SUPREME COURT OF QUEENSLAND

CITATION:	*A&B Grains Pty Ltd v Launcells Feedlot Systems Pty Ltd* [2013] QSC 58
PARTIES:	**A & B GRAINS PTY LTD ACN 009 946 141** **(plaintiff)** **v** **LAUNCELLS FEEDLOT SYSTEMS PTY LTD ACN 063 640 344** **(defendant)**
FILE NO:	BS1846 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	15 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26-28 November 2012
JUDGE:	Mullins J
ORDER:	**1. The counterclaim is dismissed.** **2. Judgment for the plaintiff on its claim in the sum of $626,719.83.** **3. Either party has liberty to apply on two days' notice in writing to the other.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – GENERALLY – where the operator of a feedlot purchased grain from the plaintiff which operated a business of buying and selling grain – where the plaintiff made representations as to the future price of grain – whether the purchaser relied on those representations in entering into contracts to purchase grain from the plaintiff TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ADVICE, STATEMENTS AND NON-DISCLOSURE – GENERALLY – where the operator of a feedlot purchased grain from the plaintiff which operated a business of buying and selling grain – where the plaintiff made representations as to the future price of grain – whether the plaintiff owed the operator of the feedlot a duty of care in making the representations

where the plaintiff did not assume responsibility for advising the operator of the feedlot when to purchase grain

Trade Practices Act 1974 (Cth), s 51A, s 52, s 82

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592, considered
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109, considered

COUNSEL: J E FitzGerald for the plaintiff
D R M Murphy SC and A J Greinke for the defendant

SOLICITORS: Edgar & Wood Solicitors for the plaintiff
Shannon Donaldson Province Lawyers for the defendant

[1] On 26 October 2012 the defendant admitted the plaintiff's claim for the sum of $626,719.83 owed under contracts for grain, subject to the defendant's counterclaim. The trial therefore proceeded in relation to the defendant's counterclaim for damages for misleading or deceptive conduct that contravened s 52 of the *Trade Practices Act* 1974 (Cth) (TPA) or negligence.

[2] The defendant has successfully operated a feedlot at the property known as "Launcells" since 1993. Mr and Mrs Sturrock are the directors of the defendant. By about 2000 the capacity of the feedlot had increased to 3,000 beasts. The plaintiff operates a business buying and selling grain, sorghum and cottonseed. At all material times Mr McKerrow was a grain trader employed by the plaintiff.

[3] Prior to the transactions the subject of this proceeding, the defendant bought grain and cottonseed from a variety of local growers and traders, including the plaintiff, to use as feed for the cattle in the feedlot. The cost of feed is a critical issue to the success of the feedlot. (The other critical issue is the cost of the cattle.) By early 2005 the defendant had ceased using sorghum to feed cattle, as the nutrition advice was that the cattle got more energy from wheat and corn. Before Mr Sturrock met Mr McKerrow, he was dealing with Mr Searle of the plaintiff to purchase cottonseed, but had not purchased grain from the plaintiff and it was also his custom not to buy grain further forward than six months.

[4] After meeting Mr McKerrow, the defendant purchased grain from the plaintiff. The counterclaim is concerned with three sets of purchases made by the defendant from the plaintiff described as the forward corn purchases in November and December 2007, the forward sorghum purchase in February 2008 and the forward corn purchases in June 2008, and the failure of the defendant to remove itself from these contracts. The allegation of misleading conduct (or negligence) arises out of representations alleged to have been made by Mr McKerrow on behalf of the plaintiff in respect of the three sets of transactions and to hold onto the contracts. The plaintiff denies that statements were made by Mr McKerrow in the terms that are alleged by the defendant and that, in any case, the defendant did not rely on any of the representations alleged to have been made by Mr McKerrow when entering into the relevant contracts or in holding onto the contracts. The plaintiff did not plead that, to the extent that the defendant proved any of the alleged representations and those representations related to any future matter, there were reasonable

grounds for making the representations. The defendant therefore relies on s 51A of the TPA in respect of any representation made by the plaintiff with respect to any future matter.

Credit of witnesses

[5] As the defendant's claim is based on alleged representations and advice communicated by Mr McKerrow to Mr Sturrock on which it is alleged that Mr Sturrock relied, the evidence of Mr Sturrock and Mr McKerrow about their relationship and the circumstances in which relevant conversations occurred and the content of those conversations is critical to determining the claim. Although the evidence of both witnesses is given within the framework of the contracts entered into by the defendant with the plaintiff, there are discrepancies between the versions given respectively by Mr Sturrock and Mr McKerrow. After analysing the evidence, there are aspects of both recollections that I am not satisfied are accurate. This is not surprising and does not necessarily reflect on the honesty of each of the witnesses. As is often the case, persons who had repetitive contacts with one another did not anticipate having to recall many years later the details of conversations that occurred in the course of those contacts and in respect of which few contemporaneous notes or records were made, apart from the contracts themselves.

[6] By the time Mr Sturrock started purchasing grain through Mr McKerrow, he had made changes to the defendant's feedlot operation by increasing the grain storage capacity, in order to take advantage of growers wanting to offload excess grain at harvest time. Mr Sturrock was also reading about trading in futures and making inquiries of his banker and another adviser on that topic, although the information he obtained discouraged him from pursuing the topic. Mr McKerrow had been working in the grain industry or related fields from when he was studying at university. It appeared from the manner in which he gave his evidence, and the content of it, that he was knowledgeable about trading in grain and enthusiastic about his work. It was easy to see how Mr Sturrock may have been affected by Mr McKerrow's enthusiasm for following the market prices for grain. Even so, the evidence of these witnesses has to be evaluated in the context in which they were dealing with each other.

[7] In general terms, Mr Sturrock's recollection of conversations focused on the key statements that he attributed to Mr McKerrow, particularly from late 2007, but in most instances Mr Sturrock did not recall the details of his side of the conversation or the timing of the conversation in relation to a particular transaction. Mr McKerrow was generally cautious in giving his evidence of the key conversations which contrasted with the picture of him as proactive and an informative salesman that otherwise emerged from the evidence. It was submitted on behalf of the defendant that Mr McKerrow was defensive, evasive and argumentative. I reject that observation as many of the propositions that were put to Mr McKerrow in cross-examination in order to paint him as an adviser rather than a grain trader were contradicted by other evidence, and it was not surprising that Mr McKerrow disagreed firmly with those propositions.

[8] The nature of the allegations made by the defendant is such that it is necessary to make specific findings in relation to the content of relevant conversations and the reasons for the defendant undertaking certain transactions. This is not a case where

the evidence of one witness can be clearly shown to be preferable to the evidence of the other witness. The summary of the events that follows reflects the evidence that I accept. Where necessary, I have indicated how I have resolved a relevant discrepancy in the evidence.

First meeting with Mr McKerrow

[9] The defendant adduced evidence that differed from the plaintiff's evidence, as to when Mr Sturrock first met Mr McKerrow. It was common ground that Mr Searle brought Mr McKerrow on a visit to the feedlot. Mr Sturrock placed the meeting in about January 2006 after the defendant had finished erecting a grain storage shed with 3,400 metric tonnes (MT) storage capacity and after Mr Sturrock had been to Sydney in late 2005 where he had met with advisers at Mann Financial about trading in futures. The defendant deduced from the date of the first contract arranged by Mr McKerrow dated 2 February 2006 for the purchase of corn by the defendant from the plaintiff that the first meeting must have been proximate in January 2006.

[10] The plaintiff had a copy of an email sent by Mr McKerrow to the email address of Mr Sturrock's business on 23 November 2005 (exhibit 8) which suggests that they had already met by that date. The inference is not negatived by the fact that Mr Sturrock does not recall or have a record of receiving that email. The email gave Mr Sturrock a link about a book entitled "Agricultural Price Risk Management: The Principles of Commodity Trading". Although Mr McKerrow did not have a note in his diary of the date that he first met Mr Sturrock, because the meeting was organised by Mr Searle, Mr McKerrow did recall that he saw parts of a shed in the paddock which Mr Sturrock advised was a Grainco storage shed that he had purchased to put up for more storage. In view of the email and Mr McKerrow's recollection that the storage shed had not been erected at that stage which is consistent with the meeting being prior to January 2006 (by which time the storage shed had been erected), I accept Mr McKerrow's evidence of the timing of the meeting in late October or early November 2005.

[11] At the first meeting Mr McKerrow described his experience in the grain trading industry to Mr Sturrock and obtained information from Mr Sturrock about the feedlot operation and the defendant's supply needs in respect of feed. Mr McKerrow told Mr Sturrock that he could source grain for him and that the plaintiff operated on the basis of back-to-back contracts and explained back-to-back contracts to the effect that, if the defendant purchased grain from the plaintiff, the plaintiff would have a contract with a grower to supply that grain to the plaintiff. Mr Sturrock mentioned futures and there was a discussion about futures, but Mr McKerrow told Mr Sturrock that he did not consider trading in futures addressed the defendant's risks in relation to the price of feed.

[12] In his evidence, Mr Rodney Wolski, the managing director of the plaintiff described the plaintiff's operations and the reason for back-to-back contracts. The plaintiff's business was a grower based business where it sourced most of its product direct from the growers and traded the grain to consumers (such as the defendant) or into the export market. The plaintiff ensured that it on-sold grain to a consumer on the same day that it contracted to buy the grain from a grower. Each contract that the plaintiff entered into to sell or purchase grain was a separate deal and involved actual grain. The plaintiff's usual method of operation was to minimise the risk of

exposure to the market by entering into a matching contract with the one it had already entered into by close of the same business day. The plaintiff made its money by the difference between the price for which it purchased grain and the price for which it then sold the grain. Mr Wolski explained the role of the traders employed by the plaintiff, such as Mr McKerrow. A trader was required to canvass for business, to build relationships with both customers for grain and the growers, and to obtain information about world and local markets from brokers and other sources of publicly available market information. The plaintiff also subscribed to reports from commodity intelligence providers to which information the traders also had access. Each day the traders and other relevant employees of the plaintiff would discuss the available market information and form an opinion about the trends for market prices for grain. The plaintiff did not conduct a business as an adviser in the grain industry where a fee to provide the advice was charged, but would use the information relating to market prices in conducting its business of buying and selling grain.

[13] Mr Sturrock acknowledged (at Transcript 1-60 and 1-76) that he understood from his first meeting with Mr McKerrow that Mr McKerrow would offer grain to him to purchase and it was for Mr Sturrock to decide in relation to each offer whether to purchase the grain or not at the price that was offered.

[14] The defendant pleaded in paragraph 19.6 of the defence and counterclaim that Mr McKerrow said to Mr Sturrock at the first meeting words to the following effect:

> "he could obtain cheaper grain for the defendant by advising him on grain trading and in particular stated that he would:
> (a) watch the market on a daily basis;
> (b) inform the defendant about price movements; and
> (c) advise the defendant when to buy grain."

[15] Mr McKerrow was clear and convincing in his evidence that he did not tell Mr Sturrock that he could obtain cheaper grain for him by advising him on grain trading (at Transcript 2-69). The evidence given by Mr Sturrock about this first meeting also does not prove the statements attributed to Mr McKerrow that "he could obtain cheaper grain for the defendant by advising him on grain trading" and "he would … advise the defendant when to buy grain." What Mr Sturrock said in evidence (at Transcript 1-34) was:

> "We discussed our grain needs and that the fact that we had a lot more storage now and we discussed how he could – he could watch futures and grain market reports and report back to me on a fairly regular basis."

[16] Consistent with the nature of the plaintiff's business of selling grain and the understanding that Mr Sturrock had after the first meeting with Mr McKerrow that Mr McKerrow would offer grain to the defendant to purchase, the defendant has failed to prove that at the first meeting the plaintiff took on the advisory role that is pleaded in paragraph 19.6. The context in which Mr Sturrock and Mr McKerrow knowingly dealt with one another was as the buyer and seller of grain, where the plaintiff was endeavouring to profit from any transactions with the defendant and the defendant was endeavouring to keep the cost of its grain purchases as low as possible.

[17] Prior to Mr Sturrock dealing with Mr McKerrow, he had experience in "washing out" contracts for purchase of grain. When a purchase is made for grain to be delivered in the future, the contract can be washed out by the purchaser selling the same quantity of grain to another party. In July 2005 the defendant had washed out a contract it had with A&B Cotton (related to the plaintiff) for cottonseed for a profit of $17,500. In August 2005 the defendant had washed out a contract it had for the purchase of 1,000MT of wheat with AWB (Australia) Limited and made a profit of $43,000.

[18] Mr Sturrock was in the habit of obtaining information about grain prices and markets from the market reports on ABC radio and the rural newspaper The Country Life. He would also speak to a contact at the Australian Wheat Board (AWB). He continued following grain prices from these sources, particularly from the radio and newspaper reports, after he commenced dealing with Mr McKerrow.

Contracts between the parties February 2006 – March 2007

[19] In February 2006 Mr McKerrow sourced corn at a similar price to that which the defendant was purchasing it from the AWB and offered to sell the corn to the defendant. The purchase of 2,344MT of corn at $195 per MT by the defendant from the plaintiff on 2 February 2006 and a further 520MT at $190 per MT on 10 February 2006 were for feed for the feedlot. The initial purchases of grain from the plaintiff were of a similar type to those which the defendant had made through other traders.

[20] The pattern developed of Mr McKerrow telephoning Mr Sturrock to offer parcels of grain for purchase by the defendant and they would discuss what the defendant's needs were by reference to how many cattle were in the feedlot and how many the defendant expected to have in the feedlot. Mr McKerrow would provide Mr Sturrock regularly, possibly once or twice each week, with market information on the prices of grain, and the expected prices of grain and futures.

[21] The defendant made purchases of corn from the plaintiff for feed by contracts dated 31 May and 1 and 6 June 2006. On Mr McKerrow's recommendation the defendant purchased wheat to be grown in central Queensland before the crop had been planted. The defendant therefore entered into a contract on 16 June 2006 to purchase 1,000MT of wheat at $238 per MT from the plaintiff for delivery between November 2006 and February 2007. The defendant entered into contracts dated 28 and 30 June and 20 July 2006 to purchase smaller quantities of wheat from the plaintiff, but those contracts were for delivery in July and August 2006.

[22] Mr Sturrock observed (at Transcript 1-37) that "at that stage of the game [Mr McKerrow] was just putting parcels of grain to me pretty regularly and I'd either … say yes or no."

[23] Between 2 August and 7 December 2006 the defendant entered into nine contracts with the plaintiff to purchase corn for feed that had not yet been planted. The total quantity purchased under these contracts for delivery in March and April 2007 was 2,540MT. Because of lack of rain, that did not get planted. Those corn contracts were washed out in January to March 2007 before the corn was due to be delivered and a profit of $161,602 was made by the defendant on those contracts. Because the corn was to be used for feed, the defendant had to buy wheat at a higher price as

a replacement feed which had the effect of diminishing the profit from washing out the corn contracts.

[24] The defendant also entered into a contract with the plaintiff dated 29 August 2006 to purchase 2,000MT of wheat for feed and another contract dated 14 December 2006 for 1,334MT of wheat which was also for feed.

[25] In February and March 2007 the defendant entered into contracts with the plaintiff for the purchase of 4,825MT of wheat. Of that quantity, 1,723MT was washed out between August and September 2007 and the balance was delivered.

Forward purchases of sorghum May – July 2007

[26] Before the defendant commenced to enter into forward contracts for sorghum in May 2007, there was a telephone call between Mr McKerrow and Mr Sturrock. Mr McKerrow cannot recall the detail of the conversation, but can recall that Mr Sturrock was keen to use other commodities to lower his feed input prices (at Transcript 2-73). Mr Sturrock recalled that Mr McKerrow said that there was a larger gap than normal between the price of sorghum and wheat and that it would be a good idea to buy some sorghum, but that he responded that he did not want to take delivery of sorghum, because it was not something he used for feed in the feedlot. He said that Mr McKerrow then suggested to him that he would not have to take delivery, if the contracts were "washed out" before the delivery period and that was a way of reducing the cost of the grain for the feedlot by buying the sorghum on the rising market as a hedge and selling at a higher price than the purchase price (at Transcript 1-39 and 1-40).

[27] The plaintiff had produced a document "Sorghum Hedge for New Crop Wheat" (tab 2 of exhibit 11) at a time when there was a large spread between the price of sorghum and the price of wheat delivered Downs in March/April/May 2008. Much of what Mr Sturrock attributed to Mr McKerrow in the telephone conversation that preceded the defendant's entry into the forward purchases of sorghum from May 2007 is reflected in this document of the plaintiff. Although the document is not dated, the content of it and the prices shown for wheat and sorghum in the document suggest that it was in existence around May 2007. The first two paragraphs of the document state:

> "***Summary***: The idea behind this strategy is to buy sorghum Delivered Downs for March/April/May 2008 and use this position to hedge the future price of wheat. The idea is that we have some control over the top end of the wheat price but with the ability to capture it lower.
>
> ***Principle Behind The Hedge***: The principle behind the hedge is that the price differential between wheat and sorghum will close up from where it is currently situated. The domestic consumptive market, especially the feedlot industry, will swap grains from sorghum to wheat and vice versa depending on the pricing of each of the different commodities. This means that as wheat moves higher against sorghum the buying decisions will be for more sorghum to be purchased than wheat, thus either increasing the price of sorghum as opposed to wheat or reducing the demand for wheat with the effect of lowering the wheat price."

[28] The document then provides more detail about current and anticipated prices for wheat and sorghum, develops the strategy, and sets out the current situation in relation to wheat crops planted in central and southern Queensland and northern New South Wales. There is a disclaimer at the end of the document:

> "The prices used in this document are for example purposes only and do not constitute a bid or offer. This is not advice and is not to be construed as such. The information contained within this document is not advice and should not be used as such. A & B Grains does not accept any responsibility for any loss or damage which may occur from use of the information or for its accuracy."

[29] On the basis that such a strategy had been documented by the plaintiff by the time that Mr McKerrow and Mr Sturrock had the conversation that preceded the defendant's forward purchase of sorghum in May to July 2007, it is likely that Mr McKerrow offered sorghum to Mr Sturrock for purchase for the reasons attributed to Mr McKerrow by Mr Sturrock. In view of the fact that Mr McKerrow conveyed the content of the document by telephone, it is unlikely that he read out the disclaimer found in the written document. It overstates the position to describe Mr McKerrow as "advising" Mr Sturrock to buy sorghum. He gave the defendant the opportunity to purchase sorghum from the plaintiff, if the defendant wished to use the strategy that was described in the document of trading in sorghum in an endeavour to lower the cost of the grain used as feed by the defendant.

[30] The defendant entered into five contracts with the plaintiff between 18 May and 4 July 2007 to purchase a total quantity of 2,000MT of sorghum for delivery between March and June 2008 at prices ranging between $220 per MT and $243 per MT.

[31] Mr Sturrock decided the price at which he wanted to washout these contracts and instructed Mr McKerrow to washout the sorghum contracts at $290 per MT. The washout contracts were entered into on 4 September 2007. The defendant therefore did not take delivery of the sorghum, but made a profit of $115,250 on the washout contracts.

[32] Mr Sturrock acknowledges that he got carried away with the success that the defendant had on these dealings with forward contracts for the purchase of sorghum that were washed out for a good profit (at Transcript 1-44):

> "Everything Angus seemed to be predicting were happening. You know, when the futures – he would sometimes say, you know, the future went up limits or down limits, all these sorts of things, and, yeah, I had – I was feeling very - you know, I was starting to feel more and more comfortable through a period in '07. So, therefore, I guess, I was trusting his judgment and I went out on a limb."

[33] The strategy that the defendant had engaged in by entering into the forward contracts for sorghum that were washed out before delivery depended on the price of sorghum increasing by the time the contracts were washed out from the price fixed in the contracts. Mr Sturrock's evidence indicates that he was aware that what Mr McKerrow was doing was making predictions about the direction the market price would go, ie upwards or downwards. The defendant had the experience of buying grain for feed for many years and Mr Sturrock kept himself informed about market prices. Although Mr McKerrow may have had access to greater sources of market information than Mr Sturrock, Mr Sturrock was receiving the information

provided by Mr McKerrow which he understood from Mr McKerrow was sourced from other sources (at Transcript 1-85) and Mr McKerrow's predictions about a market with which Mr Sturrock was familiar. The passing on by Mr McKerrow of market information to Mr Sturrock and Mr McKerrow's predictions as to the market trends did not change the fundamental nature of the relationship between the parties which was usually that the defendant was the purchaser of grain from the plaintiff, except when a contract was washed out, when the defendant was the seller of the grain to the plaintiff.

Forward purchases of corn November-December 2007

[34] Between 30 November and 27 December 2007 the defendant entered into eight forward contracts to purchase corn from the plaintiff. One contract was for 512MT at $350 per MT, another contract was for 300MT at $355 per MT and the balance of the contracts was for a total quantity of 4,174MT at $345 per MT.

[35] In December 2007 Mr McKerrow requested Mr Sturrock for information on the number of cattle he projected that he would have on feed from December 2007 through to September 2008. Mr McKerrow prepared a spreadsheet that showed the current inventory of feed, the delivery of wheat and corn purchases under contracts entered into by the defendant with the plaintiff and the monthly usage of feed, so that the projected position of whether the defendant would be short or long (where long meant having an excess) on feed from its current purchases was apparent. Mr McKerrow did this spreadsheet for the benefit of the plaintiff, so he could identify where there were gaps in the defendant's stocks of feed for meeting its requirements which might assist the plaintiff in making more sales of grain to the defendant. The spreadsheet was sent by Mr McKerrow to the defendant by email on 7 January 2008 and Mr Sturrock described it as "an excellent document" (at Transcript 1-42). It showed him that the defendant was 1,283MT long on wheat in October 2008. After Mr Sturrock referred in his evidence to the spreadsheet showing that the defendant would be 1,283MT long in October 2008, he stated (at Transcript 1-43):

> "And as we moved along and wheat prices were going up absolutely unbelievably at that stage in sort of January of '08 and we had had discussions about how we were going to handle - you know, what was going to happen, and Angus said to me that he thought that we should skip the next winter harvest with wheat because at that stage wheat was, I think, $500 odd a tonne and the corn we'd bought was more like 340 or $345 a tonne. So he thought that we should skip that crop because he had been - his information was that wheat was going to remain expensive for a couple of years. So it was a conscious thing that we were long – we were already 1,200 tonnes long, which is a pretty huge position."

[36] At the time that Mr Sturrock made further purchases of grain in 2008, he was aware of what his future stocks of feed would be from the existing purchases and could compare that with what his likely needs for feed were.

Forward purchase of sorghum February 2008

[37] Mr McKerrow can recall undertaking a customer visit to Mr Sturrock in November 2007 with Mr Shane Wolski when there were a couple of contracts that required Mr Sturrock's signature. Mr McKerrow also recalls handing to Mr Sturrock on that

occasion a document regarding hedging strategies which he had previously discussed by telephone with Mr Sturrock and had said he would provide him with a copy of the document. Mr McKerrow identifies the document as that contained in tab 2 of exhibit 11 entitled "Sorghum Hedge for New Crop Wheat".

[38] Mr Sturrock denied ever being given a copy of this document by Mr McKerrow. As I have already indicated, it was more likely to have been prepared for forward purchases of sorghum around May 2007. Mr McKerrow accepts that he had conveyed to Mr Sturrock the information about hedging strategies that are contained in the document, but I am not satisfied that the document was handed by Mr McKerrow to Mr Sturrock either at the time that Mr McKerrow identified in his evidence or at all.

[39] Mr McKerrow telephoned Mr Sturrock around 14 February 2008 to inform him that the spread between wheat and sorghum was quite large. Mr McKerrow then sent the defendant an email that set out forward projections of the price (delivered at the Downs and not the western Downs) of wheat, sorghum and barley for each of the months June to December 2008 and then showed the difference in price between sorghum and wheat, sorghum and barley and wheat and barley. The defendant entered into a contract on 14 February 2008 to purchase 2,000MT of sorghum for delivery between July to December 2008, but in respect of which the defendant never intended to take delivery. It was intended to wash out this contract by 31 December 2008.

Forward purchases of corn June 2008

[40] On 2 June 2008 the defendant entered into a forward contract to purchase 900MT of corn from the plaintiff at $330 per MT for delivery in March to April 2009. Another corn purchase contract was made by the defendant with the plaintiff on 3 June 2008 for 2,000MT of corn from the Arcadia Valley at $340 per MT for delivery in June to August 2008. Another forward purchase contract of corn was made on 27 June 2008 of 1,500MT at $330 per MT for delivery in February 2009. Mr McKerrow had offered Mr Sturrock 2,000MT to purchase on this occasion, but Mr Sturrock "cut him back to 1,500" (at Transcript 1-43).

Washout of sorghum contract and corn contracts

[41] The defendant entered into washout contracts for the sorghum on 7 November 2008 (125MT at $207.50 per MT), 10 November 2008 (1,000MT at $206 per MT), and 11 November 2008 (500MT at $198 per MT). The remainder of the sorghum (375MT) was the subject of a washout contract entered into on 9 January 2009 at $185 per MT.

[42] The defendant did not give delivery instructions and the forward purchase of 1,500MT of corn was washed out by the plaintiff on the defendant's behalf selling 1,125MT at $200 per MT on 25 February 2009 and 375MT at $200 per MT on 4 March 2009. The forward contract purchase of 900MT was washed out on 21 April 2009 at $175 per MT. The defendant took delivery of the corn purchased under the contract entered into on 3 June 2008 (2,000MT) and stockpiled it.

Has the defendant proved that the plaintiff made the pleaded representations?

[43] The content of the alleged advice and representations that preceded the November – December 2007 forward purchases of corn is set out in paragraph 27 of the defence and counterclaim:

> "From October 2007 to December 2007 Mr McKerrow repeatedly advised the defendant during telephone conversations with Mr Sturrock to make forward purchases of corn for 2008, representing that:
>
> 27.1 the price of wheat would rise during 2008;
> 27.2 the price of corn would rise during 2008; but
> 27.3 corn would remain better value than wheat."

[44] Although the allegations in paragraphs 27.1, 27.2 and 27.3 contain information about the relative prices of wheat and corn during 2008, the gist of the allegation in paragraph 27 is that Mr McKerrow advised Mr Sturrock to make forward purchases of corn for 2008 because of his predictions about the prices of wheat and corn during 2008. When Mr Sturrock was giving his evidence-in-chief and was asked about the dealings with the plaintiff after washing out the sorghum contracts in September 2007, Mr Sturrock referred as a matter of fact (at Transcript 1-41) to buying "a lot of corn in the end of '07, up to December' 07 there were several contracts of corn …". Mr Sturrock did not say in evidence-in-chief that Mr McKerrow had given him advice to make forward purchases of corn for 2008 before the defendant entered into the forward purchases of corn in November and December 2007. Mr Sturrock was cross-examined on the contract dated 12 December 2007 for the purchase of 300MT of corn at $345 per MT and the contract dated 13 December 2007 for the purchase of 350MT of corn at $345 per MT. Mr Sturrock could not recall the specific conversations he had with Mr McKerrow before he entered these contracts (at Transcript 1-81), as he described that Mr McKerrow "would just keep ringing me and saying … he's found another parcel and then the contract would turn up." It is clear that a contract to purchase grain from the plaintiff arose only if the defendant accepted the offer made to it to purchase the parcel of grain. Mr Sturrock could recall in general terms that (at Transcript 1-82):

> "Now, at that time it was about when prices were starting to move, so he was getting quite active and suggesting that we accumulate corn because wheat – wheat was starting to – was – it was more – normally – well, I hadn't had a lot of experience with corn, but it seemed to be around the same price as wheat. It seemed to be around that price. But then as wheat really got – started to get expensive, then Angus was suggesting that we buy corn as a better option and I was going along with it."

[45] In fact, Mr Sturrock conceded (at Transcript 1-82 and 1-86) that it was "not until the contracts later on" which I infer was a reference to the contracts entered into in 2008 that he had any recollection of specific conversations.

[46] Mr McKerrow could not recall the substance of any particular telephone calls during this period, but could recall (at Transcript 2-55) that Mr Sturrock expressed concern about the prices of grain and where they were trending, how the defendant was going to stay in business, and whether the defendant could be protected from a rising market. Mr McKerrow acknowledged that he would have conveyed to Mr Sturrock during this period the information that the plaintiff had about grain prices

and his opinion about where the market was heading. Mr McKerrow stated (at Transcript 2-58) that he and Mr Sturrock "always talked about what the market was doing" and his "opinion was always sought as to what the market was doing."

[47] Mr Sturrock was therefore aware of the price of wheat and had his own concerns about the rising market, when he was making the forward purchases of corn in November – December 2007. It is likely that Mr McKerrow did offer an opinion or prediction to the effect that corn would remain better value than wheat. Mr Sturrock's evidence indicates that he decided to take up the offers to purchase parcels of corn made by Mr McKerrow. I am not satisfied that the defendant has proved its claim in paragraph 27 that Mr McKerrow advised the defendant to make these purchases. The defendant has proved only that prior to the defendant entering into these forward purchases of corn in November – December 2007 Mr McKerrow made the representation set out in paragraph 27.3.

[48] Representations that are alleged to have preceded the forward purchase of sorghum in February 2008 comprise statements that were said to have been made by Mr McKerrow in a telephone call on 14 February 2008 and the representation as to the future prices for sorghum, wheat and barley up to December 2008 as set out in the email of 14 February 2008. The details of the statements alleged to have been made in the telephone call are set out in paragraph 29 of the defence and counterclaim:

> "On 14 February 2008 Mr McKerrow made a telephone call to Mr Sturrock during which conversation Mr McKerrow said words to the effect:
>
> 29.1 there was a 'considerable spread' between wheat and sorghum;
>
> 29.2 the defendant should buy sorghum as a 'hedge';
>
> 29.3 the defendant should buy 2000 tonnes of sorghum;
>
> 29.4 buying sorghum would make the corn the defendant had bought (referring to the contracts in [November and December 2007]) cheaper;
>
> 29.5 grain and wheat in particular would become increasingly expensive;
>
> 29.6 there would be a shortage of grain left by the end of the 2008 season, stating 'there will be no grain left on the eastern seaboard';
>
> 29.7 the price of sorghum would rise considerably due to the lack of grain on the eastern seaboard and because the 'spread' between wheat and sorghum must close;
>
> 29.8 the defendant would not need to take delivery of the sorghum but the plaintiff would 'wash out' the contracts to 'average down' the price of the corn purchased."

[49] The email of 14 February 2008 set out prices for delivered sorghum, wheat and barley for each of the months of June to December 2008 and under the heading "Commodity Spreads" set out the difference in prices between sorghum and wheat, sorghum and barley, and wheat and barley that were based on the monthly prices for each of the commodities set out in the email. The predicted prices in this email did suggest a significant difference in price between sorghum and wheat for those months. Mr McKerrow cannot recall the substance of the conversation that preceded the forward purchase of sorghum on 14 February 2008. He conceded that there was a considerable spread between wheat and sorghum at that stage (at Transcript 2-51 and 2-58). Mr McKerrow denied advising the defendant to buy

2,000MT of sorghum, repeating that "it was completely his call whether he entered into it or not, any contracts. We supplied the information, we supplied what help for him to make the decision we could, and it was his decision." (at Transcript 2-58).

[50] Mr Sturrock's evidence about whether Mr McKerrow made the statement at this stage to the effect that there would be no grain left on the eastern seaboard by the end of 2008 was confused and imprecise (at Transcript 1-45). Mr McKerrow knew that the defendant was purchasing this sorghum "to manage his price risk going forward" and "as a cross-commodity hedge to put a cap on the wheat prices going higher" (at Transcript 2-58). In light of the information that Mr McKerrow had provided to Mr Sturrock previously, consistent with the contents of the document entitled "Sorghum Hedge for New Crop Wheat" (tab 2 of exhibit 11) and the contents of the email dated 14 February 2008, it is likely that Mr McKerrow did make statements to Mr Sturrock to the effect of those set out in paragraphs 29.4 and 29.8 before the defendant entered into this forward purchase of sorghum. The defendant was proposing to apply the same strategy to this forward purchase of sorghum that had been successful in making a profit for it in respect of the May-July 2007 forward purchases of sorghum (at Transcript 1-49). It was put to Mr Sturrock in cross-examination that at the time he entered into the forward purchase of sorghum in February 2008, he was relying on the success of the earlier forward purchases of sorghum. Mr Sturrock agreed with this proposition (at Transcript 1-84) and stated:

> "Yes, I was getting more and more confident all the time because his predictions had been very, very good, and saying that, you know, he thought if – the information was that these grain markets were rising and we'd stayed in front of the game, that rather than wait until harvest time when they probably jumped - they can jump an incredible amount in a short amount of time and that was what I was enjoying was the fact that if I don't hear a market report, or something like that, it can change dramatically in a number of days, so it was a great comfort to me that Angus was watching this stuff all the time."

[51] On the basis that the email sent on 14 February 2008 contains the representations set out in paragraphs 29.1 and 29.5, the defendant has therefore shown that prior to the forward purchase of sorghum Mr McKerrow made statements to the effect of those set out in paragraphs 29.1, 29.4, 29.5 and 29.8.

[52] The defendant had been in the business of buying significant quantities of grain for use in the feedlot for many years and had experience of increases and decreases in the market prices for sorghum, wheat and corn and the volatility of the market. Even though Mr Sturrock was proposing to washout the sorghum contract before delivery, he was aware when the defendant entered into this forward purchase of sorghum that the financial outcome for the defendant in respect of a forward purchase of sorghum (for which delivery would not be taken) would be affected by the market price of sorghum by the time the contract was washed out and that the defendant was speculating on the price of sorghum increasing. The defendant has proved that Mr McKerrow made some of the statements set out in paragraph 29 of the defence and counterclaim, but has not proved that the decision it made to purchase the 2,000MT of sorghum or to implement the strategy of buying sorghum as a hedge was made on the advice of Mr McKerrow. What Mr McKerrow did was offer the parcel of 2,000MT of sorghum to Mr Sturrock, if Mr Sturrock wanted to

use the same strategy that had been successful for him previously in making a forward purchase of sorghum.

[53] The representation that is alleged by the defendant to have preceded the forward purchase of 900MT of corn on 2 June 2008 is set out in paragraph 32 of defence and counterclaim:

> "On 2 June 2008 Mr McKerrow made a telephone call to Mr Sturrock during which conversation Mr McKerrow said words to the effect:
>
> 32.1 there was going to be a serious shortage of grain, and 'no grain left on the eastern seaboard by Christmas';
>
> 32.2 the defendant should buy a further corn as a 'cover';
>
> 32.3 the defendant should buy 900 tonnes of corn at $330 per tonne to be delivered in March 2009 which would be 'covering further forward'."

[54] When Mr Sturrock gave evidence of the telephone conversation that preceded the purchase of 900MT of corn, he did not state that Mr McKerrow told him that he should buy the 900MT of corn, but stated (at Transcript 1-43) that Mr McKerrow "offered me a parcel of 900 tonnes for delivery in – it was either February or March." According to Mr McKerrow, he had offered the corn to Mr Sturrock at this time because the plaintiff had "a couple of corn sellers who wanted to sell corn and we knew that Duncan used corn" (at Transcript 2-59). Mr McKerrow cannot recall the exact conversation that took place on this occasion, but he may have expressed the view that there was a possibility of a shortage of grain, if it did not rain (at Transcript 2-78). Mr McKerrow was adamant that he did not tell Mr Sturrock to buy the corn. In relation to the representation alleged in paragraph 32.1 about no grain being left on the eastern seaboard by Christmas, Mr McKerrow was adamant that he did not make such a wrong statement and explained why he would not have said it (at Transcript 2-78) and Mr Sturrock conceded in cross-examination that he understood that Mr McKerrow was not saying literally that there would be no grain available, but there would be a shortage of grain which would drive the price higher and keep the price higher (at Transcript 2-8). On the basis of this concession, the representation that is pleaded in paragraph 32.1 is an overstatement of what Mr Sturrock attributed to Mr McKerrow. Mr McKerrow's evidence on what he was likely to have said in early June 2008 before there had been an opportunity for winter rain was much more persuasive about what was said than Mr Sturrock's evidence.

[55] I am not satisfied that the defendant can show that Mr McKerrow advised it to make the forward purchase of 900MT on 2 June 2008 or that Mr McKerrow made the statements in the terms pleaded in paragraphs 32.1 and 32.2 of the defence and counterclaim.

[56] The defendant relies on representations that are alleged to have been made in telephone calls between Mr McKerrow and Mr Sturrock on 3 and 4 June 2008 as inducing the purchase of 2,000MT of corn made by the defendant on 3 June 2008. The defendant could have relied only on representations alleged to have been made by Mr McKerrow before it entered into the 3 June 2008 contract. The allegation set out in paragraph 34 of the defence and counterclaim is:

> "On 3 June 2008 Mr McKerrow made a telephone call to Mr Sturrock during which conversation Mr McKerrow said words to the effect:
> 34.1 he had found 2000 tonnes of corn from the Arcadia Valley;
> 34.2 the defendant should buy the 2000 tonnes of corn at $340 per tonne 'as a cover forward' as there would be 'no grain available on the eastern sea board at the back end of the season'."

[57] Mr Sturrock's evidence is that the telephone call by Mr McKerrow offering this parcel of 2,000MT of corn for purchase to Mr Sturrock was made within a couple of days of 3 June 2008 and there was another conversation the following day. That suggests that the allegation that is made in paragraph 35 of the defence and counterclaim about a conversation on 4 June 2008 may be referring to a conversation that also took place before the defendant entered into the 3 June 2008 contract. The allegation set out in paragraph 35 of the defence and counterclaim is:

> "On 4 June 2008 Mr McKerrow made a telephone call to Mr Sturrock during which conversation Mr McKerrow said:
>
> We really should be moving on that corn.
> There is another agent sniffing around."

[58] Mr Sturrock's evidence of the statement made by Mr McKerrow was that he had said "I think we should act on this contract because there's another agent sniffing around" (at Transcript 1-43). This call had been taken by Mr Sturrock when his mobile telephone was on speaker in his vehicle. Mrs Sturrock was in the vehicle and recalled that Mr McKerrow said "Duncan, we need to – we need to do something about this as other people are interested."

[59] When Mr Sturrock was giving evidence-in-chief, he did not refer to specific statements made by Mr McKerrow that accorded with the allegation in paragraph 34.2 that the 2000MT of corn should be purchased "as a cover forward" as there would be "no grain available on the eastern sea board at the back end of the season", other than identifying that it was "probably about when we were still buying all that corn" that Mr McKerrow told him that there would not be grain available on the eastern seaboard (at Transcript 1-45). For the reasons that I have already indicated in relation to a similar statement alleged against Mr McKerrow in connection with the contract entered into on 2 June 2008, I prefer Mr McKerrow's evidence as to what he was likely to have said about the possibility of a shortage of grain before any winter rain.

[60] Mr McKerrow conceded that if Mr Sturrock had asked for his opinion (which he probably did) about whether it was a good idea to buy the 2,000MT as a cover forward, he would have said that his opinion was to that effect (at Transcript 2-79). He also conceded that if he knew that another buyer was looking at the same parcel, he would have conveyed that to Mr Sturrock (at Transcript 2-80), but that it was Mr Sturrock's call whether he wanted to buy it or not.

[61] What Mr McKerrow was doing was offering Mr Sturrock a parcel of 2,000MT of corn, so that the plaintiff could make a sale of corn that was ready to be delivered. Mr Sturrock was not keen to buy this corn, but after the telephone call to the effect there was another interested party for that parcel of corn, Mr Sturrock "weakened and agreed to buy it" (at Transcript 1-82). Although it is likely that Mr McKerrow

expressed the opinion that the purchase of the parcel of 2,000MT would be cover forward, as prices of grain were likely to rise, it is clear from Mr Sturrock's evidence that he made the decision to buy this corn that was offered by the plaintiff for immediate delivery and therefore for storage by the defendant for use in the feedlot. The defendant has not proved that Mr McKerrow told him to buy the parcel. The only representation that the defendant has proved is that the opinion of Mr McKerrow conveyed to Mr Sturrock that the purchase of the 2,000MT of corn could be "as a cover forward".

[62] The representations that are alleged to have preceded the defendant's forward purchase of 1,500MT of corn on 27 June 2008 are set out in paragraph 37 of the defence and counterclaim:

> "On 27 June 2008 Mr McKerrow made a telephone call to Mr Sturrock during which conversation:
>
> 37.1 Mr McKerrow said words to the effect that the defendant should 'take out more coverage' as grain prices would be high and there 'would be no grain available by Christmas';
>
> 37.2 Mr McKerrow advised the defendant to purchase 2000 tonnes of corn at $330 per tonne;
>
> 37.3 Mr Sturrock expressed his concern about Mr McKerrow's advice and said to Mr McKerrow that he knew that there had recently been good winter crop planting rains on the Darling Downs and that grain had been planted;
>
> 37.4 Mr McKerrow dismissed Mr Sturrock's concerns and repeated his advice and his prediction of high grain prices and shortage of grain."

[63] Mr Sturrock's evidence of this telephone call (at Transcript 1-43) was that Mr McKerrow "offered me another 2,000 tonnes in Chinchilla for delivery that early New Year," but Mr Sturrock was conscious of the position he was in which he described as "starting to be a massive position" and that was why the defendant agreed to purchase only 1,500MT and not the 2,000MT that was offered. Mr Sturrock described Mr McKerrow's response to Mr Sturrock's concern about his "potentially massive position" as "he was pretty driven on the fact that wheat was going to stay high for a couple of years" (at Transcript 1-43). No specific evidence was given by Mr Sturrock of the alleged advice set out in paragraph 37.2 or the advice and representation alleged in paragraphs 37.1 and 37.4 that the defendant should "take out more coverage" as there "would be no grain available by Christmas."

[64] Mr McKerrow cannot recall the conversation that he had with Mr Sturrock that preceded the 27 June 2008 purchase, but believes it would have been along the same lines as the conversations that preceded the other June 2008 purchases of corn (at Transcript 2-59). It is therefore likely that Mr McKerrow expressed the opinion that the purchase of a further 1,500MT of corn would be as a cover forward. Even though Mr McKerrow cannot recall the particular telephone call, I prefer his evidence to that of Mr Sturrock as to why Mr McKerrow would not in June 2008 have made a statement that there would be no grain available by Christmas. I am not satisfied that the defendant can prove that Mr McKerrow advised it to purchase this parcel of corn. The only representation that the defendant has proved in relation to this purchase is part of the representation pleaded in paragraph 37.1 to the effect that this purchase would be as a cover forward.

[65] The circumstances and content of the alleged representations made by Mr McKerrow on which the defendant claims to have relied to hold onto the contracts for the forward purchases of sorghum and corn are set out in paragraphs 40 to 43 of the defence and counterclaim:

> "40 On several occasions from July 2008 Mr Sturrock made telephone calls to Mr McKerrow to express his concern that the price of sorghum was falling and that it appeared to him that there would be a large grain crop in the Darling Downs season.
>
> 41 During each such conversation Mr McKerrow dismissed the concerns of Mr Sturrock and repeated his representation that by Christmas there would be no feed grain available on the eastern seaboard.
>
> 42 Relying on the advice and representations of Mr McKerrow set out in the preceding paragraphs the defendant took no steps to wash out or otherwise to realise any of the forward grain contracts it held.
>
> 43 On 13 October 2008 Mr Sturrock made a telephone call to Mr McKerrow during which conversation:
>
> 43.1 Mr Sturrock expressed concern that the sorghum and corn prices were falling;
> 43.2 asked Mr Sturrock for advice as to what the defendant should do;
> 43.3 Mr McKerrow said words to the effect that:
> (a) it was unlikely there would not be a good sorghum contract the following season;
> (b) the defendant should 'roll' the sorghum contract until the following year, in which the price of sorghum would rise;
> 43.4 Mr McKerrow did not advise the defendant to take any other action."

[66] The plaintiff admits the allegations contained in paragraph 40 of the defence and counterclaim, admits that Mr Sturrock telephoned Mr McKerrow on or about 13 October 2008 and admits the allegations in paragraphs 43.2 and 43.4 of the defence and counterclaim.

[67] Mr Sturrock gave evidence in general terms about raising his concern about the sorghum contract after the defendant had entered into it (at Transcript 1-50):

> "And it was not long after that was when - as the season progressed and this crop looked to be getting better and better was when I would start talking to Angus about the fact that it looked like a worry to have that position there and that I would really like to be out of it. He would often respond to that that the eastern seaboard would be out of grain by Christmas, or the back end of the season, or to - depending on - there was a number of conversations we had. I was - I was - you know, as I'd drive down to Brisbane and see this crop it was looking magnificent."

[68] Mr Sturrock's evidence-in-chief about why he held onto the forward sorghum purchase was (at Transcript 1-45):

> "And so what was the end result of that in terms of what occurred with the sorghum contracts?-- Well, it was an absolute disaster because I was, you know, hoping to be advised on when to sell, and every time I'd suggest something that we should and he would say, 'Oh, no, no, no, we can just roll the contract into the following year, pay a certain amount to roll it into the following year,' and one of the things he said was that if you know, 'Probably won't get two good summers - really good summers in a row and get a heatwave in February the price will go back up again.'
>
> And did you ask him why he thought that?-- We - by that stage, yes, I was challenging him pretty heavily on, you know, what - how we are going to get out of it.
>
> Well, was there a time when you might have got out of it at a reasonable level?-- I think it was in May when there were the floods in America that it actually had a rally and that could have got us out.
>
> And why didn't you instruct Mr---- ?--I wish I had but I was - yeah, I was - pulled the wrong rein suggesting to him - I'm sorry, I had suggested to him that prior to with various things, and when I had suggested to get out of a couple of things they proved to be wrong, and Angus was going particularly well with his predictions, yeah."

[69] Mr McKerrow accepts that from July 2008 onwards Mr Sturrock made a number of telephone calls to him about the sorghum price falling, but Mr McKerrow cannot recall the terms of the conversations (at Transcript 2-82). Although Mr Sturrock did not give evidence of Mr McKerrow telling him in a telephone conversation in October 2008 that he should roll the sorghum contract until the following year in which the price of sorghum would rise, when Mr McKerrow was cross-examined to the effect that he had made such a statement, he did not recall doing so and added that he would not have said something which he did not know (at Transcript 2-82). In the circumstances that prevailed in the market by October 2008, I accept that it was more likely than not that Mr McKerrow did not advise Mr Sturrock specifically to rollover the sorghum contract in anticipation that the price of sorghum would rise.

[70] Mr Sturrock's evidence about these conversations that occurred when the price of sorghum was falling was given in general terms. There is no doubt that Mr Sturrock had many telephone calls to Mr McKerrow from July 2008 onwards expressing his concern about the falling price of sorghum. Mr Sturrock's evidence did not reflect the statements that were attributed to Mr McKerrow in paragraphs 41 and 43 of the defence counterclaim. The defendant was exposed financially by its forward purchases at this time which must have been stressful for Mr Sturrock. I am not satisfied, however, that Mr Sturrock's evidence is sufficiently reliable and specific on the representations alleged in paragraphs 41 and 43 of the defence and counterclaim to discharge the onus of proving that they were made by Mr McKerrow.

[71] Although the plaintiff denied that any representations made by Mr McKerrow fell within the scope of his authority as an employee of the plaintiff, the plaintiff equipped Mr McKerrow with access to sources of information relevant to grain prices to enable him to form opinions about market prices to be used in carrying out his role as a grain trader. The statements made by Mr McKerrow about the strategy to buy sorghum as a hedge in respect of the future price of wheat reflected the terms of the document produced by the plaintiff. The representations that I have found were made by Mr McKerrow were therefore made on behalf of the plaintiff.

[72] The plaintiff denies that, where Mr McKerrow is found to have made any of the alleged statements, such statements were as to future matters within the meaning of s 51A of the TPA and asserts that any such statements were statements of opinion only. The fact that Mr McKerrow was expressing his opinion when he made the statements that I have found proved by the defendant does not prevent those statements from being characterised as a representation with respect to a future matter for the purpose of the TPA. In each case the opinion that was expressed was a representation as to a future matter.

[73] As the plaintiff's reply and answer to the defendant's counterclaim did not allege that there were reasonable grounds for the making of each of the relevant representations, the defendant has the benefit of s 51A of the TPA in deeming the plaintiff not to have reasonable grounds for the making of each of the representations that have been proved and for those representations to be taken to be misleading.

Expert evidence

[74] The defendant relies on the expert evidence of Professor Stephen Gray who is a Professor of Finance at the University of Queensland Business School for explanation on the risks of forward purchases of grain and the calculation of the defendant's losses. Professor Gray prepared three reports (exhibits 3, 4 and 5). The plaintiff relies on expert evidence from Mr Phillip Holmes who has had lengthy experience in grain and cotton marketing and price risk management advice and consulting services, in order to respond to Professor Gray's reports and dispute the defendant's calculation of losses. Mr Holmes produced two reports (exhibits 10 and 14).

[75] Professor Gray explains that a forward contract is an agreement between the buyer and the seller for the delivery of a particular commodity at a specified future time at a price that is agreed when the contract is entered into. As a forward contract can be closed out or washed out before maturity, forward contracts can be used to speculate on the price of a grain increasing (or decreasing) over time without the requirement of having to take delivery of the physical grain (paragraph 14 of exhibit 3). If the market is operating efficiently, forward prices should reflect all available information and the collective wisdom of the market in processing that information (paragraph 24 of exhibit 3). Professor Gray expresses the opinion (paragraph 41 of exhibit 3):

> "Any trade that is based on the view that prices will move in a particular manner in the future involves risk – there is some risk that prices will not move in the direction that is the basis for the trade."

[76] Professor Gray characterises a forward position in excess of the purchaser's requirements for that commodity as a speculative position and a forward position in a contract for a grain that is not required is also a speculative position (paragraph 56 of exhibit 3).

[77] Mr Holmes also comments on market risk (at paragraph 32 of exhibit 10):

> "The risk of purchasing forward always has the risk of the market moving lower and therefore purchasing at a higher price than is available later. Not taking a purchase forward runs the risk of the market moving higher later making the final purchase price more expensive."

Reliance

[78] To the extent that the defendant has proved that the parts of the pleaded representations in paragraphs 27.3, 29.1, 29.4, 29.5, 29.8, 34.2 and 37.1 identified in these reasons were made by Mr McKerrow to Mr Sturrock, the issue is whether the defendant has discharged the onus of proving that it relied on the relevant representations to enter into the related contracts. Reliance on the representations is relevant as, in order to recover damages for misleading or deceptive conduct under s 82 of the TPA, the defendant must prove that the loss or damage claimed to have been suffered was "by" conduct in breach of s 52 of the TPA.

[79] Provided the defendant relied on a representation made by the plaintiff that was misleading to undertake an impugned transaction, it did not matter that there were other reasons for why the defendant undertook that particular transaction: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [33] and [58].

[80] At the outset of the trial, I raised with the parties whether there was any analogy between the defendant's claim and those made by the borrowers in foreign currency loan cases. One of the authorities ultimately relied on by the defendant was *Foti v Banque Nationale de Paris* (1990) Aust Torts Reports 81-025. After considering the evidence in this matter, it is clear that the defendant's relationship between the plaintiff was not in any way analogous with that of a borrower of foreign currency who was inexperienced in the vagaries of foreign currency loans and where the bank that introduced the borrower to foreign currency loans was found to have assumed a special relationship with the borrower which extended to giving advice to undertake protective arrangements in relation to the unusual transaction.

[81] The case for the defendant would have been very different, if it had been able to show that the plaintiff had taken on the role of an adviser to the defendant as to when to purchase parcels of grain. Proof of reliance on misrepresentations made by an adviser would usually not be a problem for the recipient of the advice. In this case, however, the defendant and the plaintiff are both commercial operators dealing in contracts for the purchase and sale of grain in the usual course of their businesses where both parties were aware of the risks associated with the transactions arising from the fluctuation of the market prices for grains. The evidence shows that at the time the transactions were undertaken any user of grain for feed took a risk in purchasing grain that was in excess of requirements or in purchasing grain that was not intended to be delivered and the defendant understood that risk. It was submitted on behalf of the defendant that Mr Sturrock had no previous experience

in trading grain. If "trading grain" refers to purchases and sales of parcels of grain, then the submission is not borne out by the evidence of the defendant's purchases and sales before meeting Mr McKerrow and before the impugned transactions. Most of the transactions the defendant undertook with the plaintiff were straight out purchases of grain. Mr McKerrow did introduce Mr Sturrock to the strategy of buying sorghum as a hedge for wheat, but the nature of the transaction was a purchase of sorghum in the market with which Mr Sturrock was familiar, with the intention from the outset not to take delivery, but to wash out the contract before the delivery date.

[82] The question of reliance in respect of the impugned transactions has to be considered in the context of the nature of the activity being undertaken by the defendant, what the defendant knew about that activity, and the nature of the dealings between the defendant and the plaintiff: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [37]. It is clear from Mr Sturrock's evidence that he understood that Mr McKerrow was making predictions as to the future prices of grains (either the grain the subject of the purchase or the relative price of that grain with other grains), that there was always a risk that prices would move other than as predicted, and that Mr McKerrow's predictions were just that - predictions.

[83] The forward corn purchases made in November-December 2007 were for use in the feedlot. At this time Mr Sturrock was keen to act on his concerns about a rising market. The decision by the defendant to purchase corn for delivery under these contracts was made in the normal course of the defendant's business where the defendant was aware of the risks inherent in locking in the price of the corn in these forward purchases. Mr Sturrock entered into the transactions on the basis of willingness to take the risk that Mr McKerrow's prediction would be a good one in the circumstances (and having regard to Mr McKerrow's good record with predictions in the preceding 18 months), rather than relying on the prediction itself being realised. The defendant was prepared to speculate on what the market price for corn would be at the time it had to take delivery under the contracts. I am not satisfied that the defendant has proved that it relied as such on Mr McKerrow's representation that corn would remain better value than wheat in making the forward purchases of corn in November-December 2007, but on its own assessment of the risks of these transactions in the context of the defendant's requirement for appropriate quality feed at the lowest price for that feed.

[84] I have also reached a similar conclusion in relation to the forward purchase of sorghum that was never intended to be delivered. Mr Sturrock "went out on a limb" again. Mr Sturrock was prepared to take the risk that the strategy of buying sorghum which he did not use in the feedlot would have a positive effect on the cost of the grain that was used for feed. I do not find that the defendant was acting on Mr McKerrow's prediction as to the relative movements of sorghum and other grains, but on the defendant's own assessment of the risk of undertaking the forward purchase of sorghum at that time.

[85] In relation to the purchase of 2,000MT made on 3 June 2008 for immediate delivery, the decision that was made by Mr Sturrock was to purchase and store that parcel of corn for feed in the normal course of its business. Mr McKerrow's opinion that this purchase was as cover forward was not relied on by the defendant for the decision to purchase, but the defendant's own decision to undertake the risk

of which it was aware that the purchase of 2,000MT corn at $340.00 per MT was an appropriate purchase for feed for the business at that time.

[86] I have also concluded in relation to the forward purchase of 1,500MT on 27 June 2008 that, despite Mr Sturrock being acutely aware that such purchase was in excess of the requirements for feed for the feedlot, he again made the decision on behalf of the defendant to take the risk that prices of feed would increase which made it appropriate to fix the price for purchasing this corn for delivery in February 2009. I am not satisfied that the purchase was made in reliance on the plaintiff's representation that such purchase would be as a cover forward.

[87] To the extent that the defendant has proved that misleading representations were made by the plaintiff, the defendant has failed to prove that it relied on the relevant misrepresentations to enter into the contract which followed the making of the misrepresentations.

[88] The defendant's counterclaim based on s 52 of the TPA fails.

Negligence

[89] The key allegation to the defendant's claim based on negligence is that the plaintiff assumed responsibility to advise the defendant as to when and how much grain to purchase. That is not borne out by the findings that I have made about the nature of the relationship between the defendant and the plaintiff.

[90] The defendant fails at the threshold of proving that the plaintiff owed a duty to the defendant to take reasonable care in making the representations (to the extent they have been proved), as the plaintiff was not the adviser to the defendant of when and how much grain it should purchase or sell. The defendant fails in its counterclaim based on negligence.

Loss and damage

[91] As the defendant has failed to prove its counterclaim, it is not necessary to make findings on the calculation of the plaintiff's damages.

[92] I will make findings, however, in relation to the assumptions that were used by Professor Gray in undertaking his calculations.

[93] Professor Gray was instructed to assume that the defendant's usual practice for purchase of feed would have continued (in lieu of the impugned contracts). These practices were said to be that the defendant would not buy feed more than three to six months ahead of requirements, not buy beyond October/November (harvest time) in any year, not buy in excess of the feedlot's reasonable needs, selling excess contracts just before harvest, and buying into the market following harvest.

[94] I am not satisfied that the defendant can show that it would have continued with the pattern of purchases that it was undertaking prior to dealing with Mr McKerrow. That is because the defendant had increased its storage capacity for grain quite significantly by the commencement of 2006 and Mr Sturrock was also keen at that time to look at new strategies for containing the price of feed.

Orders

[95] It follows that the orders which should be made are:

1. The counterclaim is dismissed.
2. Judgment for the plaintiff on its claim in the sum of $626,719.83.

[96] I will give the parties an opportunity to agree on the form of order that also deals with the plaintiff's claim for interest under s 58 of the *Civil Proceedings Act* 2011 and for costs. If the parties are unable to agree on the form of orders, the matter can be relisted for submissions. For that purpose I will make an additional order that gives either party liberty to apply on two days' notice in writing to the other.