SUPREME COURT OF QUEENSLAND

CITATION:	*Fick v Groves* [2010] QSC 89
PARTIES:	**ANTONNE JUSTIN FICK AND LENCHEN MARY FICK** (plaintiff) **v** **JOHN LESLIE GROVES AND LESLEY VIVIENNE GROVES** (defendant)
FILE NO:	BS 5308 of 2005
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15-19, 22, 23, 24 and 26 February 2010. Supplementary written submissions 9, 10 and 12 March 2010
JUDGE:	Applegarth J
ORDERS:	**1. Judgment for the defendants.** **2. The plaintiffs pay the defendants' costs of the proceeding, including reserved costs, to be assessed.**
CATCHWORDS:	TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – where purchasers of macadamia and avocado farm rely on representations about past and expected future production – whether representations false – whether vendors had reasonable grounds to make representations as to expected harvest TORTS – NEGLIGENCE – ESSENTIALS OF ACTIONS FOR NEGLIGENCE – DUTY OF CARE – NEGLIGENT MISSTATEMENT - where representations about the number of productive trees on a farm and their yield are made by vendors to potential purchasers – where purchasers did not obtain warranty that representations accurate or that reasonable care had been taken in making them – where contract acknowledged that purchasers had not relied on pre-

contract representations – whether duty to take reasonable care in making representations was owed in the circumstances

DAMAGES – GENERAL PRINCIPLES – GENERAL AND SPECIAL DAMAGES – where purchasers claim difference between price paid for farm and its true value – where purchasers also claim damages for value of lost opportunity to purchase a different farm – where no acceptable evidence of whether such a farm would have been profitable under the plaintiffs' management or the return on investment that the plaintiffs would have achieved – whether plaintiffs have shown the value of the lost opportunity

Supreme Court Act 1995 (Qld), s 47.
Trade Practices Act 1974 (Cth), ss 51A, 52.

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304 applied.
Donne Place Pty Ltd v Conan [2005] QCA 481 cited.
Expectation Pty Ltd v PRD Realty Pty Ltd (2006) 140 FCR 17 cited.
Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1 cited.
Gerrard v Slamar [2004] WASCA 253 cited.
Goold v The Commonwealth (1993) 42 FCR 51 applied.
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640 cited.
Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26 cited.
Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd (1989) ATPR (Digest) 46-048 cited.
*Leda Holdings Pty Ltd v Oraka Pty Ltd (*1998) ANZ Conv R 582 considered.
Lewis v Hillhouse [2005] QCA 316 cited.
Longden v Kenalda Nominees Pty Ltd [2003] VSCA 128 cited.
MMAL Rentals Pty Ltd v Bruning (2004) 63 NSWLR 167 applied.
Nella v Kingia Pty Ltd (1989) ATPR (Digest) 46-046 cited.
Nilson v Bezzina [1988] 2 Qd R 420 cited.
Perre v Apand (1999) 198 CLR 180 cited.
Price Higgins v Drysdale [1996] 1 VR 346 cited.
Ratcliffe v Evans [1892] 2 QB 524 cited.
Rawlinson & Brown Pty Ltd v Witham (1995) Aust Torts Reports 81-341 cited.
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332 applied.
Tepko Pty Ltd v Water Board (2001) 206 CLR 1 cited.
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 applied.

COUNSEL:	N A Martin and N M Cooke for the plaintiffs M K Conrick for the defendants
SOLICITORS:	Norton Rose Australia Neilson Stanton Parkinson

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Introduction

[1] The plaintiffs purchased a farm, Bonny Downs, from the defendants. The farm produced macadamia nuts and avocados. It had a three bedroom "Queenslander", cattle yards, other improvements and plant and equipment. It was situated close to Gympie, and enjoyed good views from elevated sites of the picturesque area in which it was located. Before entering a contract to buy it on 20 May 2004 the plaintiffs received from the defendants' sales agent a brochure that promoted the farm's attributes and the lifestyle that could be enjoyed by living on it.

[2] The plaintiffs inspected the farm with the agent on 18 May 2004. After the inspection the plaintiffs requested more information, and on 19 May 2004 they received by facsimile from the agent two further documents that had been prepared by the defendants, one of which was headed "Bonny Downs – Production History 2001-2003". The plaintiffs claim damages for negligent misstatement over representations that were conveyed by the brochure and this production history document about the trees on the farm ("the planting representations") and the estimated harvest ("the production representations"). They also claim relief under the *Trade Practices Act* 1974 (Cth) ("*TPA*") over representations that were conveyed by the production history document that was facsimiled on 19 May 2004. The alleged representations include representations as to future matters, particularly estimates about the expected harvests of macadamia nuts and avocados in 2004.

[3] The production history document contained figures for macadamia and avocado harvests in 2001, 2002 and 2003 and predicted a macadamia harvest in 2004 of approximately 50 tonnes "Nut-in-Shell" ("NIS") and an avocado harvest of in excess of 3,000 trays.

[4] The brochure and the production history document had been prepared for an auction on 3 April 2004. The brochure stated that the farm was to be sold as a "going concern with crop ready to harvest". However, the farm did not sell at the auction, and the defendants say that a storm that day reduced the avocado crop to about 1,769 trays. By the time the plaintiffs inspected the farm on 18 May 2004 the avocados had been harvested and the macadamia harvest was in progress. The defendants contend that the plaintiffs knew this. They say that at the time the estimates in the production history document were made they had no reason to believe that a storm would severely damage the avocado crop, reducing its yield in 2004, and that by 2005 regrowth of pruned avocado trees would reasonably have been expected to increase the avocado crop for that year.

[5] The second facsimiled document was styled "Bonny Downs - Breakdown Production Costs" and set out estimates of the annual expenses relating to Bonny Downs. This document emphasised that the defendants operated three farms in conjunction, as well as a farm-direct retail mail order and wholesale business under the one entity, and stated that "In the absence of separate accounting figures we trust that these estimates will assist as a Guide only, for your consideration". There is no issue in these proceedings about the accuracy of the costs estimates that were made in this document.

[6] Mr Fick says that after receiving the two facsimiled documents he analysed them and formulated a lot of questions to ask the defendants so as to satisfy himself that the farm was going to give a good return on investment.

[7] The plaintiffs plead written representations about which there is no dispute, and which for convenience are described as "the planting representations"[1] and "the production representations"[2]. They do not rely in their pleading on oral representations. However, a meeting at the defendants' home on 20 May 2004 assumes importance on the issue of reliance insofar as what was said by the defendants confirmed or qualified what appeared in the documents that the plaintiffs had read, particularly the two documents that had been faxed to them on 19 May 2004.

[8] Mr Fick's evidence is that, based on the documents that had been faxed by the agent and based on the conversation with the defendants, he felt that the farm could net between $130,000 and $140,000, and that, adopting a conservative figure of $120,000, he could "borrow some money, and hopefully on the upside of the farm I could turn it around."

[9] The plaintiffs were under pressure to submit an offer that day: the defendants having received an offer from another prospective purchaser and having set Friday, 21 May 2004 as the date they would decide which offer to accept. Having been told that the defendants had previously rejected an offer of $950,000, the plaintiffs offered $960,000. This offer was accepted.

[10] The plaintiffs had no interest in acquiring the remainder of the 2004 harvest, partly because Mr Fick, a chartered accountant and businessman, did not have the time to attend to it.

[11] After the meeting the plaintiffs went with the agent to his office and a contract was prepared. Special condition 5 provided:

> "5. From the time of execution of this contact by all parties the vendors shall continue to harvest any crop growing upon the subject lands. Any crops harvested and stored upon the property at the time of completion will (subject to completion being effected) become the property of the vendor."

[12] By special condition 3 the plaintiffs acknowledged that they had relied on their own inspection and not on any representations made by or on behalf of the defendants. It read:

> "No warranty is given or implied as to the state and condition of the said lands or as to the carrying capacity thereof or as to the improvements nature of country plant furniture or other assets included in the subject property or as to the sufficiency capacity or extent of any dams tanks bores or other watering facilities or as to any natural or artificial water on the said lands or as to the qualify of such water. The Purchasers acknowledge that the subject property is sold as inspected and will be delivered on the same basis and that the subject property is purchased and relying on the Purchasers' own inspection or knowledge or enquiries and note (sic) on any brochure or publication issued or published in respect of this sale or on any representations made by or on behalf of the Vendors or the agent of the Vendors."

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1 Further Amended Statement of Claim ("FASOC") para 13.

2 FASOC para 14.

The defendants deny that the plaintiffs relied on the written representations that have been pleaded. The defendants also plead that their estimates were fair and reasonable at the time they were made, and that the documents in which they were recorded described them as being "indicative", "approximations", "a guide" and compiled without any separate accounting or production records for Bonny Downs.[3] They plead that they had reasonable grounds for making the estimates at the time they were made, based upon the then condition of the macadamia and avocado trees and their experience as farmers and in estimating the seasonal production from Bonny Downs.[4]

[13] The defendants deny that the macadamia trees were unproductive to the extent alleged by the plaintiffs, being figures based upon an expert report of Mr Vimpany, and say that the macadamia trees had the capacity to yield the crops that were represented.

[14] The plaintiffs plead that they contracted to purchase the farm for $960,000 in reliance on the planting and production representations. They contend that as a result they suffered loss and damage, principally because the true value of the land, the fixed improvements, the trees and the plant and equipment was $298,620 less than the price they paid.

[15] The defendants respond that the plaintiffs paid fair market value for Bonny Downs, and that its market value fell after the plaintiffs purchased it. They plead that the plaintiffs conducted farming operations in a way that failed to achieve the farm's potential by:

> "A. failing to properly maintain the trees on Bonny Downs;
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> B. misapplying chemicals and/or fertiliser to the trees on Bonny Downs;
>
> C. inappropriately fertilising the soil on Bonny Downs;
>
> D. failing to properly harvest the macadamias and avocados from Bonny Downs;
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> E. failing to control incursions by feral pigs into Bonny Downs;
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> F. abandoning the avocado orchard on Bonny Downs;
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> G. abandoning parts of the macadamia orchards on Bonny Downs;
>
> H. removing macadamia trees from Bonny Downs."[5]

The principal issues in contention

[16] The principal issues in contention are:

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3 Further Amended Defence (""FAD") para 8(a)
4 FAD para 8(b).
5 FAD para 16(i)(vii).

1. Whether the plaintiffs were induced by the representations that are alleged to be false and misleading to enter into the contract.
("the reliance issue")

2. Whether the planting and the production representations were false and misleading in the respects pleaded. In essence, the issues are:

   (a) whether the farm did not have the number of productive macadamia tress that were represented, but instead had the high number of "unproductive" and "unviable" trees alleged in paragraph 19(a) of the FASOC;

   (b) whether the macadamia tress had the capacity to yield the crops that were represented.
("the falsity issues")

3. Whether the defendants had reasonable grounds to make the representations as to future matters, and in particular:

   (a) whether they knew that the 2004 avocado production representation was untrue because the actual harvest only yielded 1,769 trays;

   (b) whether they knew or ought to have known that the 2004 macadamia production representations were not reasonable because they knew or ought to have known that the productive macadamia trees did not have the capacity to yield the crops that were represented.
("the reasonableness of representations as to future matters")

4. Whether the defendants were under a duty of care to take reasonable care in making the statements.
("the duty of care issue")

5. Whether the defendants failed to take reasonable care in making the statements in that:

   (a) the defendants knew the crops were farmed as a single economic unit;

   (b) the defendants failed to keep separate historical production records;

   (c) the defendants made no reasonable attempt to accurately identify production for Bonny Downs.

   (d) the defendants knew that the plaintiffs would use the production figures, that income-producing capacity related to market value and that the plaintiffs would rely on income-producing capacity in reaching a price to offer.
("the breach of duty of care issue")

6. Whether the plaintiffs suffered loss and damage:

   (a) by reason of the alleged negligent misstatements;

   (b) by reason of the alleged contravention of the *TPA*.

("the causation issue")

7. Whether the plaintiffs suffered loss and damage in the amount alleged. **("the loss and damage issue")**

[17] These issues were distilled by me from the pleadings, and at the conclusion of the evidence Counsel for the parties agreed that these were the principal issues. The proceeding has had an unfortunate interlocutory history, and the Further Amended Statement of Claim ("FASOC") which was filed by leave on 9 February 2010 shortly before trial has a number of deficiencies. However, rather than divert the energies of the parties and their legal representatives on the eve of trial and during the trial on these drafting issues, the trial proceeded on the basis of what was said by Counsel and by me at the pre-trial review when leave was granted to amend to belatedly introduce a claim for contravention of the *TPA*.

[18] A large number of statements contained in the brochure and in the facsimile were pleaded to have induced the plaintiffs to enter the contract and pay $960,000. However, the plaintiffs' case, as pleaded and as presented, necessarily focused upon the particular representations described as "the planting representations" in paragraph 13 of the FASOC and "the production representations" in paragraph 14 of the FASOC. From amongst these only certain representations are alleged in paragraph 19 of the FASOC to have been "misleading".[6] These are the "falsity issues" that I have identified in respect of the number of productive macadamia trees and the capacity of the macadamia trees to yield the crops as represented. The plaintiffs alleged, and the defendants admitted, that the 2004 harvest only yielded 1,769 trays of avocados and the harvest was completed prior to 20 May 2004. The defendants plead that in the course of their inspections of Bonny Downs the plaintiffs observed that the 2004 avocado crop had been harvested. The plaintiffs deny this in their Amended Reply. Viewed in isolation, paragraph 20 of the FASOC might be taken to allege that the defendants knew or ought to have known that the production representations were not reasonably indicative of the actual production or production estimates for Bonny Downs in respects beyond those alleged in paragraph 19. However, in the absence of further and better particulars of paragraph 20, in the context of other allegations concerning production and production estimates and in the light of the manner in which the trial was conducted, paragraph 20 should be understood as referring to the production representations that are in issue. The plaintiffs' pleadings did not put in issue the accuracy of aspects of the production representations in respect of the prices that were obtained in 2001-2003 or that could be obtained in 2004 for macadamia nuts or avocados, the estimated costs of production or the reasonableness of estimates in that regard.

[19] The issue in relation to avocado production was the narrow one of whether the plaintiffs were induced to purchase Bonny Downs by a representation that it was expected to yield 3,000 trays in 2004, in circumstances in which the 2004 harvest that was completed prior to 20 May 2004 only yielded 1,769 trays. The pleadings did not raise any broader issue about the number of productive avocado trees, the avocado harvest in earlier years or the farm's capacity to produce more than 3,000 trays of avocados.

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[6] The term used in paragraph 19 FASOC in the context of the common law claim, but which was understood to plead an allegation of falsity for the purpose of a cause of action for negligent misstatement.

[20] The primary issues in relation to macadamia nut production were those that I have described as "the falsity issues", namely:

(a) whether the farm did not have the number of productive macadamia trees that were represented, but instead had the high number of "unproductive" and "unviable" trees alleged in paragraph 19(a) of the FASOC;

(b) whether the macadamia trees had the capacity to yield the crops as represented.

[21] Evidence in relation to these issues included several witnesses of fact, including farm workers and persons familiar with macadamia plantations who visited the farm at about the time of its sale, and expert witnesses. The evidence included cross examination of witnesses about photographs of trees, aerial photographs, soil and leaf tests, production records and sales documents. Some of the evidence had little or no bearing upon the real issues in the case. I do not propose to give a detailed account of the evidence of each witness, some of whom provided lengthy witness statements or lengthy summaries of the evidence to be given by them.

Background

[22] The defendants have been farmers since 1975. Mr Groves has been a farmer the whole of his adult life, and is now aged 62. He and his wife have resided at Mary's Creek since 1978. They acquired a property (the Home Farm) and grew beans and other small crops. They also grew bananas and grazed cattle. The defendants subsequently acquired two other farms in the same vicinity that are now called Jackie Martin's and Jensen's. They acquired Bonny Downs in 1991. The farms were run as a single economic unit and with a variety of arrangements with children, family members and sharefarmers.

[23] At the time Bonny Downs was acquired by the defendants its macadamia and avocado orchards had not been well-maintained, and grass fires had killed some trees on it. After family discussions and after taking independent advice the defendants decided to continue it as a macadamia and avocado farm. In the early 1990s the defendants purchased and planted macadamia trees on various blocks on the Home Farm (later named The Nut Farm) and on Bonny Downs. They were of different varieties, and a large number of "344" and "741" varieties were planted on The Nut Farm between 1990 and 1995. Additional "A" varieties were planted on Bonny Downs between 1993 and 1996. The macadamia trees that were planted on The Nut Farm first produced nuts in 1999. The final tree numbers on Bonny Downs were approximately 5,500, whereas The Nut Farm totalled approximately 3,028. Mr Groves estimates that as at May 2004 about 400 of the A varieties on Bonny Downs were not producing because of the overshadowing effect of trees adjacent to them. Trees had been inter-planted with the intention of removing some of the adjacent, poorer yielding, older varieties. However, the existing trees recovered and the demand for the smaller kernels from these varieties improved, and so they were left. There were also about 150 trees on Bonny Downs that were planted around 2002 and 2003 that were too young to produce nuts in 2004.

[24] An issue in the proceedings is the total and relative production of macadamia trees on Bonny Downs and The Nut Farm.[7] Relative yields do not necessarily reflect the number of trees on each farm. This is because the trees on each farm were of different ages, were of different varieties and grew in different conditions. The age of a macadamia tree affects its productive capacity. The Macadamia Growers Handbook, which is produced by the Queensland Department of Primary Industries and is regarded as a reliable source of information, states the following in respect of expected average yields:

"**Table 1.** Expected average yields (kg NIS at 10% m.c. based on 312 trees/ha)

Year	Yield per tree	Yield per hectare*
1	0	0
2	0	0
3	0	0
4	0	0
5	1	300
6	2	600
7	4	1,200
8	6	1,800
9	9	2,400
10	10	3,000
11	11	3,200
12-15	12-13	3,500-4,000

* Figures assume that trees are pruned to maintain machinery access and light and spray penetration. Note that in closer-spaced orchards, yields may reach the peak/ha figures earlier than indicated. However, yields may then decline without pruning and good management. With good management, yields/ha for mature trees are generally similar for all spacings."

[25] Topography and soil type also affect yields. Their effects may be pronounced during droughts.

[26] Although Bonny Downs had access to water resources, and irrigation to the macadamia trees on its South Block had been trialled in 1993, the defendants found that the costs of maintaining the irrigation system and pumping water was not effective and that after the drought year of 1994 there was no appreciable difference in yield between irrigated and non-irrigated macadamias. As a general proposition, with all other things being the same, a macadamia tree that is irrigated will produce more nuts than one that is not. However, in drought years unirrigated trees may perform better than previously irrigated trees that no longer have access to their usual water supply. Mr Vimpany explained that this was because the irrigated tree does not have as good a root system and so it does not cope as well with dry conditions. This also was Mr Groves' experience and he told the plaintiffs about this at the meeting on 20 May 2004.

[27] The 2001 and 2002 years were very dry. According to Mr Groves yields on The Nut Farm were very poor in those years, whereas previously they had been producing at a rate comparable to industry averages. His evidence was that the 344 and 741 varieties seemed particularly susceptible to drought and that in 2002 and

[7] References to The Nut Farm are to various blocks on that property and also to a small quantity of nuts harvested from Jensen's nearby farm. Jensen's farm only had a couple of rows of macadamia trees and in a good year it would not produce any more than two or three bins.

2003 The Nut Farm produced only three and four tonnes respectively. Mr Ironside, an agronomist with extensive experience in relation to macadamia plantations, explained that the steeper blocks on The Nut Farm had shallow soil, most of which washed down to the farm below. Mr Groves' evidence about the topography and soils on the Nut Farm compared to Bonny Downs was not contested. In general the soils on The Nut Farm were poorer and its slopes were steeper.

[28] The differences in the topography between The Nut Farm and Bonny Downs were reflected in the way in which nuts were harvested on each property. The steeper, rockier ground on The Nut Farm made it unsuitable for mechanical harvesting. By contrast, about 80 per cent of Bonny Downs was mechanically harvested. The remainder was hand-harvested. An employee of the defendants, Mr Hartwig, kept a record of the number of bins that he filled as a result of mechanical harvesting and these records permit a calculation of the approximate number of tonnes of nuts that were mechanically harvested.

[29] Separate records were not retained by the defendants in relation to harvests on Bonny Downs and The Nut Farm. However, workers who hand-harvested nuts on The Nut Farm were paid according to the quantity that they harvested. Mr Groves kept notes for the purpose of paying these workers and says that he had a good idea of the amounts harvested from The Nut Farm in the relevant years. This is one of the reasons he estimated that The Nut Farm produced three tonnes in 2002 and four tonnes in 2003. These estimates also were based upon his direct knowledge of the farm, having undertaken all of the spraying and having observed the crop. He says that in the drought years of 2002 and 2003 Bonny Downs produced much better than The Nut Farm which is generally higher and drier with the result that its subsurface moisture drains fast. Mr Groves' evidence was that in 2002 and 2003 the top or higher halves of the blocks on The Nut Farm were so poor in nut set that there was active consideration about whether or not they would be harvested. A big factor in the decision to harvest was a hygiene measure to remove a food source for rats and pigs. He says that some of the top halves of the blocks on The Nut Farm did not even flower and produced nothing in those years.

The decision to sell Bonny Downs and the information provided in advance of the auction

[30] As a result of an accident that injured Mr Groves' knee and hip, he and his wife decided to sell Bonny Downs. It was listed for sale for some years prior to 2004, but it was not until late 2003 or early 2004 that a serious marketing program was initiated at the instigation of Mr Steedman from Raine & Horne in Gympie. Mr Steedman persuaded the defendants to offer the farm for sale at an auction. The auction was scheduled for April when both the macadamia and avocado crops were largely unpicked. The brochure that was prepared advertised Bonny Downs as a "going concern with crop ready to harvest" and indicated a price range of $950,000 to $1,100,000. The brochure described the property and its various blocks. The House Block was said to have 3,000 macadamia trees whilst the South Block had 2,500 macadamia trees and 450 avocado trees. There was a breakdown of the macadamia and avocado trees with approximate numbers.

[31] The macadamia breakdown was:

"MACADAMIAS
VARIETY APPROX NUMBER

660 1000 trees

333 800 trees

246 800 trees

A4 1000 trees

A16 1000 trees

A38 500 trees

344, 508 & Own choice make up the remainder"

Beneath this list the brochure stated:

"Total of 5,500 trees of varying age and maturity
Estimated crop for 2004 of 55-60 tonnes NIS"

[32] The brochure contained a separate page of Crop Estimates:

"'BONNY DOWNS'

CROP ESTIMATES 2004

MACADAMIAS

Machine Harvesting commences in April and continues through to October
Estimated yield of approx 55 tonnes or better of nut-in-shell
A firm offer to buy nut-in-shell is displayed in attachment 8
In this respect the Macadamia Industry levy on NIS is .08 cents per kg

The first 21 tonne silo is usually ready to go by the end of May
With payment at 30 days, cash-flow commences end of June

AVOCADOS

Need to start picking Hass as soon as possible after auction date to take full advantage of being the first Hass on the central market each year.
This is a high price window.
Estimated yield of approx 3000 trays or better
Picking is usually completed by the end of May & is confined to picking into bins in-field and transporting to the local packhouse.

A marketing company takes care of selling the fruit & payment is 21 days

In 2003 'Bonny Downs' averaged a net return (after packhouse & marketing costs) of $16.40 per tray.

ESTIMATED ON FARM HARVESTING COSTS

Macadamias – pick up & de-husk ..... 50cents per kg nut-in-shell

> Avocados – picking into bins & transport packhouse ..... $1.00 per tray
>
> The above estimates are supplied by the owners, based on their production records and projections.
> They are an indication only.
> In the absence of separate accounting between farms, the owners are genuinely attempting to present approximations as a guide."

[33] Mr Groves says that he estimated the 2004 macadamia crop that Bonny Downs would yield based on the amount of nuts on the trees. He says that by 2004 he was well-experienced in predicting with a high degree of accuracy how much crop there was on each property. His initial estimate for a crop of 55-60 tonnes from Bonny Downs was based upon the fact that after the very bad drought years of 2002 and 2003, it looked like 2004 "would be a normal season crop". However, as the season progressed and there was no late summer rain, it became apparent that not all the nuts would fill out properly, and Mr Groves reduced his estimate for Bonny Downs to about 50 tonnes.

[34] This revised estimate for the 2004 harvest was included in the document headed "Bonny Downs Production History 2001-2003". This document was typed by Mrs Groves and provided to Raine & Horne for the purpose of providing information to prospective purchasers. In respect of the avocado harvest the production history document stated that the harvest in 2001 had been 3,100 trays, in 2002 2,200 trays and in 2003 2,500 trays, and that the trees had been heavily pruned. As to 2004 the document stated:

> "2004 ... Projected in excess 3,000 Trays (not yet completed) ... returns will match/better 2003".

[35] Mr Groves' evidence is that the 2004 macadamia crop estimate and the 2004 avocado production estimate and the costs estimates were discussed in the course of compiling the documents and that the defendants were cautious in their estimates because they knew they would be living next door to whoever purchased the farm, and they did not wish to mislead them. The thrust of the plaintiffs' case is that the figures for past and expected macadamia production were exaggerated because the defendants were keen to sell a property that had been on the market for years.

[36] The evidence was unclear as to the precise date upon which the production history document was prepared. Mr Groves' evidence is that it was produced prior to the auction and that they were a good approximation. Mrs Groves gave evidence that the documents were prepared at the request of Mr Steedman from Raine & Horne and that she probably hand-delivered them to Raine & Horne when she was in Gympie. The production history document was prepared prior to the auction. Mrs Groves said they were provided in order to give an indication of the farm's capability and that the figures were "very reasonable".

[37] Mr Groves said that he and Mrs Groves spent the best part of a day compiling the production history and breakdown of costs documents. The production history document relevantly stated in relation to the macadamias:

> " 2001 61 Tonnes Sound Quality Nut-in-Shell
> 2002 (drought year) 32 Tonnes
> 2003 (drought year) 31 Tonnes

2004 Projecting approximately 50 Tonnes"

In arriving at past macadamia production estimates for Bonny Downs, Mr Groves says that he and his wife looked at the Stahmann's batch reports going back a couple of years. The defendants mostly dealt in kernel and Stahmann's "cracked out" their macadamias. The amount of NIS that was sent to Stahmann's indicated their total production from Bonny Downs and The Nut Farm, save for an amount of about one tonne a year that was retained by the defendants for their retailing business.

[38] Mr Groves says that he knew how much nut had come off The Nut Farm because it was hand-picked and there was never much of it. It was taken down to Bonny Downs for de-husking and put in a silo. The contractors were paid per bin and he would write down details in a pocket book in order to pay these contractors at the end of each fortnight. He estimated past macadamia nut production on Bonny Downs by deducting the production from The Nut Farm from the total amount that was sent to the processors.

The auction

[39] The auction was held on 3 April 2004 and was to occur under a big fig tree at the gate of Bonny Downs. However, a storm came and the auction was moved to a shed. No bids were received at the auction.

[40] By the date of the auction some avocados had been harvested. The auctioneer mentioned this at the auction and told those in attendance that the harvesting of the remainder of the avocados would continue.

The storm

[41] The Bureau of Meteorology records do not indicate that there was a thunderstorm or hail in the vicinity of Bonny Downs on the day of the auction, and the evidence is that a significant storm would appear on the Bureau's radar images. However, there is evidence in addition to the evidence of the defendants that a significant storm occurred on the day of the auction. Mr Cameron described it as very heavy, with a lot of wind, thunder and lightning. Mr Vollmerhausen attended the auction and said there was "a significant storm". Based on his past observations it was the kind of storm that could produce hail. Ms Horton's evidence is that it was a big storm, but she did not realise that there had been hail damage until she and others went to pick the avocados after the auction and saw that there was substantial damage. She says that they discarded a fair proportion of the crop because of the hail damage. Mrs Groves' evidence is that the storm on the day auction ruined a significant part of the avocado crop. Mr Groves' evidence is that the storm damaged about one third of the avocado crop. He says that the storm was of significant severity to ruin such a large percentage of the crop. He explained that it does not take very big hail to render avocados unmarketable. He also explained that, depending at what stage the fruit is, heavy rain with high wind can damage the avocado skin so that it has marks on it and is not marketable through Sunfresh.

[42] The defendants and their workers continued to harvest the avocado crop in the week after the auction. The avocados that were not marketable because of storm damage were taken off the tree to avoid fruit fly, left on the ground and put through the slasher. Those that were marketable through Sunfresh were harvested.

Marketing after the auction

[43] Raine & Horne continued to market the property after the auction. A potential purchaser was Mr Hilton Taylor, who had a professional background in forestries and land management. He had inspected a number of macadamia farms with a view to purchasing one. He inspected Bonny Downs in May 2004. He described the condition of the trees that he inspected as "variable", and appreciated that some areas of the plantation were steep and stony. On the basis of his inspection, and having compared Bonny Downs with other macadamia properties that were on the market, he was prepared to buy it and sought finance from his bank to do so. He conveyed an offer of $950,000, that was conditional upon the sale of another property.

Inspection of Bonny Downs by the plaintiffs

[44] The plaintiffs migrated to Australia from South Africa. In May 2004 they lived with their children at Pullenvale. Mr Fick was qualified as a chartered accountant and had business interests in Australia and South Africa. He was interested in running a farm and in early 2004 the plaintiffs inspected some farms. Some of the farms that they inspected were smaller than Bonny Downs and in the nature of "hobby farms". The plaintiffs wanted to acquire a farm that was reasonably close to a city that would have private schools that their children could attend. Mrs Fick described herself as "very much the housewife" and relied upon her husband, a businessman, to make financial decisions.[8]

[45] The plaintiffs ascertained that Bonny Downs was for sale, made contact with Mr Ben Cameron of Raine & Horne in Gympie and arranged to meet him. The witness summaries of the plaintiffs stated that this meeting and inspection occurred on Monday, 17 May 2004, but they accepted in their oral evidence that the inspection probably occurred on Tuesday, 18 May. The plaintiffs met Mr Cameron that day and he gave them the sales brochure that had been used for the auction. The plaintiffs inspected Bonny Downs with Mr Cameron and observed that nut harvesting was in progress.

[46] I found the evidence of each plaintiff in relation to their observations of avocados on the trees unconvincing. Mr Fick denied that he would have observed that there were no avocados on the trees and said that he did not notice any avocados. He said that they did not stop, get out and look at the avocado trees. He denied knowing that the avocados had been harvested. Mrs Fick's evidence about knowing that the avocados had already been harvested was unsatisfactory. She initially gave evidence that "the harvest had taken place" and that there were discussions that any purchase would be without the crop. She then added that she did not recall looking to see avocados on the trees.

[47] It seems improbable that prospective purchasers of an avocado plantation would not look to see whether there were any avocados on the trees during an inspection of the property. Mr Cameron said that the inspection on 18 May 2005 took at least an hour and a half in his four-wheel drive vehicle and that during the inspection they stopped a few times, including in a spot where the avocado and macadamia nut trees joined. It was "very obvious" from the inspection that the avocados were gone. As

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[8] Exhibit 36 para 3. The plaintiffs separated in March 2009. Before this the second plaintiff was known as Lenchen Fick. She is now known as Lenchen Kurtzahn. It is convenient to refer to her by the name that she used at the time of the relevant events, and the name that was used by other witnesses to describe her at the time of those events.

Mr Cameron said, "You couldn't help but see they were gone". I accept his evidence.

[48] Each plaintiff gave evidence of having met the defendants on 18 May 2004 after completing their inspection at Bonny Downs. Mr Fick described the visit to the defendants' home as "an extremely brief visit" because the plaintiffs had to return to Brisbane to pick up their children. He said that they met the defendants outside their home and that there was a conversation about the need to get a financial or production history for the farm, at which point Mrs Groves said that the information was available through Ben Cameron. Mrs Fick said that they briefly met with the Groves "just as an introduction", but could not recall whether or not they went inside the home.

[49] Neither Mr Cameron nor the defendants could recall such a meeting on Tuesday, 18 May 2004. It is possible that such a brief meeting occurred and that Mr Cameron and the defendants cannot recall it. Nothing material turns upon whether or not this meeting occurred.

[50] Relevantly, Mr Fick asked Ben Cameron to provide additional information in relation to the financial or production history of the farm. There was some delay on Mr Cameron's part in finding the documents. In a facsimile cover sheet sent to Mr Fick on 19 May 2004 he apologised about the delay in finding the documents in his office.

[51] Mr Fick says that after receiving the facsimile, and noting that there was not a lot of information, he sat down at home and started extrapolating figures. He did calculations based upon what he called a "normal year" and drought years, and made optimistic and pessimistic projections, based on what the defendants had done in the past. He described the production history document as "an incredibly flimsy document" that did not give very much information. He said that the meeting the next day was very important because he needed to ask a lot of questions and had had to satisfy himself at the meeting that the farm was going to give a good enough return to justify borrowing money. He said that he made a list of the questions that he needed to ask the defendants at the meeting the next day.

Was there a visit to Bonny Downs on 20 May 2004?

[52] Mr Fick says that he and his wife arrived at the defendants' home at about 9.30 am on 20 May 2004 with Ben Cameron. He denied having inspected Bonny Downs again prior to this meeting. He said that the meeting went for about four hours. Mrs Fick gave evidence to like effect. By contrast, Mr Cameron says that there was another inspection on the morning of 20 May before they went to the defendants' home. He estimates that the meeting at the defendants' home went for about an hour and a half. Mr Groves thought that the meeting started at around 11 o'clock, as did Mrs Groves.

[53] Mr Cameron's recollection is that a further inspection of Bonny Downs occurred on the morning of 20 May and it would have taken between an hour and an hour and a half to get around the whole property.

[54] I accept Mr Cameron's evidence that a second inspection occurred on 20 May. He impressed me as an honest witness who had no interest in recalling an inspection that did not take place. In addition, it seems improbable that the plaintiffs would not wish to undertake another inspection before meeting the defendants and

discussing aspects of the farm that they were interested in buying. Bonny Downs was in close proximity to the location of the meeting, and there was good reason to inspect it again if the plaintiffs wished to ask the defendants questions about it.

[55] The plaintiffs have an interest in understating the extent of their inspections of Bonny Downs prior to purchase and their knowledge of matters such as the completion of the avocado harvest. This is because the defendants assert that the plaintiffs relied, in part, on their own inspections and in the course of their inspections on 18 and 20 May 2004 observed that the 2004 avocado crop had been harvested. In their amended reply filed by leave on 19 February 2010 the defendants deny this allegation. I find that the plaintiffs did in fact observe that the 2004 avocado crop had been harvested.

Discussions between the parties on 20 May 2004

[56] The discussions that occurred at the defendants' home on 20 May 2004 are not relied upon as the occasion upon which negligent or misleading misrepresentations were made. However, what was said at the meeting is relevant to reliance. Unsurprisingly, the parties have different recollections about what was said. McClelland CJ in Equity observed:

> "... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then again often subconsciously, constructed. All this is a matter of ordinary human experience."[9]

[57] Some aspects of the meeting are not in contention. The meeting began with pleasantries, talk of football and the plaintiffs telling the defendants about their background in South Africa. Discussion ranged over a number of topics, including the proximity of the farm to Gympie and schools for the plaintiffs' children to attend, the plaintiffs' idea to develop the property as a farmstay and the scope to ride horses on it.

[58] At some stage discussion turned to the topic of irrigation. Mr Fick had an interest in this topic and, as matters transpired, imported irrigation equipment from South Africa and took other steps to irrigate the property. Mr Groves explained that the avocados were irrigated, but the macadamias were not. The effect of the drought on the farm was discussed. Mr Groves explained that irrigated macadamia trees that were not able to be irrigated during a drought would be more stressed than unirrigated trees.

[59] The past production of the farm was discussed. However, relatively little time was spent in relation to this topic, and more time was spent by Mr Fick discussing production costs, based upon the contents of the "Breakdown Production Costs" document.

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[9] *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

[60] Mr Fick says that at the meeting they discussed the projected avocado crop for 2004, and he asked "Is that still the case? Are you guys still projecting to get 3,000 trays at $16.40", to which the defendants said "Yes, that actually is correct". By contrast, the defendants say that there was no discussion about the 2004 avocado season, other than Mr Fick saying words to the effect that "The avocados are picked and gone aren't they?"

[61] I do not accept Mr Fick's evidence that he inquired whether the defendants were "still projecting to get 3,000 trays" for 2004 because he knew that the avocados had been harvested. The brochure for the auction that was to occur on 3 April 2004 referred to the sale of a crop ready to harvest, noted that the Hass and Fuerte varieties grown on the farm were the first on the market each year and that they would need to be picked "as soon as possible after auction date." Mr Fick had observed the avocado trees on his inspections, and must have observed that the avocados had been harvested. Any question by him about the avocados would not have been about a projected harvest in 2004. I accept the defendants' evidence that Mr Fick said words to the effect "The avocados are picked and gone aren't they?".

[62] I found Mr Fick's evidence on disputed questions of fact about what was said at the meeting unreliable. I conclude that there is a substantial element of reconstruction in his account of conversations about the farm's income. For example, he gave evidence that he asked the defendants whether the farm could net between $130,000 and $140,000 to which they both said "Yes, that's about right", as a result of which he felt that a figure of $120,000 was conservative. Whilst Mr Fick may have had in mind the income that he expected the farm to produce based upon his review of the brochure and the documents that had been facsimiled to him, I am not persuaded that these figures were discussed at the meeting. The defendants were prepared to discuss expected costs, but were understandably reluctant to predict future farm income. The written information provided by the defendants was intended to provide information about what the farm produced. However, as Mr Groves explained, his approach was not to give figures about future production because he did not know who was going to take over the farm and did not know what the weather was going to be like.

[63] I find that Mr Fick was inclined to exaggerate the role played by the production history document at the meeting. Notably, there was no reference to this document in the plaintiffs' original pleading.

[64] I found Mrs Fick's evidence on disputed questions of fact generally unconvincing, and involved an element of reconstruction, rather than actual recollection. She was not actively involved in asking questions at the meeting about the farm, its production and its expenses. It was Mr Fick and the defendants who discussed these matters in her presence.

[65] Mr Cameron was not actively involved in the discussions. He recalls discussions about a number of matters including Mrs Fick being quite interested in a tourism venture. He did not recall a lot of "serious discussion" about the tonnage and production from the farm. He recalls that the plaintiffs had the brochure and a couple of pages that he had faxed to them. He did not recall Mr Fick having a notebook for written questions. He recalls some discussion about running costs and how much these costs would be until the next harvest came in, which Mr Groves estimated to be about $90,000. He was "quite sure" that there was not a close line by line analysis of production or costs.

[66] Prior to the meeting Mr Cameron had indicated to the plaintiffs that they would have to pay $950,000 or more to buy the property. There was a discussion at the meeting about a 70 day settlement and a non-refundable $20,000 deposit. According to Mr Cameron, the Ficks offered $960,000 and there was "a done deal" before the meeting concluded. I do not accept the plaintiffs' submission that the Ficks made the decision to purchase in the car after leaving the farm.

[67] Mr Groves had a fair recollection of what was discussed at the meeting. I accept his evidence that discussion turned to the running costs, and that Mr Fick wanted to know how much money he would require before he received any income. I accept Mr Groves' recollection about Mr Fick's request for 70 days to pay. Mr Groves said words to the effect that there were nuts laying around and that Mr Fick would have to do something about them, to which Mr Fick responded "I'm too busy for that. I've got all this furniture to sell" (being a reference to his furniture business) and that Mr Fick said "You can have the nuts".

[68] I found that Mrs Groves had the most reliable recollection of what was discussed at the meeting. Based principally upon her evidence I reach the following conclusions on disputed questions of fact. I will not detail matters about which there is no dispute such as the discussions that occurred about the locality, education and other services in Gympie and the plaintiffs' interest in establishing farmstay and horse riding activities on the farm.

[69] There was a general discussion about every aspect of the farm and clarification about what was for sale. There was an offer of access to records of production and records in relation to soil and leaf analysis and fertiliser applications. The plaintiffs were encouraged to contact DPI and other persons who were familiar with the farm and its history to seek independent advice. There was an offer to put them in contact with persons who provided goods and services, including Mr Ironside who looked after insect control and fertilisers. The defendants explained how they marketed their avocados and macadamias. They offered to provide advice and assistance to the plaintiffs if they bought the farm, but indicated that they did not want a management job there.

[70] There was no in-depth or line-by-line discussion of the production history and the production costs documents. Mr Fick asked some questions in relation to them and Mr Groves answered most of them. The discussion moved fairly quickly through the facsimiled documents. Mr Fick said words to the effect "The avocados are picked and gone, aren't they?", to which Mr Groves responded that they were. Mr Groves also said something about the progress of the macadamia harvest. His evidence was that he said that 16 tonnes had already been harvested. Whilst it is possible that he gave such a figure, this probably is a reconstruction. Mrs Groves could not remember whether Mr Groves said 16 tonnes or not.

[71] Mr Fick said that he would like 70 days to settle, to which Mr Groves said "Well, what do you want to do about the crop? We can't just let it ruin on the ground for 70 days". Mr Fick said "I don't want the crop. I'm too busy". Mr Fick asked Mr Groves how much he would need "to get through to the next harvest", to which Mr Groves responded that $90,000 would probably be sufficient, depending on how much work Mr and Mrs Fick wanted to do.

[72] Mr Fick indicated that the plaintiffs were prepared to pay $960,000 and this offer was accepted.

[73] The essential terms were agreed at the meeting which lasted about two and a half hours from around 11 am to 1.30 pm.

[74] The facsimile transmission of the production history and production cost documents to the plaintiffs by Mr Cameron on 19 May 2004 did not clearly transmit some words and figures. These were written on the document in pen by Mrs Fick at some stage. Her recollection is that they were written by her at the meeting. There is reason to doubt her recollection in this regard. If, as Mr Fick said in his evidence, he relied upon the facsimiled document to calculate the financial viability of the farm, then it is surprising that the plaintiffs did not seek the missing information from Mr Cameron, particularly since the missing words included the estimated cost of production and harvest of NIS of $1.50 per kilogram and he wanted to be satisfied about the cost of production. It is possible that the words and figures that were not legible were supplied by Mr Cameron before the meeting with the defendants and were written by Mrs Fick at that time. Mrs Fick's recollection is that it was Mrs Groves, not Mr Cameron, who supplied the missing words and that Mrs Fick wrote them at the meeting on 20 May 2004. I find that Mrs Fick's recollection is probably unreliable in this regard.

[75] I do not accept Mr Fick's evidence that he was working off a list of notes of the things that he needed to talk to the defendants about and that Mrs Fick had a book that she was "busy making notes with". The defendants and Mr Cameron did not recall such a list or such a book being used. Mrs Fick recalled a list of questions being written in a book but did not give evidence about writing notes in a book at the meeting. No such book was disclosed. Mr Fick gave evidence that before the meeting he did calculations working on an average harvest of between 50 and 60 tonnes and used an average of 55. The book in which these calculations were performed was not disclosed. Mr Fick explained that the hardcover book which had all of his workings was later used as a petrol log book for the farm and that when he took over the farm he tore all of these pages out. It is remarkable that a businessman and qualified chartered accountant, who Mrs Fick describes as being very analytical, would not retain the pages in which such a feasibility exercise was recorded. In any event, I reject Mr Fick's evidence that Mrs Fick was busy making notes in a book during the meeting.

The reliance issue

[76] The plaintiffs contend that they relied upon the written information provided by the defendants, together with the defendants' confirmation about production, as a base or a starting point from which they could take over and manage the farm. They say that they relied on both the written representations and the oral representations in their decision to make an offer to purchase Bonny Downs. Their reliance on the facsimiled documents is evidenced by their request to Mr Cameron to supply the same before any meeting occurred. The plaintiffs had insufficient time to seek out other advice because the defendants were intending to make a decision by the afternoon of Friday, 21 May 2004 and there was another offer on the table.

[77] The defendants contest whether the plaintiffs relied upon the facsimiled documents as they allege. The plaintiffs' statement of claim dated 23 June 2005 and filed on 30 June 2005 contains no reference to the facsimiled document or the crop estimates contained in it. Instead, it pleaded oral and written representations which were said to include an estimated macadamia crop for 2004 of 55 to 60 tonnes NIS. This was the figure given in the brochure, not the revised figure contained in the production history document. The defendants referred to this production history document in

their defence filed on 10 August 2005. The unexplained omission to refer to the production history document in the plaintiffs' original statement of claim undermines the plaintiffs' case that they relied upon this document. At trial Mr Fick referred to the production history document as "an incredibly flimsy document" that did not give much information. The overall effect of his evidence was that the plaintiffs relied upon oral representations consisting of responses to questions asked by him at the meeting.

[78] The contractual acknowledgement in special condition 3 that the plaintiffs relied upon their own inspection, knowledge and inquiries and not on any representations made by or on behalf of the defendants is inconsistent with their plea of reliance. Whilst the terms of this contractual acknowledgement were pleaded, reference was not made to it in the defendants' written submissions on reliance. The contractual acknowledgment does not preclude a finding that the plaintiffs did in fact rely upon oral and written representations.

[79] Many factors influenced the plaintiffs' decision to purchase Bonny Downs. These included the lifestyle that the property offered them and their family. The plaintiffs had decided to go farming when they lived in South Africa and purchased a farm there. However, they migrated to Australia. Mr Fick had always wanted to be a farmer of orchards. He and Mrs Fick had ideas about Bonny Downs' potential as a farmstay. These and other factors influenced the purchase. Mr Fick had ideas about what he could do to change the farm. He had ideas about introducing additional irrigation.

[80] The existence of numerous factors that influenced the decision to purchase Bonny Downs does not mean that reliance was not placed upon the contents of the brochure and the facsimiled documents. The production history document contained information about past production upon which Mr Fick concluded that in a normal year "one could do about 60 tonnes (of macadamia) and 3,000 trays of avocados." This is what he says he "took out" of the meeting on 20 May 2004. He concluded that he would probably make about $140,000. Leaving some leeway he thought he would make $120,000 and, on this basis, was prepared to buy the farm.

[81] The reasonableness of adopting a tonnage of 60 tonnes when the expected yield for 2004 had been downgraded to 50 tonnes is questionable. The adoption of a figure of 60 tonnes is more consistent with the plaintiffs' originally pleaded case and reliance upon the brochure, rather than reliance upon the production history document. If Mr Fick relied upon the production history document, as he suggests, then a figure of 55 tonnes for a "normal year" would have been more conservative, being the average of the 61 tonnes in 2001 and the expected harvest of 50 tonnes in 2004, leaving out the drought years of 2002 and 2003. In any event, the issue is not the reasonableness of Mr Fick's optimistic projections, but whether he in fact relied upon the past production document in arriving at them and in deciding to buy the farm. I find that he relied upon the figures contained in it about the past production of macadamias and the projected harvest of 50 tonnes in 2004.

[82] As to the production history document with respect to avocado harvests, the plaintiffs were not misled by the statement about the projected avocado harvest for 2004 because by the time of the meeting on 20 May and at the time they entered the contract to purchase Bonny Downs they knew the avocados had been harvested, and the 2004 harvest was not a matter of projection. The plaintiffs were not interested in the 2004 avocado harvest, save insofar as it might be indicative of future yields, because they knew it had been harvested and they had no interest in acquiring it as

part of the purchase. They did not ask Mr Cameron or the defendants about it, save to confirm that the harvest of avocados had been completed.

[83] The 2004 avocado harvest was 1,769 trays, rather than the expected 3,000 trays because of the storm that occurred on 3 April 2004. This reduced harvest did not, however, affect the avocado trees' capacity to yield 3,000 trays or more in later years. The plaintiffs do not contend that the previously prepared projection for the 2004 avocado crop was in error or unreasonable at the time it was prepared and originally provided by the defendants to Raine & Horne. They do not contend that in May 2004 the avocado trees on Bonny Downs did not have the capacity to yield 3,000 or more trays in the future.[10]

[84] I find that the plaintiffs were not misled by the production history document's statement about the projected avocado crop for 2004 because by 20 May they knew the 2004 crop had been harvested and, in that regard, the document had been overtaken by events, namely the harvest that had taken place. To the extent that the production history document represented that Bonny Downs had the capacity to yield 3,000 trays of avocados the plaintiffs were not misled in this regard, nor do they claim to have been misled about the farm's capacity.

[85] The plaintiffs submissions acknowledge, as did Mr Fick in his evidence, that if he had been given a plausible reason for the avocado harvest in 2004 being approximately 1,700 trays, such as the impact of a storm, then this would not have affected the decision to purchase Bonny Downs.

[86] In summary, the fact that the 2004 avocado harvest was previously expected to be 3,000 trays did not mislead the plaintiffs, they did not rely upon the representation as an indication of the actual harvest that had been achieved in 2004 and any inaccuracy caused by the defendants and their agent not updating the production history document did not cause the plaintiffs any loss or damage.

[87] Otherwise the plaintiffs relied upon the production history and production costs documents that were facsimiled to them on 19 May 2004 in deciding to purchase Bonny Downs. More generally, and subject to the qualification with respect to the expected avocado harvest in 2004, the plaintiffs relied upon the planting representations and the production representations pleaded in paragraphs 13 and 14 of the FASOC, save to the extent that those representations were qualified by what was said at the meeting on 20 May 2004 and the plaintiffs' inspections of Bonny Downs on 18 and 20 May 2004. The facsimiled documents qualified the contents of the brochure in respect of the expected harvest of macadamias in 2004. The plaintiffs relied upon the estimate of 50 tonnes contained in the production history document that was facsimiled to them, not on the earlier estimate.

The number of "productive" macadamia trees

[88] The brochure's summary referred to "Approximately 6,000 macadamia/avocado highly productive trees".[11] Its contents were more specific about the number and variety of macadamia and avocado trees, and stated that there were a total of 5,500 macadamia trees "of varying age and maturity". The plaintiffs plead that these representations were misleading because:

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[10] The parties are agreed that the actual harvest in 2001 was 3,512 trays, not the 3,100 represented in the production history document.

[11] Neither this nor any other statement about the trees was pleaded to represent that each and every tree was highly productive.

(a) there were 5,468 macadamia nut trees on Bonny Downs;
(b) 3,202 of these trees were unproductive;
(c) 846 of these trees were unviable;
(d) there were "other macadamia nut trees".[12]

On this reckoning there were only 1,420 "other macadamia nut trees". The plaintiffs' case in this regard depends upon acceptance of definitions of "productive" and "unproductive" adopted by, and counts of "productive" trees undertaken by, Mr Vimpany. The plaintiffs' case on this aspect was not abandoned. But difficulties with it emerged during the trial which highlighted the plaintiffs' difficulty in sustaining the contention that there were only about 1,420 "productive" macadamia trees on Bonny Downs as at May 2004. The plaintiffs' written submissions on the issue of the number of trees simply was "that the health of the trees on Bonny Downs is as opined by Mr Ian Vimpany". However, the present issue is not specifically about the health of the trees, but the number that were productive.

[89] At this point it is unnecessary to address challenges by the defendants to the methodology adopted by Mr Vimpany in the count that he undertook in response to requests by the plaintiffs' former solicitors in October 2006 to assess the current crop and the productivity of each tree. A fundamental problem with this aspect of the plaintiffs' case is the absence of any accepted definition of what constitutes a "productive" tree. Mr Vimpany's initial report of March 2006 stated that his assessment of a productive tree "is one which for its age is producing nut to the value of at least 2 times its cost of maintenance". Mr Vimpany purported to reference this definition to the Macadamia Growers Handbook, but neither he nor the plaintiffs could point to such a definition appearing in it. In his later April 2008 report he adopted the following definitions:

> "**Productive** - Trees that are likely to or are carrying a crop of 5-10kgs NIS (Nut in Shell) and are healthy now or will be so in within 2 yrs. Healthy trees are dense, large and vigorous and include categories R0-R2. Trees uprooted by the storm are included ...
>
> **Unproductive** - Trees with none or < 5kg NIS. These are thin with leaf, have large amounts of dead wood but are likely to recover and become productive in 3-6yrs. They include categories R3-R6. Also included are dead and young trees ...
>
> **Non Viable** - These are shaded out interplants or old trees severely debilitated by poor roots, sunburn/canker. They were never good trees. ..."

[90] These definitions are contentious. On the basis of them, a tree that produced four kg NIS would not be "productive". The productivity or lack of productivity of trees may have an important bearing upon the next substantial issue that I am required to consider, namely whether the macadamia trees had the capacity to yield the estimated 50 tonnes NIS. However, in circumstances in which there is no generally-accepted definition of what constitutes a "productive" tree, I do not consider that the definitions adopted by Mr Vimpany provide a proper basis to

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12 FASOC para 19(a).

determine the number of productive macadamia nut trees that were on Bonny Downs in 2004.

[91] Mr Thompson, an agricultural consultant with extensive experience in the macadamia industry, explained:

> "There is no such clear definition within the macadamia industry of something being productive or unproductive. If there were – within a row 25 per cent of the trees, for example, might have less than five kilos – producing less than five kilos per tree, you would certainly harvest those, and even, depending on circumstances, if the whole orchard was producing less than five kilos on average per tree you would probably still harvest that."

[92] Other aspects of the evidence additionally persuade me to not accept this part of the plaintiffs' case. The first is the evidence of Mr Clarkson, a registered valuer, who inspected the farm on 10 June 2005 with Mr Fick for the purpose of providing a valuation report on the market value of the property as at 20 May 2004. Mr Fick instructed Mr Clarkson that there were "approximately 4,500 effective macadamia trees". This expression appears in Mr Clarkson's valuation report which was not disclosed in a timely fashion. Mr Fick said that it was not disclosed due to an error on the part of his former solicitor. Incidentally, the report was unhelpful to the plaintiffs' case on loss and damage since it valued the land and improvements as at 20 May 2004 at $830,000 exclusive of plant and equipment or $920,000 if plant and equipment was valued at the figure of $90,000.

[93] Mr Clarkson explained in his evidence that Mr Fick gave him the figure of 4,500 effective trees on the basis that about 200 trees were less than three years old and that there were 800 inter-planted trees, of which 700 were in poor condition. In short, Mr Fick reduced the total tree count of 5,500 by 1,000 to arrive at a figure of 4,500 "effective macadamia trees". These were the numbers that Mr Clarkson was asked to assume were "commercially viable". Although neither Mr Fick nor Mr Clarkson was a horticulturalist, Mr Fick had direct knowledge of the number of nut trees that were productive in the year after he acquired the farm, and Mr Clarkson did not suggest either in his report or in his evidence that the figure of "approximately 4,500 effective macadamia trees" was inconsistent with his own observations in June 2005. Mr Fick's instructions that there were 4,500 effective macadamia trees as at 20 May 2004 cannot be reconciled with the plaintiffs' case that there were only about 1,420 "productive" trees as at May 2004. Mr Fick acknowledged under cross-examination that the assertion in the amended pleading about the number of productive trees was based solely on Mr Vimpany's assessment, and that both in June 2005 and May 2008 he had a different view, namely that there were roughly 4,500 trees that looked to be good trees.

[94] Mr Vimpany's low count of "productive" trees is not supported by persons who inspected the property in 2004. These include Mr Ironside and Mr Thompson who each visited the property for the purpose of providing horticultural advice about the macadamia trees.

[95] Mr Kermond also inspected Bonny Downs in early 2004 for a potential purchaser. He described the macadamia trees as variable, but on the basis of his assessment capable of about 50 tonnes NIS. He observed that the trees were variable and, like one of his company's farms, there were "stronger areas and the not so strong areas". His main objection to recommending the purchase of Bonny Downs was that some

areas were very stony and required hand harvesting, whereas his advice was to mechanise as much as possible. It was this feature that stood out more than the condition of the trees. Mr Kermond's evidence is inconsistent with the proposition that less than 1,500 trees on the farm were "productive". The farm was also inspected by Mr Taylor, who made an offer to purchase. His evidence is also inconsistent with the plaintiffs' case concerning the number of productive trees on Bonny Downs.

[96] In summary, Mr Fick's instructions to Mr Cameron about the number of effective trees on Bonny Downs in May 2004 and the observations of persons who inspected Bonny Downs in 2004 are inconsistent with the plaintiffs' case about the number of trees that were productive.

[97] I conclude that the plaintiffs have failed to establish their case that Bonny Downs had more than 3,000 trees that were unproductive and 846 trees that were unviable. Expressed differently, the plaintiffs have failed to establish that in May 2004 Bonny Downs had fewer than 1,500 macadamia trees that were productive.

Did the macadamia trees have the capacity to yield the crops as represented?

[98] The plaintiffs contend with respect to representations about the macadamia production history and the estimated macadamia harvest for 2004 that:

(a) the macadamia trees on Bonny Downs did not have the capacity to yield the crops that were represented; and

(b) the defendants ought to have known that they did not have the capacity to yield the crops as represented.

The plaintiffs' pleaded case in paragraph 19(b) of the FASOC is in terms of the "other macadamia nut trees" which is defined in the pleading as the balance of the 5,468 trees after deducting 3,202 trees that were alleged to be unproductive and 846 trees that were alleged to be unviable. In other words, the pleaded case is that the balance of 1,420 productive trees did not have the capacity to yield crops, as represented. The plaintiffs' particulars in relation to the capacity to yield issue rely on Mr Vimpany's report and his definition of productive trees.[13] However, the case as conducted at trial about the capacity to yield crops was not so confined.

Sales and production records

[99] The plaintiffs sought to call into question sales records of the defendants. Their case on this aspect depended upon assumptions or conclusions about the number of bins that were mechanically harvested or hand-harvested on Bonny Downs and the approximate weight of NIS contained in each bin that was harvested. It is convenient to first address the defendants' case about sales records, bin numbers and bin weights.

[100] The defendants contend that records of the crop dispatched as NIS for processing by Stahmanns and Macadamia Exports Australia ("MEA") support the conclusion that Bonny Downs produced the quantity of NIS represented, once account is taken of the NIS harvested from The Nut Farm. They further contend that harvesting records of the number of bins harvested on Bonny Downs supports this conclusion.

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13 Para 3 of the Further and Better Particulars filed 25 July 2008.

[101] Stahmanns' documents record a total delivery of 57.212 tonnes in 2001.[14] The defendants delivered 21.3 tonnes NIS to MEA in 2001.[15] The total NIS delivered to the two processors in 2001 was approximately 78.5 tonnes.

[102] In 2002 the defendants sent 34.6 tonnes of NIS to Stahmanns. The defendants retained about one tonne of NIS in that year for direct retailing. The total for 2002 was therefore 35.6 tonnes.

[103] In 2003 the defendants sent 35.3 tonnes of NIS to Stahmanns for processing. The defendants also retained about one tonne of NIS in that year for direct retailing. Their total production for 2003 therefore was 36.3 tonnes.

[104] In 2004 the defendants sent 59.7 tonnes of NIS to Stahmanns for processing. They again retained about one tonne of NIS for direct retailing, making a total of 60.7 tonnes.

[105] The plaintiffs question whether the total quantity of NIS delivered by the defendants to the two processors came from their farm and, in particular, contend that there is a "lack of unambiguous evidence" relating to a delivery of 21.72 tonnes on 29 June 2001. They also point to the fact that the defendants did not disclose separate production records for Bonny Downs and The Nut Farm, that the harvest from both farms was combined and therefore it is possible that The Nut Farm produced more than that contended for by the defendants. I shall deal with each issue in turn.

[106] The plaintiffs speculate that the defendants purchased NIS from other growers or some other source that was delivered to the processors. This possibility was put to each defendant and rejected by them. There is no proper evidence to support such a suggestion. Documents evidencing the defendants' delivery of NIS to Stahmanns and MEA were provided as annexures to a statement of Ms Kate Groves dated 20 December 2005. The plaintiffs were on notice for more than four years prior to trial of the defendants' case in relation to quantities of NIS delivered from their farms. No former employee, farm worker, truck driver or other witness was called by the plaintiffs to support the theory that the defendants purchased NIS from another source and delivered it to a processor. No purchases of NIS are recorded in the defendants' books, either as a cost of goods purchased or as a "contra" item. If the defendants earned taxable income from the NIS that was processed it is surprising that the cost of purchases was not brought into account.

[107] The plaintiffs questioned in their written submissions a delivery of NIS that occurred on 29 June 2001. The plaintiffs' argument on this point depends upon assumptions about the number of bins that were mechanically harvested by Mr Hartwig, the number that were mechanically harvested by Mr Groves, the number that were hand-harvested and the average bin weight. To follow the plaintiffs' argument with respect to the particular delivery and the issues in the case in general about macadamia production on Bonny Downs it is necessary to canvass some of the evidence concerning harvesting practices and the weight of NIS in harvest bins.

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[14] Exhibit 68. The delivery dockets and tax invoices referred to in para 27.1 of the plaintiffs' submissions total 59.05 tonnes.

[15] Exhibit 73 records 21.41 tonnes whereas the delivery docket for 3 September records 21.3 tonnes. I adopt the lesser figure.

Harvesting practices

[108] About 80 per cent of the macadamia nut crop on Bonny Downs was mechanically harvested. The remaining 20 per cent was hand-picked in steeper and rockier areas. All of the macadamia trees from The Nut Farm were hand-picked. Nuts harvested from Bonny Downs and The Nut Farm were stored in a silo on Bonny Downs before being delivered to a processor. Mr Groves estimated the capacity of the silo to be about 20 tonnes.

[109] The mechanical harvesting on Bonny Downs was mainly undertaken by an employee, Mr Hartwig. Mr Hartwig undertook about 90 per cent of the machine harvesting, the balance being performed by Mr Groves. The parties are agreed that calculations of the estimated tonnage of crop should be on the basis that about 70 per cent of the nut harvest on Bonny Downs being by Mr Hartwig, 10 per cent by Mr Groves and the remaining 20 per cent being hand-picked.

[110] Mechanical harvesting involved the nut in its husk being picked up from the ground by the harvester, which was attached to a tractor. The steel harvester bin was filled and the nuts formed a pyramid shape at the point of entry into the harvester bin. Mr Hartwig would remove the pyramid effect by tipping the bin two or three times to ensure that the harvester bin was full. Once filled, the harvester bin would be emptied into a wooden crate known as a pick bin.

[111] In the case of hand-harvesting, Mr Hartwig would take a pick bin on the forks of a tractor to areas in which hand-picking took place. Nuts were picked into buckets. According to Ms Lyn Horton, who worked on a casual basis for the defendants and subsequently for the plaintiffs, there was a mark up to which the wooden bins would be filled. The nuts were picked into 20 litre buckets, and 24 of these buckets would go into the hand-picked bin. Individuals and contractors were paid by weight of nuts picked, and 24 buckets would fill the hand-picked bin to the required level. The hand-picked bins contained less than the machine-filled pick bins. Ms Horton's understanding was that there were eight hand-picked bins to the tonne.

[112] Informal records of the number of hand-picked bins were kept in a notebook to enable the defendants to pay contractors each fortnight. However, these documents were not retained save for some notes recorded in a small green pocket notebook for 2004.

[113] Mr Hartwig kept daily timesheets and recorded on them the number of wooden pick bins that were filled by mechanically harvested nuts. They record that he mechanically harvested 209 bins in 2001 and 105 bins in 2002. There is no record of the bins harvested in 2003, but like 2002 it was a drought year.

[114] The small, green field book contains notes in Ms Horton's handwriting. It includes a summary for 2004 in her handwriting of both mechanically harvested and hand-picked bins. It records a total of 189 mechanically harvested bins and 58 hand-picked bins.

Bin weight

[115] Mr Groves operated on the basis that there were between four and five mechanically harvested bins to the tonne and eight hand-picked bins to the tonne.

[116] On 10 May 2006 the plaintiffs conducted a weighing process in the presence of Mr Perissinotto, a chartered accountant. A summary of what Mr Perissinotto

observed appears in Exhibit 99. The harvested nuts in husk were emptied into a pick bin, a photograph of which is Attachment 5 to Mr Perissinotto's report. The contents of the pick bin were dehusked. The NIS was weighted and totalled 204.5 kilograms. On a later date, the contents of a pick bin that was not filled as much were dehusked and the NIS weighed 161 kilograms. Mr Fick advised Mr Perissinotto that this pick bin was typical of the quantity of nuts usually stored in a pick bin.

[117] Mr Hartwig reviewed the photographs attached to Mr Perissinotto's letter and said that the photograph, Attachment 5, was a fair representation of the usual or ordinary level to which he would fill a pick bin by emptying the harvester bin into it. The photograph, Attachment 11, showed an amount of nuts that was "well short" of the amount of nuts that Mr Hartwig usually carried in the pick bins. Mr Hartwig's evidence about this and other aspects of his mechanical harvesting of Bonny Downs was not challenged by cross-examination, and I accept it. His timesheets are a reliable record of the total number of pick bins that were filled by him by the mechanical harvesting process that he described. In conjunction with the weight reported by Mr Perissinotto of the NIS derived from the pick bin photographed in Attachment 5, I conclude that the pick bins filled by Mr Hartwig produced, on average, more than 200 kilograms NIS.

[118] The defendants also point to a document, Exhibit 93, prepared by Mr Fick that records the number of bins harvested in 2005, 2006 and 2007. There is evidence that the harvests from Bonny Downs in each of those years were 27 tonnes, 37 tonnes and 30 tonnes. Based on these figures, the defendants submit that the average bin weight of NIS in 2006 was 209 kilograms per bin, and that the average bin weight of NIS in 2007 was 215 kilograms. The plaintiffs submit that it is uncontroversial that the number of bins recorded on Mr Fick's document for 2006 and 2007 refers to the steel harvester bin, and note that the document and its reference to steel bins were not the subject of cross-examination. The parties' competing arguments about this document and its implications for bin weights assume that the document records the number of steel harvest bins of nuts that Mr Fick harvested in 2006 and 2007. However, I am reluctant to proceed on that assumption. The document appears to record both the number of mechanically harvested and hand-picked bins. No explanation is given as to how and why the hand-picked nuts would be collected in the steel bin that was used for mechanical harvesting. The original of the document was not produced, a photocopy of it being included in the Bundle of Documents for the trial and admitted in that form without objection. After the document assumed importance in the parties' supplementary written submissions, I requested that the original of the document be provided and become an exhibit. The solicitors for the plaintiffs advised that they had made inquiries to locate the original, however, neither they nor their client held the original, and were uncertain as to its whereabouts. Because the document was not the subject of cross-examination, no explanation was given by Mr Fick about how and why the word "(steel)" came to be written on the document in some places after a number of bins were totalled. Reliance upon the document without evidence about its compilation is potentially unfair to Mr Fick even where the parties are content to proceed on a common assumption.

[119] I have major reservations about the reliability of Mr Fick's evidence in general, and about his use of bins in particular. He gave evidence that all but two of the wooden pick bins were disposed of because they were "dilapidated" and were "absolute rubbish". Yet a number of them appear in photographs taken in April 2006. One of

the wooden pick bins contains a large quantity of nuts. Four others appear to be in reasonable condition. Another is upturned, with one piece of wood requiring a nail or a screw to put it back in place. Mr Perissinotto witnessed wooden pick bins being used in May and June 2006. The evidence is in an unsatisfactory state about the extent to which wooden pick bins were used in 2006 for at least hand-picked nuts.

[120] I shall adopt the assumption shared by the parties that Exhibit 93 records the number of steel harvester bins that were harvested from Bonny Downs in 2006 and 2007. Mr Hartwig's evidence is that, except for two or three pick bins that were smaller, the steel harvester bin and the pick bins were of similar size and capacity. His oral evidence was that the steel bin could hold "slightly more" than the wooden pick bin into which it was emptied. Mr Hartwig's evidence did not suggest that it was ever much more.

[121] The plaintiffs contend in supplementary submissions that the bin weights of 209 kg and 215 kg in 2006 and 2007 respectively submitted by the defendants cannot be accepted as being the average weight of nut in the wooden pick bins, but are the average weight of nut in a full steel harvester bin. In response, the defendants make essentially two submissions. The first is that on the basis of Mr Fick's evidence about his harvesting practices compared to those of Mr Hartwig, Mr Fick could not have put more nuts into the steel harvester bin than did Mr Hartwig, and that, in any case, the limiting factor was that the nuts would continuously strike the fan when the bin was full. This submission is not contested and I accept it. The second submission is that Mr Hartwig's evidence was to the effect that a full steel harvester bin held approximately the same amount of nuts as a wooden pick bin. In response the plaintiffs submit that Mr Hartwig's reference to "slightly more" is not necessarily confined to a few extra nuts, and could conceivably be between 10 per cent and 20 per cent more. I do not accept the plaintiffs' interpretation of Mr Hartwig's evidence. I understood his oral evidence as indicating that a full steel harvester bin *could* hold "slightly more" than the wooden pick bin, but did not always do so. His evidence did not suggest that it was in the order of 10 per cent or 20 per cent more. There is no evidence that it could hold a significantly greater capacity than the wooden pick bin. In any case, it would not be efficient to routinely overfill the steel harvester bin, leaving a substantial quantity of nuts in the bottom of it after the wooden pick bin was filled, with these excess nuts being taken back to the harvesting operation rather than being emptied into another wooden pick bin.

[122] I accept the defendants' submission which is based upon the shared assumption that the bin numbers referred to in Exhibit 93 are to the steel harvester bin. I accept that the weight of nuts contained in the steel harvester bin was almost the same as the weight of nuts contained in the wooden pick bin into which it was emptied. The plaintiffs' documents therefore support the conclusion that the steel harvester bin collected an average of 209 kg NIS in 2006 and an average of 215 kg NIS in 2007, and that this weight was very close to the weight of NIS in the wooden pick bins that were filled by Mr Hartwig when he undertook mechanical harvesting for the defendants. The records pointed to by the defendants support the conclusion that a wooden pick bin filled by Mr Hartwig was capable of holding the equivalent of 215 kilograms NIS. This equates to 4.65 pick bins to a tonne of NIS.

[123] Although I accept the defendants' submissions about the weight of NIS harvested by Mr Fick, it is sufficient to conclude on the basis of Mr Hartwig's evidence and the weighing process witnessed by Mr Perissinotto, that Mr Hartwig filled pick bins

with more than the equivalent of 200 kilograms NIS. A weight of 215 kilograms NIS equates to 4.65 pick bins. A weight of 210 kilograms NIS equates to 4.76 pick bins. A weight of 205 kilograms equates to 4.88 bins to a tonne.

[124] The evidence supports Mr Groves' rule of thumb that it took between four and five pick bins to produce a tonne of NIS. Mathematical precision in these matters is impossible. I conclude that it took approximately 4.75 of the pick bins filled by Mr Hartwig to produce a tonne of NIS.

Production on Bonny Downs based on bin weights

[125] In arriving at an estimate of the tonnes of NIS produced by Bonny Downs I shall adopt the percentages accepted by the parties, namely that Mr Hartwig's mechanical harvesting constituted 70 per cent of the harvest, Mr Groves' mechanical harvesting 10 per cent and the remaining 20 per cent was hand-picked. Based on these figures, in 2001 Mr Hartwig's 209 bins produced the equivalent of 44 tonnes NIS, Mr Groves' mechanical harvesting produced approximately 6.3 tonnes and the balance that was hand-picked produced 12.6 tonnes. On this basis, the total production for Bonny Downs in 2001 would have been 62.9 tonnes. This is slightly more than the 61 tonnes estimated by the defendants in the production history document.

[126] I return to the plaintiffs' submissions that seek to cast doubt on there having been a delivery of 21.72 tonnes on 29 June 2001. The plaintiffs' submissions proceed on the basis of a number of assumptions about the contribution from The Nut Farm and Bonny Downs to a first delivery that occurred on 22 May 2001 and a second delivery on 29 June 2001. They also involve assumptions about the mix of hand and mechanically harvested bins. There is no basis in the evidence to assume that the 80-20 ratio of mechanically harvested bins to hand-picked bins applied with respect to the nuts comprising particular deliveries. It was a ratio in respect of production over an entire season. I am not persuaded by the plaintiffs' submissions, particularly because the assumptions upon which they are based are not reliably established by evidence. The 103 bins that were harvested by Mr Hartwig by May 2001 could, in themselves, account for the 21.62 tonnes that were delivered to Stahmanns on 22 May 2001, assuming an average bin weight of 210 kilograms. Assuming a figure of 205 kilograms, the balance of approximately .5 of a tonne might have been supplied by Mr Groves' mechanical harvesting or a small amount of hand-harvesting. I am not persuaded by the plaintiffs' arguments that seek to call into question the delivery of 21.7 tonnes on 29 June 2001. I accept the defendants' evidence that the quantities of NIS delivered to Stahmanns and MEA came from Bonny Downs and The Nut Farm and are recorded in the delivery dockets and tax invoices that appear in the evidence. These records indicate a total delivery in 2001 from both farms of about 78.5 tonnes of NIS.

[127] In 2002 the defendants delivered 34.6 tonnes NIS to Stahmanns and retained about one tonne for direct retailing. That the 2002 harvest was about a half of the 2001 harvest is reflected both in the records of the tonnes of NIS delivered and in Mr Hartwig's records of the number of bins that he mechanically harvested. In 2002 it was 105 bins compared to 209 in 2001. Bonny Downs would have produced about half its 2001 production of 62.9 tonnes, or 31.5 tonnes.

[128] I have previously found that in 2003 the total production from both farms was 36.3 tonnes, and that in 2004 their total production was 60.7 tonnes.

Relative production – Bonny Downs and The Nut Farm

[129] The plaintiffs contend that the evidence, and the lack of disclosed, separate production records for Bonny Downs and The Nut Farm, make it possible that The Nut Farm produced more than that asserted by the defendants. They submit that the production attributed by the defendants to Bonny Downs and The Nut Farm seems to have no relation to the proximity of the two farms and the fact that the same person farmed them. The plaintiffs, however, acknowledge that the comparison of trees and potential historical production between the farms is not a simple task. One reason is that the trees on the farms were planted at different times. Although there is general consensus about the age at which trees reach their maximum production potential, the plaintiffs acknowledge that "the exact amount produced is affected by variable factors such as the health of the tree (which may be tied back to factors such as soil quality, farm management practices, climatic conditions and irrigation), the particular varietal type and the concentration of planting per hectare."

[130] The relative production of Bonny Downs and The Nut Farm in the relevant years cannot be derived by a simple comparison between the number of trees on each property. The plaintiffs' management of Bonny Downs commenced in 1991 with 2,500 established trees that had been neglected by the previous owner of the property. New tree plantings occurred on both The Nut Farm and Bonny Downs in the 1990's. These new trees were planted amongst existing banana plantations and the trees that were planted on The Nut Farm did not produce until 1999.

[131] Calculations based upon industry averages are problematic. Estimating relative yields is complicated by the fact that different varieties were planted on The Nut Farm to those that were planted on Bonny Downs and different varieties have different characteristics, including their productivity during droughts. Mr Ironside, who worked as an independent consultant to macadamia growers, including Mr and Mrs Groves, noted that the varieties 344 and 741 were amongst the worst affected by the prolonged drought that occurred in 2002 and 2003. He observed that, in common with other farms in the Gympie region, the 344 and 741 trees that were planted on the defendants' home farm produced very little, compared with the previous seasons. Mr Ironside reported this in 2005, and his evidence was that these trees were in shallow, dry soils and were adversely impacted by the severe drought.

[132] I have found that the total tonnage delivered to processors from Bonny Downs and The Nut Farm in 2001 was approximately 78.5 tonnes. I have found that approximately 63 tonnes were harvested from Bonny Downs. The balance of approximately 15.5 tonnes came from The Nut Farm. This constitutes about 20 per cent of the total production. The Nut Farm had about 35 per cent of the total number of trees. However, given the ages of the trees on The Nut Farm compared to the ages of the trees on Bonny Downs, a figure of 20 per cent does not seem anomalous.

[133] I accept Mr Groves' evidence concerning the poor yields from The Nut Farm in the drought years of 2002 and 2003. It was based upon his personal inspection of the trees during those years, his management of the properties and his payment of contract workers for hand-picking nuts from those properties. The plaintiffs invite a comparison between aerial photographs taken in 2002 which indicate that both Bonny Downs and The Nut Farm had areas with "strong canopies and areas of less canopy such as on the House Block". The interpretation of these photographs

comes with its difficulties. The apparent strength of the canopy in different blocks may depend upon the space between trees or even the extent to which trees which appear to be close together are on a steep hillside. In any case, the apparently strong canopy on some blocks on The Nut Farm does not necessarily mean that the trees on those blocks were highly productive.

[134] Rather than rely upon interpretation of aerial photographs, I prefer to rely upon the observations of witnesses who visited the two farms in the relevant years. In addition to Mr Groves, who closely observed each farm and the development of nuts in particular areas, the farms were visited by Mr Ironside who had occasion to collect nuts on both properties. Mr Ironside's focus was not specifically on yield, let alone estimating the likely harvest from each property. However, he visited each property and observed very little crop in certain areas. He particularly observed that the 741 variety had very little crop whereas, at the same time, the A38 varieties growing nearby were holding obvious crop. Mr Ironside's evidence was that tree canopy was not necessarily indicative of production. Trees with large canopies may produce very little crop. According to Mr Ironside, in determining productivity the amount of canopy may not be as important as the variety. The A38 does not have a big canopy, but can be a prolific producer of nuts, while the 741 variety growing nearby with a huge canopy can produce very little crop. Mr Ironside's impressions of the relative productivity of Bonny Downs and The Nut Farm at the time of the drought were derived, in part, from the fact that his horticultural work normally required him to take 10 nuts off a tree to look for eggs of the nut borer. He was able to take 10 nuts off a tree on Bonny Downs easily but found it very difficult to find nuts on the 344 and 741 varieties that grew on The Nut Farm. He deduced that the trees on The Nut Farm were less productive than those on Bonny Downs. His observations in the field enabled him to conclude that there were very few nuts on the 341 and 741 varieties on The Nut Farm and more nuts on the trees on Bonny Downs. He was not able to say whether the orchards on The Nut Farm yielded a particular percentage compared to those on Bonny Downs. However, he observed the effect of the drought on certain blocks in The Nut Farm, particularly Cherry's Block which he described as a very steep block with shallow soil. He observed that most of the soil had washed off.

[135] The plaintiffs have not persuaded me that The Nut Farm produced substantially more than that asserted by the defendants.

Ms Horton's evidence

[136] In March 2005 Mr Fick asked Ms Horton about the result of the 2004 macadamia nut harvest from Bonny Downs. Ms Horton's evidence[16] is that in response to this request she located records for various blocks and added up the bins for each block. However she says that, in error, she divided the total number of bins by eight, using the figure of eight to the tonne that applied to hand-picked bins. Ms Horton's recollection is that she told Mr Fick that Bonny Downs produced about 36 tonnes in total. She recalls giving him a note that had the total number of bins on it, without distinguishing between hand-picked and harvested bins. The figures that she arrived at were the result of going through time books and other pieces of paper. She wrote details down in the green field book and was able to remember doing so as she was sitting at the end of the Groves' kitchen table. The Groves were overseas at the time.

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[16] Exhibit 98 being witness statements dated 3 June 2006 and 1 June 2008 admitted pursuant to s 92 of the *Evidence Act*. Ms Horton died prior to the trial.

[137] Mr Fick says that the document that was given to him by Ms Horton is the document which became Exhibit 20. It records 18 tonnes for the South Block, 10½ tonnes for The Flat and eight tonnes for the House Block. These figures total 36.5 tonnes. There is independent evidence of Ms Horton having given Mr Fick a document at about this time in the evidence of Mr Laird, but he did not see the contents of the document. In her witness statement Ms Horton said that she had no recollection of ever providing the document that became Exhibit 20 as a record of the 2004 production. However, her lack of recollection does not mean that this did not occur. Ms Horton may have given Mr Fick more than one document at about this time. She may have given Mr Fick a summary of total bin numbers for 2004, and also given him the document that became Exhibit 20.

[138] When the defendants returned from overseas Ms Horton mentioned to Mr Groves that while they were away Mr Fick had asked her what had been harvested. She informed Mr Groves that she took the figures out of the green book and told Mr Fick that it was "eight to the tonne". According to Mr Groves, Ms Horton and he located the green book where she had written down the totals, and that Ms Horton realised her error in using a figure of eight to the tonne. Her handwritten totals of machine harvested and hand-picked harvest for 2004, which were written in pencil, were supplemented with writing in pen. The total number of 189 mechanically harvested bins when divided by 4.5 resulted in 42 tonnes, and the 58 hand-picked bins when divided by eight produced 7.25 tonnes.

[139] Mr Groves speculates that the document that became Exhibit 20 and records tonnages of 18 tonnes for the South Block, 10½ tonnes for The Flat and eight tonnes for the House Block (a total of 36.5 tonnes) recorded what had been harvested after an initial harvest of 16 tonnes had been delivered. I am not prepared to act on this speculation.

[140] Because of her death, Ms Horton was not available to be cross-examined about the notes that were made by her. The total of 36.5 tonnes derived from Exhibit 20 cannot be easily reconciled with the bin numbers recorded in pencil in the green book. If Ms Horton had divided the total number of bins (both mechanically harvested and hand-harvested) of 247 by eight she would have arrived at a figure of approximately 31.

[141] I take into account, in assessing the weight of Ms Horton's evidence, that she was not cross-examined. Her evidence about harvesting practices was not contradicted by any other witness, and I am prepared to accept it. I am not willing to reject her evidence that in March 2005 she went through time books and other documents that she could find and wrote down the number of bins that were mechanically harvested and hand-picked on the South Block, The Flat and the House Block in 2004. I consider that her pencil-written totals as recorded in March 2005 are a reasonably accurate record of the 2004 harvest of macadamia nuts from Bonny Downs, based upon records that were available to Ms Horton in March 2005. If the total number of mechanically harvested bins of 189 is divided by 4.5 it results in 42 tonnes of mechanically harvested NIS. The 58 hand-picked bins when divided by eight results in 7.25 tonnes. The total tonnage for 2004 on this basis is about 49.25 tonnes. Adopting a more conservative figure of 4.75 mechanically harvested bins to the tonne, there were approximately 39.8 tonnes produced from mechanical harvesting and approximately 47 tonnes in total.

[142] I consider that this is a reasonably reliable indication of the tonnes of NIS produced by Bonny Downs in 2004. Relevantly, the defendants estimated that there would be

a harvest in 2004 of 50 tonnes. A harvest of 47 tonnes would be six per cent less than this estimate. No submission was made, nor could be made, that a prediction which was six per cent less than the actual production was unreasonable.

Findings – production achieved by the defendants

[143] Based on the harvesting records, Mr Hartwig's uncontested evidence, the evidence of Ms Horton, the evidence of the weight of NIS in pick bins and the number of bins required to produce a tonne of NIS, I conclude that Bonny Downs produced approximately 63 tonnes NIS in 2001, approximately 31.5 tonnes in 2002 and approximately 47 tonnes in 2004. The absence of harvesting records for 2003 makes a finding in respect of this year more difficult. However, it was probably in a similar order to the harvest in 2002, another drought year. The total production from both farms in 2003 was 0.7 tonnes more than in 2002. On this basis the total production from Bonny Downs would have been about 32 tonnes.

[144] These conclusions support the defendants' estimate of past production in 2001, 2002 and 2003 and their estimate of the expected harvest in 2004.

Year	Defendants' Estimate	Finding
2001	61	63
2002	32	31.5
2003	31	32
2004	50	47

Production achieved by the plaintiffs

[145] The plaintiffs' written submissions do not place reliance upon the yields that the plaintiffs achieved in 2005 and later years as proof that in 2004 and in earlier years Bonny Downs did not have the capacity to yield crops, as represented. There are good reasons for this. Mr Fick neglected the farm immediately after he purchased it. He was busy attending to other matters. Mr Fick did not attend to farm maintenance in advance of the 2005 harvest. He permitted grass to grow in the orchard and delayed spraying it. According to Mr Hartwig, the dead grass was still standing and was tangled with the fingers of the mechanical harvester and a lot of difficulty was encountered in harvesting because of the long grass. The plaintiffs did not employ enough labour to properly maintain the farm and to harvest the potential crop in 2005. The production costs document indicated that the equivalent of 1.6 full time employees was required. During Mr Fick's absence in late 2004 there was no full time employee to attend to day to day tasks. Mr Fick was inexperienced in the operation of the farm and disregarded advice given to him by Mr Groves about spraying. He similarly ignored advice from Mr Horton about aspects of farm management. General maintenance of the farm deteriorated. This was observed by people who worked on it, such as Mr Garrett, and those who visited it, such as Mr Taylor who noticed a deterioration in its condition compared to its state in early 2004. The poor maintenance of the macadamia orchard by early 2005, with nuts not being harvested from the ground, may have led to an increase in incursions by pigs. Large pigs are capable of consuming substantial quantities of nuts.

[146] In 2006 Mr Fick abandoned part of the House Block and later removed trees from it.

[147] Mr Fick conceded that he did not get his timing right in his first year. Rather than focus his attention on maintaining existing farming practices, Mr Fick embarked on new activities. He introduced irrigation systems. He planted new orchards, including avocado plants in an area that Mr Groves advised him not to. He arranged the renovation of the Queenslander. He built a dam in a location that Mr Groves warned him would not hold water. As matters transpired, the dam did not hold water.

[148] Mr Fick's poor management practices in 2005 meant that Bonny Downs did not achieve the macadamia harvest that it was capable of achieving that year. Mr Fick's farming practices also partly explain poor yields in later years. However, poor yields were also attributable to the effect of a storm in December 2006 and drought in more recent years. Yields on a farm like Bonny Downs can vary significantly from one year to the next due to drought, disease from insects, different standards of maintenance, damaging storms and other factors. The decline in the macadamia harvest after the plaintiffs purchased Bonny Downs does not prove that the defendants' representations about harvests between 2001 and 2004 were false or unreasonable. The decline in 2005 may have convinced Mr Fick that he had been misled about past production. A more objective view is that the decline was due to his failure to maintain the orchard and to harvest it in accordance with the standards achieved by the defendants.

Observations of Bonny Downs

[149] Mr Thompson, an agricultural consultant, who visited Bonny Downs noticed areas of "die back" throughout Bonny Downs. In 2004 he visited the property on behalf of a potential purchaser. There was significant die back in some parts of the plantation, but Mr Thompson did not suggest that it affected most trees. The trees on Bonny Downs showed similar symptoms to trees on another property that the company for which Mr Thompson worked managed. The aftermath of the drought was a probable explanation for these symptoms, according to Mr Thompson.

[150] Mr Thompson said that an average, well-managed orchard with good soil and irrigation in the Gympie area would probably return in the range of 13-15 kilograms per tree, and with good management it could go up to 20 kilograms per tree. If the orchard was not irrigated the yield would vary substantially, depending upon the season. In a very good rainfall year it could go as high as 15 kilograms. In a poor year it could be half or even less than that.

[151] Mr Thompson conducted soil and leaf tests on Bonny Downs. His evidence was that macadamias require free-draining soil, and that the orchards on Bonny Downs were free-draining. Mr Thompson did not indicate that there were poor soils on Bonny Downs, and counsel for the plaintiffs declined the opportunity to put this to him when the issue arose during cross-examination. I accept Mr Thompson's description of his observations of Bonny Downs in 2002 and 2004.

[152] Mr Ironside is an entomologist by training and was engaged by the defendants to monitor their plantations both on Bonny Downs and The Nut Farm after 1996. When he saw Bonny Downs in 1996 it was "on the road towards rehabilitation and full production". He says that the defendants turned the Bonny Downs orchard around and it showed continual improvement. Following a meeting on 14 July 2004 with Mr Fick, he reported on what might be the cause of die back in a tree that was

close to the gate on the South Block. Mr Ironside acknowledged that die back was not limited to only this tree, and stated that it is a problem that occurs in most orchards. Mr Ironside's advice of 20 July 2004, his subsequent reports and his oral evidence do not suggest that Bonny Downs was beset by widespread die back or pest infestation. On the contrary, his evidence is that the macadamia orchards on Bonny Downs were carefully looked after and maintained and the extent of die back on it was similar to other macadamia farms.

Mr Vimpany's opinions

[153] The plaintiffs' expert, Mr Vimpany, did not observe Bonny Downs until he first visited it in November 2005 to collect soil and leaf samples to formulate a fertiliser program. His advice was on areas within his expertise and he was not asked to look, and did not look, at the extent to which problems with Bonny Downs in November 2005 were due to insects and poor pest management practices by the plaintiffs.

[154] Once engaged to provide a report for use in these proceedings, Mr Vimpany opined in March 2006 that it was "obvious that the trees had suffered from drought, disease, a lack of fertiliser and neglect over the past 5 years".

[155] Mr Vimpany is a highly experienced consultant to the macadamia industry with special expertise in relation to plant nutrition, soil analysis, site selection and related issues. However, the opinions expressed in his March 2006 report and in his later reports about the number of productive trees on Bonny Downs at various dates and their productive capacity do not command acceptance. His opinions are inconsistent with the observations of persons who, unlike Mr Vimpany, saw Bonny Downs when the defendants farmed it before mid-2004, including experts on macadamias such as Mr Ironside, Mr Thompson and Mr Kermond.

[156] Regrettably, Mr Vimpany's opinions about Bonny Downs and its productivity in 2004 and earlier years were not informed by inquiry into its history. Extraordinarily, he was given to understand that he was "not allowed" to speak to the defendants or visit their farm. This is despite the defendants' solicitors communicating such an offer to the plaintiffs' former solicitors, Le Mass Solicitors, on 22 March 2007. The fact that Mr Vimpany was misinformed of the opportunity to speak to the defendants and to inspect their farm calls into question the worth of his declaration that he had made all inquiries that he considered appropriate and that there was no other readily ascertainable additional facts that would assist him to reach a more reliable conclusion.

[157] Whilst prepared to opine that Bonny Downs was not properly fertilised during the defendants' period of ownership, Mr Vimpany did not inquire whether there were soil and leaf analyses from this period available for him to consider and he did not inquire about the farm's history. Apparently he did not speak to the consultants who conducted those tests and gave advice.

[158] On the basis of plant analysis reports prepared on 1 October 2004 (some months after Bonny Downs had been acquired by the plaintiffs) which recorded nitrogen levels of 1.1, 1.1 and 1.3, Mr Vimpany concluded that the nitrogen levels were "grossly deficient". Leaving to one side that the Department of Primary Industries' Macadamia Handbook at the time recommended leaf nitrogen levels of between 1.3 and 1.4, the 1 October 2004 report of the samples taken on 30 September 2004 provided a "snapshot" on a date prior to the regular application of fertiliser.

Without more, it did not provide a proper basis to conclude what the plant nitrogen levels were during the defendants' operation of the farm. Any conclusion in that regard depended on the extent that fertiliser was applied in the months before 30 September 2004 and how much rain there had been since the trees were last fertilised, matters about which Mr Vimpany did not inquire. If there had been little or no rain in the preceding two months then a leaf analysis a few months earlier would have been "very similar". In circumstances in which Mr Vimpany could not say when the farm was last fertilised by the defendants or the plaintiffs and how much rain there had been since that date, the plant leaf analysis provided an inadequate basis to conclude that the farm had not been properly fertilised during the relevant years of the defendants' ownership.

[159] When Mr Vimpany inspected Bonny Downs in January 2006 he saw what appeared to him to be symptoms of Roundup damage, and he added in his March 2006 report the possibility of chemical damage as one of the causes of the trees on Bonny Downs being "non-productive". Mr Vimpany confirmed in his evidence that he was not positively asserting that the trees had been affected by Roundup, only that it appeared to be Roundup damage. He could not say when the damage occurred. The damage detected by him may have been from other causes that were outside his area of expertise to detect. He acknowledged that insect damage, particularly thrip damage, can manifest itself in the same way as Roundup damage, and that it is very difficult to identify as thrip damage except when there is a "new flush".

[160] In expressing opinions about the condition of trees on Bonny Downs and their productivity in 2004 and earlier years, Mr Vimpany did not take account of changes in farming practices after the plaintiffs' acquisition of the farm and Mr Fick's neglect of its operations due to other commitments during the early period of the plaintiffs' ownership. Mr Groves gave evidence, which was not challenged, about Mr Fick's spraying techniques and his refusal to follow advice in that regard and other aspects of Mr Fick's farm management. This evidence leaves open the distinct possibility that Mr Fick's management of the farm after July 2004 led to an increase in insect damage to the macadamias and a decline in their condition and productivity.

[161] Mr Vimpany conceded in cross-examination that he could not rule out the possibility that the condition of the orchard when he inspected it in November 2005 and early 2006 represented a decline in its condition since May 2004.

[162] The fact that Mr Vimpany did not see Bonny Downs in 2004 does not preclude a finding that the die back that he later saw was due to a lack of fertiliser and that Bonny Downs had not been adequately fertilised in 2004 and earlier years. Mr Thompson observed die back in some trees throughout Bonny Downs in 2004, and Mr Ironside gave Mr Fick advice about die back that was observed in some trees on 14 July 2004. However, the evidence, including the observations of Mr Thompson and Mr Ironside in 2004, does not support the conclusion that there was extensive die back in 2004. The die back that Mr Vimpany observed in 2005 and later years may have been from a number of possible causes.

[163] Mr Vimpany's opinions about Bonny Downs' productivity (or lack thereof) are not supported by production records which support the conclusion that Bonny Downs produced substantially more nuts than Mr Vimpany contends it was capable of producing in 2004 and earlier years.

[164] Mr Vimpany's view that "you cannot economically produce macadamias in the Gympie district without irrigation" is not supported by evidence which indicates that the defendants did so, at least during non-drought years, and the evidence of other persons experienced in the macadamia industry who gave active consideration to recommending the purchase of Bonny Downs in 2004 based upon their assessment of its productivity.

[165] Mr Vimpany's opinion that Bonny Downs was unlikely to have ever produced greater than 10 kilograms NIS cannot be readily reconciled with production records for Bonny Downs and supplies to processors from Bonny Downs and The Nut Farm. These include a supply of 60.268 tonnes to Stahmanns in 1999. Mr Vimpany's evidence could not really assist on the issue of what proportion of the nuts supplied in that year or any other might have been supplied from The Nut Farm because he never inspected The Nut Farm.

[166] Mr Vimpany's opinions were not informed by discussions with experts such as Mr Ironside, who inspected Bonny Downs and The Nut Farm prior to its sale. His reports do not suggest that he sought to inform himself of the state of the orchard as observed by Mr Ironside or Mr Thompson.

[167] In summary, Mr Vimpany's conclusions about the condition of trees on Bonny Downs in 2004 and their productivity were largely based on assumptions that he failed to verify by adequate inquiry and which are not proven by acceptable evidence.

Mr Vimpany's 2007 assessment

[168] Mr Vimpany's opinions about the condition and productivity of Bonny Downs in 2004 were based, in part, on his "tree-count" and assessment of Bonny Downs' productivity in 2007. Leaving aside Mr Vimpany's personal definition of what constitutes a "productive tree", other matters call into question the reliability of his 2007 assessment as a guide to Bonny Downs' productivity in 2007, let alone its productivity in 2004.

[169] His April 2007 assessment of productive capacity depended upon an assessment of the nut in each tree at the time of carrying out his inspection and the health of the tree. Such an assessment would not take into account that some macadamia trees had previously dropped mature nuts. Dr Drew, a consultant to the plaintiffs, observed in an inspection on 5 March 2007 that the 660 variety were dropping mature nuts. Mr Vimpany counted 991 of the 660 variety trees on Bonny Downs.

[170] A storm in December 2006 caused substantial damage to the orchard. Mr Vimpany reported that the December 2006 storm damaged many trees, and this damage also appears in photographs. The December 2006 storm was apt to cause loss of macadamia flower and nuts. On 18 December 2006 Dr Drew observed that there had been widespread wind damage and nut drop. The plaintiffs' real estate agent advised in 2009, presumably on the basis of information from the plaintiffs, that the crop for 2007 was 30 tonnes and noted "a wild storm damaged a number of trees and reduced production for the year". Mr Vimpany's assessment did not take adequate account of the quantity of nuts that had been stripped from the trees in the December 2006 storm. For instance, if in April 2007 he saw a tree that had effectively been stripped of nuts because of the December 2006 storm he probably would not have counted it as a productive tree because he would not have been able to see any nut in it.

[171] The 2007 assessment of Bonny Downs appears to underestimate the actual production achieved by it in 2007 and 2008. Mr Vimpany concluded that there were 1,420 productive trees and 3,202 unproductive trees. If one was to adopt his definition of the maximum production of each tree, namely 10 kilograms for a "productive" tree and five kilograms for an "unproductive" one, the production of Bonny Downs was about this figure in 2007 notwithstanding the impact of the severe storm in 2006. If an average figure is adopted (7.5 kilograms for "productive' trees and 2.5 kilograms for "unproductive" trees) then the yield according to Mr Vimpany's figures would be about 18.6 tonnes, far less than Bonny Downs' actual production. In 2008 the farm produced 32 tonnes in a year that was affected by drought and after the number of trees had been reduced.

[172] I conclude that Mr Vimpany's 2007 assessment of Bonny Downs' productivity does not provide a reliable basis to infer what Bonny Downs production was in 2004 and earlier years.

Mr Vimpany's evidence

[173] Mr Vimpany was not willing to make concessions under cross-examination when concessions were warranted. For example, he refused to accept that two photographs were of the same tree when this was obvious to any reasonable observer. He earlier described the first photograph as depicting poor regrowth, and the second photograph as reasonably healthy regrowth. Rather than concede an understandable error, Mr Vimpany denied that the photographs were of the same tree.

[174] Mr Vimpany concluded that the average production figures for the Gympie district indicated that the trees on Bonny Downs were unlikely to have ever produced yields greater than 10 kilograms NIS, even in 1999. Mr Vimpany presumably was not shown production records which recorded the trees on Bonny Downs yielding 11.88 kilograms per tree in 1994. Although 1994 may have been a productive year compared to others, it was during a period when the defendants were at an early stage in rehabilitating the neglected macadamia orchard that they purchased in 1991. I accept Mr Ironside's evidence that over the following years the defendants' work resulted in continuous improvement to the property.

[175] Mr Vimpany's definition of a "productive" tree is contentious. His determination of which trees were "productive" according to this definition at the time of his inspection in early 2007 is called into doubt for the reasons earlier given. His conclusion that there were only 1,420 productive trees does not accord with the evidence of other witnesses who observed Bonny Downs. The production records to which I have earlier referred support the conclusion that in 2001 Bonny Downs produced almost 63 tonnes of NIS. Such a result cannot be reconciled with Mr Vimpany's count of productive and unproductive trees or his opinions about the capacity of Bonny Downs.

[176] I find that Mr Vimpany, having reached the conclusion that he did in March 2006 about the history of Bonny Downs in the previous five years without adequate inquiry into that history, was reluctant to alter that opinion. I am unwilling to accept the conclusions drawn by Mr Vimpany in his report.

The capacity of Bonny Downs in the relevant years

[177] I prefer to base my findings concerning the condition and productive capacity of macadamia trees on Bonny Downs upon the observations of experts and lay witnesses who observed the property before its sale in mid-2004. These witnesses include Mr Ironside, Mr Thomson, Mr Kermond and persons who worked on the farm like Ms Horton. Ms Horton's recollection is that in the good years, particularly after the rain in 1999, Bonny Downs was producing 50 or 60 tonnes. Mr Kermond, the principal of Macadamia Exports Australia Pty Ltd managed six macadamia orchards on its behalf. He inspected Bonny Downs in the first half of 2004 as a potential farm for one of his managed farm clients. He formed the opinion that it was capable of producing about 50 tonnes. He assessed the tree condition to be fair, within normal variability for orchards in the area, and concluded that the productivity of the trees was in the order of 10 to 15 kilograms per tree.

[178] I find that in May 2004 Bonny Downs had almost 5,500 macadamia trees. These included about 400 inter-planted trees which yielded little or no nuts because of the canopy of nearby trees. Included in the macadamia nut trees were approximately 3,000 trees which had been planted between 1993 and 1996. Some of these had not reached full capacity by 2004. However, most of the macadamia trees on Bonny Downs were productive and many of them were capable of producing in excess of 10 kilograms NIS in a normal year that was unaffected by drought, damaging storms or other significantly adverse events. Bonny Downs was capable after 2001 of producing in excess of 50 tonnes NIS in a normal year. It produced more than 60 tonnes NIS in 2001. It produced substantially less in the 2002 and 2003 drought years. It produced approximately 47 tonnes NIS in 2004.

[179] Its productive capacity, the records of its actual production and the records of the NIS supplied from the defendants' farms support the conclusion that it was capable of producing the crops that were represented in the production history document.

[180] I conclude that the plaintiffs have failed to establish their case with respect to the second aspect of "the falsity issues". They have failed to prove that the macadamia trees on Bonny Downs did not have the capacity to yield the crops that were represented.[17]

[181] They have also failed to establish that the defendants knew or ought to have known that the macadamia trees did not have the capacity to yield the crops that were represented.[18] The defendants believed that Bonny Downs had produced in the past the approximate quantities of macadamia nuts that they represented. It is convenient to address their knowledge and belief in the capacity of Bonny Downs to produce 50 tonnes in 2004 in discussing the next issue.

The reasonableness of representations as to future matters

[182] In various parts of their pleading, the plaintiffs raise issues about whether the defendants had reasonable grounds for making representations as to future matters. In the context of their common law claim, representations about the future production of avocados and macadamia nuts are described collectively as "future representations" and the plaintiffs allege that the defendants did not have reasonable

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17 FASOC para 19(b)(i).

18 FASOc para 19(b)(ii).

grounds for making them.[19] The plaintiffs also allege that the defendants knew or ought to have known that the production representations that they made "were not reasonably indicative of the actual production or *production estimates* for Bonny Downs".[20] In the context of their *TPA* claim, the representations in the production history document with respect to the 2004 macadamia production and the 2004 avocado production are alleged to have been representations as to future matters, and the defendants are alleged to have had no reasonable basis for making them.[21] Section 51A of the *TPA* is invoked. The effect of s 51A in the present case is that the defendants' representations in the production history document with respect to future matters shall be taken to be misleading if they did not have reasonable grounds for making them. Section 51A(2) has the effect that unless the defendants adduce evidence to the contrary, they shall be deemed not to have had reasonable grounds for making a representation with respect to a future matter.

[183] I have previously summarised the defendants' pleaded case to the effect that their estimates were fair and reasonable at the time they were made and that they had reasonable grounds for making them, based upon the then condition of the macadamia and avocado trees and the defendants' experience as farmers and in estimating the seasonal production from Bonny Downs. I take account of the altered onus of proof with respect to future matters created by s 51A of the *TPA*. My findings in relation to the reasonableness of representations with respect to future matters for the purpose of determining both the plaintiffs' common law and *TPA* claims follow. Separate consideration is required of representations about avocado and macadamia harvests.

Representations about the 2004 and 2005 avocado harvests

[184] The 2004 avocado harvest has previously been addressed by me in relation to the issue of reliance and whether the plaintiffs were in fact misled by the line in the production history document that stated that the 2004 avocado harvest was not yet completed and was projected to exceed 3,000 trays.

[185] There is no issue in dispute that the 2004 avocado harvest was completed prior to 20 May 2004, yielded 1,769 trays of avocados and the defendants knew this. At the time the statement about the 2004 avocado harvest was prepared, the defendants had reasonable grounds for making it. There is evidence that up to and including 2001 the farm had generally made 3,000 trays "very comfortably". The 2001 harvest exceeded 3,500 trays. Afterward the trees were pruned because they had become too high. As a result the 2002 harvest was reduced. By 2003 it was improving, and the defendants were confident that the trees would produce 3,000 or more trays for 2004. The "Breakdown of macadamia and avocado trees" page in the brochure referred to the fact that the avocado trees were heavily pruned in 2003 to facilitate better management and that as a result "the projected crop for 2005 is much higher".

[186] In the light of the past production of avocados and the evidence adduced by the defendants about the basis for their estimates for 2004 and 2005, I find that the defendants had reasonable grounds for making the statements they did at the times the brochure and the production history document were prepared. The plaintiffs do not contend otherwise. Neither document was revised in the weeks following the

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19 FASOC para 16.
20 FASOC para 20, emphasis added.
21 FASOC para 30-34.

auction. The evidence suggests that copies of the production history document were prepared and provided to Raine & Horne prior to the auction, and that when they ran out of copies, or could not locate a copy, another copy was faxed by Mrs Groves to Raine & Horne on 8 April 2004. This was the copy that was located by Mr Cameron and faxed to the plaintiffs on 19 May 2004.

[187] The defendants would not have had reasonable grounds on 19 or 20 May 2004 to represent that the projected harvest for 2004 was 3,000 trays because, as they admit, they knew the avocados had been harvested and produced substantially less than this figure. The production history document that was facsimiled to the plaintiffs on 19 May had the capacity to mislead them about a projected harvest of avocados. However, it did not do so. The plaintiffs knew prior to meeting the defendants on 20 May 2004 that the avocados had been harvested. They confirmed this fact when Mr Fick spoke to the defendants that day. The 2004 avocado crop was no longer a projected harvest or a future matter. The plaintiffs did not inquire about, and the defendants did not state, how many trays had been produced by the harvest that had been completed. As I have previously found, the plaintiffs did not rely upon the earlier written prediction about what the 2004 avocado harvest was expected to be as an indication of the actual harvest that had been achieved in 2004. They were not misled by it. Further, any inaccuracy caused by the defendants and their agent in not updating the production history document did not cause the plaintiffs any loss or damage.

Representations about the 2004 macadamia harvest

[188] The second aspect of the plaintiffs' case concerning representations as to future matters is whether they knew or ought to have known that the 2004 macadamia production representations were not reasonable because they knew or ought to have known that the productive macadamia trees did not have the capacity to yield crops as represented.[22]

[189] Mr Groves estimated the 2004 macadamia crop that Bonny Downs would yield based on the amount of nuts on the trees. By 2004 he was experienced in predicting such yields. His initial estimate was for a crop of 55 to 60 tonnes because he thought it would be a normal season crop after the drought years of 2002 and 2003. However, as the season progressed and the farm missed late summer rain, it became apparent to Mr Groves that not all the nuts would fill out properly and he reduced his estimate to approximately 50 tonnes. I accept Mr Groves' evidence concerning his estimates for the 2004 macadamia crop, and consider that he had reasonable grounds for making them.

[190] As matters transpired, Bonny Downs produced approximately 47 tonnes, not the 50 tonnes that Mr Groves had predicted. The reasonableness of his earlier estimate is not undermined by this outcome. It amounts to a variation of six per cent on his estimate, which is not unreasonable given the vagaries of weather and other factors that may affect yield.

[191] In summary, the defendants had reasonable grounds for making the representations that they did with respect to the 2004 macadamia harvest.

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[22] FASOC paras 16(g)(ii); 33(b).

The duty of care issue

[192] The plaintiffs rely upon the principle that a person may be under a duty to take reasonable care to not cause economic loss by a misstatement. Such a duty of care may arise where:

(a) the person must realise or the circumstances are such that he or she ought to realise that the recipient intends to act upon the information or advice with respect to some matter of business or serious consequence; and

(b) the circumstances are such that it is reasonable in all the circumstances to rely upon the information and advice.[23]

The reasonableness of the plaintiffs' reliance may be determined by:

(a) the nature of the subject matter, and the occasion for the interchange;

(b) the identity and relative position of the parties as regards knowledge, actual or potential; and

(c) the relevant capacity to form or exercise judgment.

The fact that a defendant has special expertise or knowledge is not, in itself, sufficient to establish reasonable reliance. A duty of care may be imposed by law, however, where a statement is made with the intention of inducing the plaintiff to act in a particular way, especially where the defendant gives an unqualified response to a request for information.

[193] In this case the plaintiffs contend that the circumstances give rise to a duty of care because the defendants knew or ought to have known that the plaintiffs would rely upon the representations. This is supported by the fact that the plaintiffs requested the relevant financial information in order to determine the income-generating capacity of the farm, and the defendants were aware that the plaintiffs did not have an opportunity to carry out their own investigations to determine the farm's production history, production capacity and the number of trees on it. The plaintiffs further submit that it was reasonable in all the circumstances for them to rely on the defendants' representations about a such serious business transaction because of the difference between the knowledge and experience of the parties in relation to Bonny Downs and the limited, potential capacity of the plaintiffs to form an opinion about the number of trees, the farm's production history or its production capacity. The plaintiffs also submit that the occasion of the interchange made it necessary for them to rely on the defendants in circumstances in which the plaintiffs had only a very short period in which to decide whether or not to offer to purchase Bonny Downs. Given the lack of available time, the plaintiffs did not have an opportunity to carry out their own investigations to check the correctness of the defendants' representations or to obtain expert reports about the farm's production capacity or other aspects of it prior to making an offer.

[194] I generally accept the plaintiffs' submissions. The difference between the knowledge and expertise of the parties concerning Bonny Downs was huge. The defendants were intimately involved in its operation and had knowledge about it that the plaintiffs lacked and could not reasonably acquire, even with the benefit of

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[23] *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 16-17 [47].

time. One qualification to this is that the plaintiffs might have sought additional advice from an expert about the condition of the trees and the estimated production capacity of the farm. Whilst the plaintiffs were offered the opportunity to inspect the records upon which the defendants had prepared the documents upon which the plaintiffs relied, these documents did not include detailed production records over a number of years in respect of each farm. The opportunity to conduct any kind of due diligence exercise was limited by the information that was available, and by time if the plaintiffs were to submit an offer by the Friday afternoon. The plaintiffs had limited experience in farming, no experience in farming macadamias or avocados and no past experience with Bonny Downs.

[195] The plaintiffs submit that they were vulnerable to suffer harm if the representations made to them by the defendants were false because in the short time frame within which they were required to make a decision about whether to purchase Bonny Downs they were not able to verify the defendants' representations.

[196] The issue of vulnerability is engaged by the defendants who rely upon *Perre v Apand*[24] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[25] to submit that the plaintiffs were not "vulnerable" because they chose to contract on terms that provided that there were no warranties. In *Woolcock Street Investments*[26] Gleeson CJ, Gummow, Hayne and Heydon JJ explained that "vulnerability" in the context of a duty of care to avoid economic loss 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 a 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 consequences of loss on the defendant. In cases such as *Perre* the plaintiffs could do nothing to protect themselves from the economic consequences of the defendant's negligence. In other cases, a plaintiff may not be "vulnerable" in the relevant sense because it can protect itself in contract.

[197] The extent to which the defendants might have protected themselves in contract was not explored in oral evidence.[27] Special condition 3 provides some evidence that the defendants were not prepared to give a warranty about the state and condition of Bonny Downs. There is no evidence that they would have been prepared to warrant the accuracy of the information provided by them, however, the confidence expressed by Mr Groves in the reasonableness of the defendants' estimates in relation to past production and expected production in 2004 leaves open the distinct possibility that the defendants may have been prepared to include as a special condition a clause to the effect that they had taken reasonable care in arriving at such figures. Such a clause may have been qualified by the kinds of expressions that appeared in the brochure to the effect that the estimates were based upon the defendants' production records and projections, and were an indication only that had been prepared in the absence of separate accounting between farms. If the defendants had declined to include a suitably-qualified clause to the effect that they had taken reasonable care in arriving at the production figures, then the plaintiffs were not entirely vulnerable to the consequences of the defendants' want of reasonable care. They had the choice to not make an offer to purchase, or to offer a

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24 (1999) 198 CLR 180 at 225-230 [118] – [129].
25 (2004) 216 CLR 515 at 530-531 [23] and 548-549 [80].
26 Ibid at [23].
27 cf *WoolcockStreet Investments* (supra) at 533 [31], 552-553 [95].

reduced price that reflected the defendants' refusal to either warrant the figures or to warrant that they had taken reasonable care in arriving at them.

[198] Accordingly, I am not persuaded that the plaintiffs were unable to protect themselves from the loss that would arise from the defendants' failure to take reasonable care.

[199] The defendants rely upon the occasion of the interchange being a negotiation between vendor and purchaser where the familiar maxim *caveat emptor* is the primary rule.[28] The contract marks out the extent to which that rule has been modified as between the parties, and special condition 3 made clear that no warranties were given in relation to the condition of the property. However, this is not a case in which the vendors remained silent concerning the production of the farm and its capacity to yield crops.[29] In this case the defendants, by their agent, provided information about the farm's productivity in response to a request by the plaintiffs and the defendants knew that the plaintiffs were relying upon the documents that their agent had supplied. The fact that the duty of care contended for arises in the context of a negotiation between vendor and purchaser does not preclude the imposition of a duty of care in circumstances in which representations concerning the farm's capacity were made by the vendors or their agent.[30]

[200] The matters that detract from a finding that a duty of care should be imposed is the issue of vulnerability that I have addressed, and the effect of special condition 3 by which the plaintiffs acknowledged that they not rely upon representations.

[201] As to special condition 3, the plaintiffs submit that such a "no reliance" clause does not protect the defendants from liability for negligent misstatement. They cite a sentence from *Leda Holdings Pty Ltd v Oraka Pty Ltd*[31] that any attempt to rely upon such a provision in the circumstances was conduct which "the common law should not accept". Contrary to the plaintiffs' submissions, this statement was not made by the Full Court of the Federal Court. It appears in the judgment of Beaumont J in the context of Leda's cross-claim. Beaumont J did not suggest that the clause should not be taken into account on the issue of reliance in determining Oraka's claim. His Honour accepted that it should. The other members of the Court, Branson and Emmett JJ, ordered that the appeal be allowed and had regard to the relevant clause in overturning the finding made by the trial judge that reliance had been placed upon certain statements. A "no reliance" clause such as special condition 3 cannot be ignored. The present issue is its implications on liability for negligent misstatement. Special condition 3 is not in the form of a contractual bar to the plaintiffs' claim for negligent misstatement. Instead, it constitutes a contractual acknowledgment of the absence of reliance. It does not preclude a finding of reliance once the clause is weighed against other evidence that the plaintiffs did in fact rely upon the representations.[32]

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28 *Donne Place Pty Ltd v Conan* [2005] QCA 481 at [35].

29 Of course, in some circumstances a party may be liable for negligent misstatement in respect of a failure to provide information or advice: Balkin & Davis *Law of Torts* 4th ed [13.34-13.35].

30 cf *Rawlinson & Brown Pty Ltd v Witham* (1995) Aust Torts Reports 81-341, being a case of representations made by the vendor's agent about the capacity of a bore on a farming property.

31 (1998) ANZ Conv R 582.

32 *Nella v Kingia Pty Ltd* (1989) ATPR (Digest) 46-046. In the context of liability under the *TPA* see *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR (Digest) 46-048 at 53,146 and 53,161; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 321[31] and 348[130].

[202] A defendant may make it clear, by the use of appropriate words, that a statement is not such as might reasonably be relied upon by the plaintiff, and hence negative the common law liability which would otherwise accrue.[33]

[203] The plaintiffs are contractually bound by special condition 3, and must accept the consequences that flow from its inclusion in the contract. The documents upon which the plaintiffs relied, particularly the production history document, did not include a notice or disclaimer to the same effect as special condition 3. There is no evidence that they read the condition. Still, vendors such as the defendants include "no reliance" clauses in their contracts for good reason and courts should not ignore such clauses. Purchasers who fail to read such a clause do so at their peril. The presence of special condition 3 severely undermines the contention that the plaintiffs acted in reasonable reliance upon the pleaded representations.

[204] Ultimately, such a contractual acknowledgment of no reliance needs to be weighed with the evidence of actual reliance. I find that the plaintiffs did in fact rely upon the representations. The issue is whether such reliance was reasonable in circumstances in which they contracted on the basis that they did not rely upon such a representation.

[205] The contractual acknowledgment is an important circumstance against a finding that the plaintiffs' reliance was reasonable in all the circumstances. However, the circumstances in which the representations were made were such as to indicate to the defendants that the plaintiffs intended to rely upon the representations in the brochure and the production history document, save to the extent that these were qualified or contradicted by what was discussed at the meeting. The defendants intended that the plaintiffs should rely upon the information and advice contained in the brochures. The disparity between the knowledge and expertise of the parties in relation to the matters contained in the representations and the limited opportunity that the plaintiffs had to verify the representations are circumstances which strongly favour the imposition of a duty of care. I consider that in all the circumstances it was reasonable for the plaintiffs to rely upon the representations, notwithstanding the "no reliance" clause in the contract and the fact that the plaintiffs did not seek to protect their position by negotiating a contractual provision to the effect that the defendants had taken reasonable care in making the representations.

[206] I find that the defendants owed a duty to take reasonable care in making the representations upon which the plaintiffs relied.

The breach of duty of care issue

[207] A person who is under a duty of care in making statements should take reasonable care to ensure that the statement is correct. The standard of care depends upon the circumstances, including the knowledge and experience that might reasonably be expected of a person in the defendant's position. In this case the circumstances include the defendants' knowledge and experience in farming Bonny Downs and in estimating yields from it. The circumstances also include the fact that the crops were farmed by one business entity and the defendants did not retain separate historical production records for each farm. Despite these limitations on the defendants' ability to estimate past and future production, the defendants knew that

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[33] Balkin & Davis (supra) [13.36]; Gillies "Actions for Breach of s 52 and for Negligent Misstatement at Common Law: Some Observations on their Relative Competitiveness" (2003) 11 *Competition & Consumer Law Journal* 43 at 58-59.

the plaintiffs would rely upon the production figures in estimating the farm's income-producing capacity and in determining a price to offer. The plaintiffs were encouraged to make an offer before the Friday afternoon and the absence of comprehensive production records meant they were not in a position to easily verify the past production from Bonny Downs. They were offered access to the sales and other records upon which the defendants relied in formulating their estimates. The circumstances were those of a vendor/purchaser relationship, not a paid consultant or expert adviser. The written materials provided to the plaintiffs made it clear that the estimates provided in the brochure were estimates and that the defendants had never kept separate figures for each farm beyond actual production each year. However, the circumstances, including the vastly superior experience of the defendants in relation to farming and their knowledge of the past production of Bonny Downs and its capacity to yield crops in the future, required a reasonably high standard of care in the circumstances.

[208] I consider that the defendants exercised reasonable care in making the production estimates that they did. The plaintiffs' case on breach of duty particularly asserts that the defendants "made no, or alternatively, no reasonable, attempt to accurately identify production for Bonny Downs".[34] I am not persuaded of this. I accept the defendants' evidence concerning the manner in which they prepared the production estimates that were included in the brochure and the estimates of past and future production that appeared in the production history document. In particular, I consider that the defendants made a reasonable attempt to recall and estimate the quantities of macadamia nut produced by The Nut Farm and to deduct it from the total of the amount of nuts supplied to processors each year. My findings in relation to the past production of Bonny Downs in 2001, 2002 and 2003 support the conclusion that the defendants' estimates were reasonably accurate. Their predictions of the 2004 harvest were reasonable at the time they were made.

[209] The plaintiffs have not proved that the defendants breached any duty to take reasonable care in making the statements.

The causation issue

[210] I have previously found that the plaintiffs were not induced to purchase Bonny Downs by any inaccuracy in the production history document about the 2004 avocado harvest. They were not misled by that statement and did not rely upon it as an indication of the actual harvest that had been achieved in 2004. In addition, I have found that any inaccuracy caused by the defendants and their agent not updating the production history document in respect of the 2004 avocado crop did not cause the plaintiffs any loss or damage. If the defendants had informed the plaintiffs of the loss of crop then this would not have affected their decision to purchase Bonny Downs.

[211] I have addressed the respects in which the plaintiffs otherwise plead that the planting representations and the production representations were incorrect or misleading. I have found that the plaintiffs have failed to establish their claim for negligent misstatement and failed to establish a contravention of the *TPA*. In the circumstances, it is strictly unnecessary to further address the causation issues of whether the alleged negligent misstatement or the alleged contravention of the *TPA* caused the plaintiffs loss and damage.

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[34] FASOC para 27(c).

[212] The plaintiffs' case was conducted as a "no transaction" case, namely had the negligent statements not been made and if the *TPA* had not been contravened then they would not have purchased Bonny Downs. Instead they would have continued to look for another farm or business to purchase.[35]

[213] The cross-examination of the plaintiffs did not explore the likely course of events if statements about past or predicted production of macadamias had been different. For example, the plaintiffs were not cross-examined about their likely actions if represented yields had been slightly less, and the extent to which any reduction in the income which Mr Fick expected to derive would have affected his preparedness to purchase the farm. It was not suggested to him that a relatively small reduction in expected income, whilst reducing his "leeway", would not have stopped him offering to purchase Bonny Downs. Similarly, the defendants did not give evidence about their preparedness to accept a price of $950,000 or less upon such a scenario. The defendants did not defend the case on the basis that a sale for a different price would have occurred if the representations had been different.

The loss and damage issue

[214] Because the plaintiffs have not established either cause of action, it is strictly unnecessary to determine whether they suffered loss and damage in the amount alleged. However, I shall do so. The measure of damages for negligent misstatement is governed by the general principle that the assessment of damages in tort is to compensate the injured party to the extent necessary to put it in the position that would have existed if the tort had not been committed. A similar principle of awarding reliance losses applies in respect of a contravention of s 52 of the *TPA*.[36] The conventional measure of compensation for a contravention of s 52 of the *TPA* in a case such as this is the difference between the real value of the property at the time of the purchase and what the plaintiffs paid for it.[37] The remedies available under the *TPA* are not to be constrained by reference to the common law. However, the parties in these proceedings did not contend that a different approach to the measure of damages or the date for assessment of loss should be adopted.

The real value of Bonny Downs

[215] The value of Bonny Downs was the subject of evidence from two valuers. As previously noted, Mr Clarkson inspected the property on 10 June 2005 at the request of Mr Fick and provided a valuation report which assessed its market value as at 20 May 2004. He did so on the basis that the improvements included a total of 5,500 macadamia trees, but that there were only 4,500 "effective macadamia trees" because Mr Fick estimated about 200 trees were less than three years old and a further 800 were inter-planted trees with 700 of these being in poor condition. Mr Clarkson had regard to sales evidence. He had regard to the quality of the trees, noted that they were not irrigated, and observed that this resulted in a number being in a state of lesser growth than would be expected of a tree of 12 years of age. He took account of DPI advice that the cost of establishing a commercial fruiting tree to full maturity and production is between $50 and $120. He valued the land at $9,000 per hectare TFW, being an industry term for "treated, fenced and watered" so as to thereby value the land and the trees upon it. The value derived was $729,720 to

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35 Plaintiffs' Further and Better Particulars filed 15 December 2009.

36 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1.

37 *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at 49-50 [252] - [254]; *HTW Valuers (Central Qld) Pty Ltd v Astonland -Pty Ltd* (2004) 217 CLR 640 at 656-657 [35] – [36].

which he added his assessed value of the improvements, being the dwelling home and sheds, which totalled $100,000. For practical purposes he valued Bonny Downs at $830,000 excluding plant and equipment.

[216] Mr Fuller prepared a retrospective valuation for the purposes of these proceedings. He accepted the engagement to prepare such a report in July 2009, having inspected Bonny Downs on 16 June 2009 and also on 8 August 2006. Mr Fuller's valuation approach was to separately value the land to which he added the value of trees, and then the value of structural improvements. The different approaches of Mr Clarkson and Mr Fuller are each acceptable approaches to the valuation of a farm such as Bonny Downs. A significant difference between them is that Mr Fuller was specifically instructed to assume that the number and condition of the avocado and macadamia trees present on Bonny Downs as at 20 May 2004 was as is set out in the affidavit of Mr Vimpany sworn on 21 May 2008. As a result, Mr Fuller adopted Mr Vimpany's calculation of tree numbers and Mr Vimpany's advice about trees that were "unviable". A total of 1,980 trees were not valued by Mr Fuller, based on the report of Mr Vimpany. In addition, Mr Fuller spoke to Mr Vimpany who informed him that the tables in his report were based on the date of Mr Vimpany's inspection in 2006 and that in Mr Vimpany's opinion the health of the trees would have been inferior as at the date of purchase. Mr Vimpany also advised Mr Fuller that works undertaken by Mr Fick in the two years between purchase and his inspection would have improved the health of the trees. In accordance with these instructions, Mr Fuller arrived at the following added value of the macadamia trees:

127 mature, healthy trees @ $70/tree	$8,890
376 require 3 years to full production @ $45/tree	$16,740
752 require 4 years to full production @ $35/tree	$26,320
1142 require 5 years to full production @ $25/tree	$28,550

[217] I have earlier found that Mr Vimpany underestimated the number of productive trees and that his report was not an accurate description of the condition and productivity of the macadamia trees as at 20 May 2004. As a consequence, Mr Fuller's valuation report undervalued the macadamia trees on Bonny Downs as at 20 May 2004. This was the result of the express instructions that he was given to base his assessment on the affidavit of Mr Vimpany.

[218] Mr Clarkson and Mr Fuller each approached the valuation exercise requested of them in a professional and competent manner. Whilst each adopted a different approach to the valuation of land and trees, each arrived at a similar value for the land content. There was a difference between them on a point of detail concerning the area of a comparable sale, but nothing of consequence turns on that and I am not in a position to determine the correct area. Mr Fuller did not agree with Mr Clarkson's valuation because of the tree numbers adopted by Mr Clarkson, but undertook an exercise in using Mr Fuller's rates per hectare and improvement figures. The result was $5,000 more than Mr Clarkson. The method of separately valuing trees adopted by Mr Fuller was not based upon an assessment of the productivity of the trees. Instead, a value was assessed for trees depending upon their health and age.

[219] Mr Clarkson arrived at a value of $729,720 by applying a value of $9,000 per hectare. This was on the basis of excluding 1,000 trees. In arriving at his valuation including the approximately 4,500 "effective macadamia trees" Mr Clarkson applied a figure of around $70 or $75 per tree, which he explained was at the lower

end of the $50 to $120 range. On this basis, a separate valuation of land and trees by Mr Clarkson would be along the following lines:

Valuation	$730,000
Value of trees – 4,500 x $70	$315,000
Value of land without trees	$415,000

This serves to demonstrate the closeness of Mr Clarkson's value of land without trees to that adopted by Mr Fuller, which was $405,400. A calculation using a value of $75 per tree would result in a land value without trees of $392,500.

[220] I do not propose to refer to the sales evidence relied upon by each valuer. Mr Fuller's comparisons between the subject property and other properties was apt to be affected by the assumption that he made that the trees on Bonny Downs were as stated in Vimpany's affidavit. However, this should not have affected his valuation of the land only content. I shall adopt $405,000 for the land only content which is the figure arrived at by Mr Fuller. It is also in the middle of the range of $392,500 and $415,000 that I have arrived at based upon Mr Clarkson's evidence concerning the separate valuation of trees.

[221] The next aspect is the separate valuation of trees. Mr Fuller's valuation cannot be accepted because it is based upon the assumption that the number and condition of the trees were as set out in Mr Vimpany's affidavit. Because Mr Fuller was instructed specifically to adopt Mr Vimpany's affidavit he valued only 127 mature, healthy trees and did not value thousands of trees that were in fact productive. However, I have regard to the figure of $70 per tree that Mr Fuller adopted. I note from his report that his valuation of mature trees on other properties ranged from $65 to $100 per tree. In his evidence to the Court Mr Clarkson's recollection was that he applied a figure around $70 to $75 per tree at the time. His evidence suggested a range of between $70 and $80 per tree.

[222] I take account of the evidence from persons who closely observed the macadamia trees in or around May 2004 concerning the extent of die back and their condition. I place particular reliance upon Mr Ironside's observations and contemporaneous reports. Other observers remarked on the "variable" quality of the trees. However, none of these witnesses suggested than an overwhelming majority of the trees were in poor condition and the photographs taken of them at about the time do not suggest that they were. The yield in 2004 supports the conclusion that most of the macadamia trees were productive. However, I shall adopt a conservative figure of $70 per tree and base a calculation on there being 4,500 productive trees. This is the figure that Mr Fick instructed Mr Clarkson to adopt and it is supported by the evidence which I have accepted. The balance of 1,000 trees either were too young to produce or were inter-planted between productive trees. The canopy of those productive trees meant that most of the inter-planted trees produced little, if any, nuts. I do not consider that a separate value should be given to them despite this small productive capacity or the potential capacity of some inter-planted trees to produce if neighbouring trees were removed. Some value, however, should be given to the approximately 200 young trees that had not reached a productive age. It is appropriate to give them a value of $25 each. The value of the macadamia trees should be assessed at:

4,500 x $70	$315,000
200 x $25	$5,000
	$320,000

I adopt Mr Fuller's valuation of 450 avocado trees at $50 per tree, being $22,500.

[223] Mr Fuller valued the structural improvements at $91,850. Mr Clarkson arrived at a figure of $100,000. There is no reason to prefer the opinion of one valuer over the other in this regard. I shall adopt a figure of $95,000 for the structural improvements.

[224] There was no separate apportionment in the contract for the plant and equipment that was sold with the farm. It was listed with the contract and was described as having been maintained in good condition. Mr Fick and Mr Groves subsequently discussed the value of individual items. Mr Groves made inquiries of certain persons who were familiar with the value of certain items and on the basis of this information, and his own knowledge of the value of farm equipment, individual values were attributed to each item of plant and machinery. These totalled $99,630.

[225] Mr Jackson, an experienced valuer of plant and equipment, produced a retrospective valuation at the request of the plaintiffs' solicitors in 2009. He was instructed to do so on two bases. The first was that the plant and machinery was in good condition. The second was that it was in the condition set out in Annexure B to his instructions. Annexure B described the tractor as not being in good working condition and various other items as being in poor condition or poorly maintained. On the assumption that the plant and equipment was in good condition as at 20 May 2004, Mr Jackson valued it at $103,270. On the assumption that it was in the condition set out in Annexure B as at 20 May 2004, he valued it at $67,880.

[226] The plaintiffs submit that I should adopt the lower value because the equipment was old, had been used in every harvest and that in the absence of any evidence showing proactive maintenance, logic would dictate that the equipment was in the condition described in Annexure B.

[227] Mr Jackson did not assume in arriving at a "good condition" valuation that the plant and machinery was new. I accept the plaintiffs' submission that account should be taken of wear and tear and the age of the equipment. However, the evidence is that the plant and equipment was properly maintained. The tractor and other equipment was used on parts of the farm that were rocky or steep. However, the wear and tear on the tractor may have been less than use in cropping. I do not propose to undertake an item-by-item valuation. I am not persuaded that each item of equipment was in the condition set out in Annexure B. For example, the Kubota tractor was old, but it is not accurate to say that it was "not in good working condition". The evidence does not support the conclusion that the nut dehusker was poorly maintained. The harvest bins are described as "dilapidated". However, the evidence indicates that they were still in use in 2006. The sprayer was assessed as being in good condition as late as August 2005. The body of the tipping trailer was in good working condition and was sold in May 2005. It seems likely, however, that the value attributed to the tractor in the apportionment arrived at by Mr Fick and Mr Groves overstated its value. I proceed on the basis that the tractor was in reasonable condition. I conclude that the value attributed to the plant and equipment totalling $99,630 overstated its actual value in May 2004 by about $15,000. I shall adopt a figure of $85,000.

[228] In summary, I conclude that the true value of Bonny Downs as at 20 May 2004 was $927,500.

Land value	$405,000
Macadamia trees	$320,000
Avocado trees	$22,500
Structural improvements	$95,000
Plant and equipment	$85,000
	$927,500

[229] The defendants submit that I should have regard to Mr Kermond's evidence in respect of the physical condition of the orchard when he saw it in 2004 and in respect of his opinion about its capacity to yield about 50 tonnes of nuts, being an opinion that was not challenged and which was based upon his expertise in relation to macadamia plantations and their production. I earlier have had regard to Mr Kermond's evidence concerning his direct observations. His opinion concerning the nut-producing capacity of the trees confirms conclusions that I have reached. In addition, the defendants contend that I should have regard to Mr Kermond's opinion as to the value of the property, since valuation evidence is not confined to the expression of opinion of registered valuers, Mr Kermond is qualified by his practical experience and the valuation of macadamia orchards is a limited field. Although there was no objection to Mr Kermond's expression of opinion concerning the value of Bonny Down, I have not had regard to it in reaching my conclusions concerning the value of Bonny Downs.

[230] The defendants also submit that I should have regard to the offer submitted by Mr Taylor. The law concerning the admissibility of evidence of offers is helpfully analysed by Hyam in *The Law Affecting Valuation of Land in Australia*.[38] To the authorities surveyed might be added the decision of the Full Federal Court in *Expectation Pty Ltd v PRD Realty Pty Ltd*[39] that "an actual unconditional open offer by a purchaser with the means to effect the purchase might have some relevance to market value". I respectfully adopt the analysis of Wilcox J in *Goold v The Commonwealth*[40] and the more recent discussion by the New South Wales Court of Appeal in *MMAL Rentals Pty Ltd v Bruning*.[41] Mr Taylor's conditional offer of $950,000 may be admissible, however, I place no reliance upon it in reaching a finding in relation to market value. The offer was conditional upon the sale of an existing property. It is probable, but not proven, that in making the offer Mr Taylor had regard to the production history document. However, if this is not the case, then his offer may have been based upon the more optimistic prediction that Bonny Downs would produce between 55 and 60 tonnes NIS in 2004. Mr Taylor's offer is admissible to demonstrate that there was a demand for Bonny Downs. However, I do not rely upon it as evidence of market value.

Claim for loss of opportunity to invest capital

[231] The plaintiffs submit that they are entitled to be compensated for "lost opportunity costs" on the basis that were it not for the representations about which they complain, they would not have purchased Bonny Downs. Instead, they would have purchased another farm "with the appropriate characteristics" and until that time left their money in the Sandhurst Select Mortgage Fund. The plaintiffs submit that they

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38 4th ed pp 139-152.
39 Supra at [90].
40 (1993) 42 FCR 51.
41 (2004) 63 NSWLR 167 at 182-184 [84] – [97].

"lost the opportunity to continue to earn the profit that would have been achieved had they purchased a different farm".[42]

[232] I accept the plaintiffs' submission that if they had not purchased Bonny Downs they would have looked to purchase another farm. The evidence was that Mr Fick was highly-motivated to become an orchard farmer, and that the plaintiffs had the capacity to borrow money to fund such a purchase.

[233] There is no contest about the principle that a claimant in tort or for contravention of s 52 of the *TPA* can be awarded compensation for deprivation of a commercial opportunity.[43] The value of the lost opportunity must be assessed. The general principle governing all claims for recovery of loss or damage was stated by Bowen LJ in *Ratcliffe v Evans*:[44]

> "As much certainty and particularity must be insisted on ... in proof of damage as is reasonable having regard to the circumstances and the nature of the acts themselves by which the damage is done."

McPherson J (as his Honour then was) observed that the "degree of precision with which damages are to be proved is proportionate to the proof reasonably available".[45] Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat an award of damages.[46] The claimant must prove on the balance of probabilities that he or she has sustained *some* loss or damage.[47] The claimant does so by proving the loss of an opportunity which had *some* value. The claimant is required to demonstrate by evidence that the opportunity had a real value.[48]

[234] The plaintiffs did not adduce evidence even of a general nature about the levels of profitability of the kind of farming venture which they say they would have pursued,[49] let alone that such a farming venture would have been profitable under their management.[50] The possibility that another farming venture under their management would have been profitable does not enable me to value the chance of that becoming a reality or to assess the possibility of such a venture being unprofitable.

[235] There is no acceptable evidence that the plaintiffs would have achieved a profit if they had purchased a different farm. The evidence in relation to Mr Fick's farming practices on Bonny Downs provide substantial reason to doubt whether an alternative farm would have been profitable under his management, at least in its early years due to his inexperience and his reluctance to follow advice of persons who were familiar with the property. Any monies that the plaintiffs had invested in the Sandhurst Select Mortgage Fund would have earned interest during the period prior to the purchase of a different farm. However, there is no sound basis in the

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42 Plaintiffs' submissions paras 45.8 and 45.9.
43 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 348, 355 and 364-5.
44 [1892] 2 QB 524 at 532-533
45 *Nilson v Bezzina* [1988] 2 Qd R 420 at 424.
46 *Sellars v Adelaide Petroleum NL* (supra)
47 Ibid at 355.
48 *Price Higgins v Drysdale* [1996] 1 VR 346 at 354-5*; Lewis v Hillhouse* [2005] QCA 316 at [22] to [26].
49 cf *Gerrard v Slamar* [2004] WASCA 253 at [32] – [33] about proof by evidence about the return to be derived from a venture and that guesswork may not be good enough.
50 cf *Longden v Kenalda Nominees Pty Ltd* [2003] VSCA 128 at [5], [8], [10] – [14] and [30] – [39].

evidence to conclude that the farm would have been profitable, or provided a reasonable return on investment.

[236] The plaintiffs have failed to show that the lost opportunity to purchase another farm was the loss of something of value.

[237] The plaintiffs claim the costs of creating, maintaining and discharging a mortgage. They submit that had the purchase price represented "the true valuation in this case", the plaintiffs would not have been required to take out and service a mortgage, nor would they have incurred discharge fees in paying out the mortgage. However, the plaintiffs' claim is premised on the assumption that another farm would have been purchased. The plaintiffs have not proven that they would not have been required to borrow a similar amount to the amount that they borrowed in order to complete the purchase of Bonny Downs.

[238] The plaintiffs seek to invoke the same argument in claiming the difference in stamp duty between the purchase price and "the true valuation of the property". For the same reason, such a claim is not sustained in circumstances in which the plaintiffs contend that this is a "no transaction" case, and that they would have purchased another farm.

Interest pursuant to statute

[239] The plaintiffs claim interest pursuant to s 47 of the *Supreme Court Act* 1995. The principles governing the discretion to award such interest were discussed in *Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Qld) Pty Ltd (No 3)*[51] A discretionary consideration is whether the plaintiffs' delay in prosecuting the litigation to trial should affect the period in respect of which such interest is awarded. The proceedings have an unfortunate interlocutory history which was summarised in the affidavit of Mr Banks filed 25 June 2009. However, had the plaintiffs established an entitlement to damages, I would have awarded interest for the period between settlement of the contract and the date of judgment on the basis that, despite their delay, the plaintiffs had been kept out of the money represented by the judgment sum. An appropriate rate of interest would have been the default rate of interest under relevant practice directions during that period.

Conclusion

[240] The plaintiffs relied on the brochure and the production history document in contracting to purchase Bonny Downs. Before they contracted to purchase it they knew that the 2004 avocado crop had been harvested, and they had no interest in acquiring it. They were not misled by the defendants' previous prediction of what they expected the 2004 avocado harvest to be.

[241] Bonny Downs had far more productive macadamia trees than contended for in Mr Vimpany's 2008 report upon which the first aspect of the plaintiffs' case of false and misleading representations rests. That Bonny Downs had far more than 1,500 productive macadamia trees is clear from the evidence of persons who observed it in 2004 and from the yields that it achieved. It also was apparent to Mr Fick who instructed a valuer that it had 4,500 effective trees in May 2004, a belief to which Mr Fick continued to subscribe in the years that followed. The plaintiffs have failed to prove their case about the number of productive macadamia trees.

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[51] [2003] 1 Qd R 26.

[242] The plaintiffs also have failed to prove that Bonny Downs did not have the capacity to yield the crops that were represented. Their case is contradicted by the defendants' sales and production records and the evidence of those involved in harvesting macadamia nuts on Bonny Downs and The Nut Farm. The opinion of Mr Vimpany should not be preferred to reliable evidence about the production actually achieved on Bonny Downs and the evidence of those who observed Bonny Downs in 2004 and earlier years.

[243] The defendants' representations about past production of macadamia nuts on Bonny Downs have not been shown to be false, and they had reasonable grounds for predicting a harvest of 50 tonnes in 2004.

[244] The issue of whether the defendants owed to the plaintiffs a duty to exercise reasonable care in making such statements is finely balanced in the light of the plaintiffs' ability to protect themselves by insisting on contractual warranties and their contractual acknowledgement that they did not rely on the defendants' representations. I have concluded that the defendants owed such a duty. However, the plaintiffs have not proven that the defendants breached it. The defendants made a reasonable attempt to accurately state the production of Bonny Downs.

[245] The plaintiffs have failed to establish their claim in negligence. They also have failed to establish a contravention of the *TPA*.

[246] Having failed to establish either cause of action, the plaintiffs are not entitled to compensation. The measure of compensation would have been $32,500, being the difference between the price they paid and what I have determined to be the true value of Bonny Downs at the time they purchased it. The plaintiffs have failed to show that the lost opportunity to purchase another farm was the loss of something of value.

Order

[247] Subject to further submissions on costs and directions in relation to the payment to the defendants of security for costs, my orders will be:

1. Judgment for the defendants.

2. The plaintiffs pay the defendants' costs of the proceeding, including reserved costs, to be assessed.