.

Which is likely to give you a more accurate estimate of variance?---It depends on the future. Right? So we're using historical data. So it's hard to say.

But if there's an observable trend as to history and it's reasonable, to reflect that trend across history - isn't that going to give you a more reliable prediction as to the future?---You could take that view. Yes.

Do you agree with it?---I wouldn't dispute it.

So - - -

HIS HONOUR: Sorry. Did you say you would or would not dispute it?---1 would not dispute it.

MR POMERENKE: So I think where that ends up is it's preferable, to fit the trend line?---My answer was it's - it's fine, to fit the trend line, if you want to modify the Rolfo approach. I don't have a problem with that. As I said, I was trying to follow Rolfo the best I could.

HIS HONOUR: Does that mean that Rolfo doesn't - or - the Rolfo method doesn't take into account inflation?---Essentially, yes.

Do you think that's a flaw in the method?---It could be a minor flaw, depending on how it changes the optimal hedge ratio. And obviously- it depends on the length of time and the market as well."[225]

[225] Professor Carter's point, which was made a little later in his cross-examination,[226] is that this issue, in the end, made no difference to his conclusion that the full 30% of the crop represented by the seasonal pool ought not to have been allocated until it was physically produced. That is because when the figures are calculated the optimum hedge ratio still sits under 70%. While that might be so, Professor Carter's concessions in my view undermine the appropriateness of the use of the Rolfo model in circumstances of the QSL marketing structure.

[226] Professor Gray's opinion was that the Rolfo model assumes that the futures are sold at one point in time and that is the beginning of the season and the crop is sold at one point in time and that is the end of the season. Professor Carter was cross-examined about this:

"And the way the equation works - the futures are sold only at the beginning of the season?---That's how the - the model applies it. Yes.

Yes. So it's all sold at one point in time. And the way the equation works - the crop itself is sold only at the end of the season?---When it's harvested, yes.

Yes. And if things change during the course of the season - let's assume for the moment that three months into the season the volume had gone up by 30 per cent. The Rolfo model will still have you selling the same fixed number of tonnes; won't it?---Which volume are you referring to?

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[225] Transcript 3-43 to 3-45.
[226] Transcript 3-45 ll 25-35.

Let's assume that in the real world - let's - assume you've done your Rolfo calculation at the start of the season and you've set your fixed number of tonnes and you've set your optimal hedge ratio and that's what you do for the season, later turns out, that the volume's going to be higher, you've set your optimal hedge ratio according to Rolfo and, according to Rolfo, you've done all your pricing, that's done, you've priced the fixed tonnes produced by the Rolfo model. What I'm really putting to you is that those fixed tonnes are the fixed tonnes priced according to Rolfo irrespective of the change in volume that comes later?---That's how the Rolfo model works, but I might add that your example of a 30 per cent increase is not very realistic. As I explain in my report, the change in the volatility of the harvest is very asymmetric. There's low probability of a big increase compared to a decrease, but you're right. That's how the model works.

Yeah. All similarly, if the volume were to go down, you would have priced your fixed tonnage according to the Rolfo model already - - -?---That's right, because you're accounting for the possibility of volatility in the volume."[227]

[227] Whether or not the Rolfo model is appropriate to apply, perhaps as adapted, in a season where there are multiple sale points, need not be decided. Professor Carter here applies the Rolfo model on the basis of a single allocation of the crop through the sale of futures and the single sale of the physical actual crop. That, however, is simply not what is contemplated by the RSSA. What is contemplated by the RSSA is a continual cooperative approach between the parties during the season leading to multiple entries into the futures market and sales of the crop.[228]

[228] Professor Carter insisted that the Rolfo model could be applied in the context of the arrangement set up under the RSSA. Professor Gray on the other hand opined that the Rolfo model was inappropriate for application in such circumstances.

[229] Professor Carter was cross-examined on this issue as follows:

"Yes, yes. I'm just interested in the value for M, though. You said 'a value that represents the group'. Who do you include in the group?---The - the millers who are supplying the seasonal pool sugar.

I see. So if QSL is sitting down and applying this Rolfo formula, it should adopt a value of M that's representative of the millers as a group?---Yes.

And what if the different millers have different risk aversion?---That wouldn't change my opinion.

But I'm just interested in the value of M, you understand, not the outcome, just the value of M. If different millers within the group have different risk aversion, how does QSL come up with a value for M?---Well, their focus should be on what - what their job is, and their job is to manage the revenue from the sugar in the seasonal pool, and as far as I understand it, that pretty much comprises their portfolio. So that would be the decision-making steps that they would take. And that would be their focus. They wouldn't be focused on certain aspects of individual mills.

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227 Transcript 3-20 to 3-21.

228 See cl 5 for instance.

Well, if we're trying to replicate the risk aversion of the millers as a group, we do have to look at the millers; don't we?---Well, the millers have turned the sugar over to QSL. So that's when I say 'as a group'. So it's - if there's certain unique characteristics of a certain mill - that would not play a role.

All right. If QSL is not trying to replicate the risk aversion of any particular mill but, rather, trying to come up with a figure loosely based on all the mills together - is there some sort of formula or equation they could apply to do that?---Well, I think it would be reasonable, for them to establish that they're averse to risk, that they have risk aversion, and proceed accordingly. And if - following up on your question - if they're using the Rolfo framework or something similar, they could then see how a change in that assumption affected the optimal hedge ratio.

Sure. So if I'm following you, you're saying they should make an assumption that the millers in the group are risk-averse?---Yes.

And how risk-averse?---That would be their choice. They could be highly risk-averse or less risk-averse.

Sorry?---As they said - - -

When you say it would be their choice -whose choice?---QSL.

Right. And how is QS to choose?---As I said - - -

What criteria does it apply to choose?---Yes. As I said, they could make that decision and then conduct some sensitivity analysis to see how that choice affected the outcome, and given the nature of the sugar market, it's not going to have a huge effect on the optimal hedge ratio, because the contribution of Rolfo is to show that, when you have output variability and price variability, the optimal hedge is going to be less than one.

Now, did you undertake an exercise like that yourself when you were applying the Rolfo model?---I did comment on alternative values for the risk-aversion parameter.

In the sense that you said that the risk-aversion value didn't make any difference to the result that was - - -?---In the end, it did not make a huge difference. That's right.

Did you seek to replicate the risk aversion for the millers as a group?---No. I assumed a risk-aversion co-efficient of one.

Right?---And then I looked at whether something different would have an impact and determined that it would not.

So you didn't consider the risk-aversion co-efficient that was appropriate for the millers as a group or, I take it, any individual miller either; is that right?---Well, essentially I was doing a - providing estimation as a group, because that was QSL."[229]

[230] Professor Carter's later answers in the passage set out above are a reference to the fact (observed earlier) that the risk aversion coefficient, in the particular circumstances of the

[229] Transcript 3-53 to 3-54.

2010 season, will not make any difference to the outcome because the effect of that factor is "swamped" by other factors. However, there are clearly special features of the arrangement set up under the various RSSAs which cast doubt on whether the Rolfo model is applicable. For instance, QSL is the party to whom the Rolfo model is to be applied but QSL is nothing more than a pass-through entity. The relevant risk is being taken by the millers. The millers have not in fact entrusted the entire crop to QSL's management under the Seasonal Pool. The millers make their own decision in relation to up to 70% of production. The different mills are of different sizes, representing in turn different growers of different sizes all no doubt with different risk appetites. Such features are well divorced from the Rolfo assumptions.

[231] Despite Professor Carter's superior experience in agricultural economics, I favour the evidence of Professor Gray. Professor Carter seems set in his views that Rolfo could be applied even though the scheme underpinned by the RSSA is very much a unique one and even though there were obvious other difficulties in the application of the model as explained above. I thought Professor Carter often appeared uncomfortable in cross-examination and rather resorted to reliance upon the Rolfo model rather than properly dealing with the issues raised by counsel. Professor Gray on the other hand seemed assured during cross-examination which I took as reflecting his confidence in the economic principles about which he was giving evidence. I found Professor Gray to be a very impressive witness.

[232] Wilmar's case is in effect that QSL had no alternative but to allocate the raw sugar consistently with the Rolfo model. I reject that case.

[233] Once the Rolfo model is found not to apply, there is no evidence upon which it can be concluded that the entirety of the crop allotted to the Seasonal Pool ought not to have been allocated except as it was physically produced. As that is the only case advanced by Wilmar, it has failed to prove loss.

QSL's contributory negligence claim

[234] QSL raises contributory negligence. Its submission is that the loss which was ultimately sustained was a result of the estimates lodged pursuant to cl 6.2 of the RSSA and the failure to lodge revised estimates pursuant to cl 6.4 of the RSSA. The counterclaim is put on the basis that if QSL was expected to react to the evolving weather conditions then so were the millers and therefore any loss is attributable to a failure to give proper estimates.

[235] There are obviously difficulties in assessing contributory negligence in circumstances where I have found that no relevant duty fell upon QSL and I have found that Wilmar has not established the loss which it claims.

[236] In my view though, assuming that a duty as pleaded fell upon QSL, QSL has failed to properly quantify any contribution to that loss by Wilmar.

[237] The structure of the scheme is such that, on any version, Wilmar could not have contributed to its loss to the tune of 100%. This is because the RSSA was part of a pooling arrangement and other millers were also required to lodge estimates.

[238] It necessarily follows that any consideration of the contribution of Wilmar to its loss must involve an inquiry into the actions (or lack of action) of the other millers. If the other

millers had been negligent then Wilmar should have joined them in the proceedings.[230] Alternatively, the other millers are not negligent. Even if the other millers are not negligent, it doesn't follow that Wilmar is solely to blame for its own loss. The fall in production by the other millers may have been contributed to partially by the foreseeable weather conditions or may have been contributed to by other factors not foreseeable. There is simply no evidence upon which those types of assessments can be made.

[239] Further, it is obvious that QSL has, to a point, acted independently of the estimates provided pursuant to the RSSA.[231] This raises issues as to the extent to which Wilmar's loss is attributable to those decisions as opposed to reliance upon the millers' estimates. That case has not been litigated by either party.

QSL's counterclaim

[240] QSL, by its counterclaim, asserts that any award of damages constitutes a "cost" for the purposes of cl 22 of the RSSA and so can be passed back to the millers, relevantly here, Wilmar. QSL seeks declarations to that effect.

[241] In *Electricity Generation Corporation v Woodside Energy Ltd & Ors*,[232] the High Court described the appropriate approach to the construction of a commercial contract in these terms:

> "The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background , the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience."[233]

[242] QSL's proposition amounts to this; the intention of the contracting parties objectively ascertained from the terms of the RSSA is that any loss which flows from a contractual obligation imposed under the RSSA, or a tortious duty which is not inconsistent with the contract, is to be borne by one of the parties, Wilmar, regardless of who is in breach. The consequence of acceptance of such a proposition would be to effectively relieve one of the parties to the contract (QSL) from all consequences of any failure to perform its

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[230] *Civil Liability Act* 2003 (Qld), s 32(1).

[231] See the memorandum by Mr Beashel set out at paragraph [44] of these reasons; the fact that QSL began closing out futures contracts on 15 October 2010, before any millers lodged adjusted estimates; Wenham statement, CFI 33, paragraph 162(a).

[232] (2014) 251 CLR 640.

[233] At [35], citations omitted. Followed in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [17].

obligations under the contract. I would not construe the contract in that way unless the express terms of the contract make such a construction inevitable. They do not.

[243] The RSSA is part of a broader scheme whereby all participating millers pool the sugar for sale by QSL. While it is anticipated by the RSSA that QSL will not profit or suffer loss from the commercial enterprise envisaged by the RSSA, it remains the case that the RSSA contains covenants for the performance by Wilmar and covenants for the performance by QSL. It is against that background that cl 22 must be considered.

[244] Clause 22.1[234] can be seen to contain two parts. The first sentence is a declaration of intention and the second sentence creates rights, one of which is a right in QSL "to pass on [to Wilmar] all costs … of any nature that it incurs … in performing its obligations under the supply contracts".

[245] The reference to "costs and revenues" in the second sentence colours the words "profit or loss" in the first sentence. Those words "profit or loss" in the first sentence are also limited and qualified by the words which follow them, namely "in performing its obligations under this agreement or the other supply contracts". It also imposes an obligation upon QSL to pass on all revenues.

[246] What is intended by cl 22.1 is that the position of QSL should be trading neutral. While cl 22.1 protects QSL against a "loss in performing its obligations under [the RSSA]", there is nothing in cl 22 which protects QSL against a loss incurred as a result of breaching its obligations under the RSSA or breaching any tortious duty.

[247] An award of damages for breach of the RSSA or for breach of QSL's tortious duty is not, relevantly to cl 22, a "loss" which QSL may pass on to Wilmar.

[248] The declaration sought should not be made and the counterclaim should be dismissed.

Orders

[249] It is ordered that:

1. The claim is dismissed.
2. The counterclaim is dismissed.
3. The parties shall be heard on the question of costs.

[234] Set out at paragraph [61] of these reasons.