IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001958
[2016] NZHC 28

BETWEEN	ALLAN ROY MCCOLLUM, NANCY MARGARET MCCOLLUM AND TERENCE NEIL WALKER Plaintiffs
AND	DAVID JOHN THOMPSON AND JOSEPHINE RUTH MACBETH Defendants

Hearing:	28-30 September and 6 November 2015
Appearances:	L Kemp for plaintiffs W T Nabney for defendants
Judgment:	28 January 2016

JUDGMENT OF LANG J

This judgment was delivered by me on 28 January 2016 at 2 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

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[1] In this proceeding the plaintiffs seek to recover monies that they loaned to the defendants, Mr Thompson and Ms Macbeth, in July 2011. In order to provide the plaintiffs with security for the advance, the defendants executed in their favour a General Security Agreement (GSA). This gave the plaintiffs security over livestock owned by the defendants.

[2] The defendants do not contest the fact that they owe money to the plaintiffs, although there is some dispute regarding the issue of quantum. The principal issue in dispute is a counterclaim that the defendants advance against the plaintiffs. They contend that the plaintiffs seized their livestock and sold it at undervalue. In addition, they say that some of the livestock that the plaintiffs seized were not included within the security provided by the GSA. They say that the amount to which they are entitled to judgment under their counterclaim far outweighs any amount that they owe the plaintiffs.

Background

[3] The plaintiffs are a partnership involved in dairy farming and the defendants are sharemilkers. By July 2011 the defendants were in default in respect of a loan owing to their bank, and the bank had appointed receivers to take control of their livestock. At that point the plaintiffs lent the defendants the sum of $260,000, and this enabled the defendants to repay the bank in full.

[4] The terms of the arrangement between the plaintiffs and the defendants were contained in three standard form documents produced by the Auckland District Law Society (ADLS). These comprised a term loan agreement and the GSA, both of which were dated 4 July 2011. The GSA incorporated the terms contained in an ADLS Memorandum of General Terms and Conditions that was registered pursuant to s 155A of the Land Transfer Act 1952 in all New Zealand land registries under Memorandum number 2002/4119.

[5] The loan was to be repaid by 4 July 2012. When this had not occurred by 4 February 2013, the plaintiffs issued a demand for the sum of $ 270,056.03 being the amount then outstanding under the loan plus interest. The demand was not met, and on 13 February 2013 the plaintiffs appointed Messrs Paul Manning and Kenneth

Brown as receivers of the defendant's property subject to the GSA. Messrs Manning and Brown had also been the receivers appointed by the defendant's bank in 2011, so they were familiar with the background to the dealings between the plaintiffs and the defendants.

[6] On the date of their appointment the receivers uplifted 201 cows from a property at 239 Onion Road in Hamilton (the Onion Road property) where the defendants were sharemilking. The defendants accept that these animals were subject to the security created by the GSA. At the same time the receivers uplifted a number of two year old heifers that were being grazed on the property. The defendants do not accept that these animals were secured under the GSA.

[7] The plaintiffs were not satisfied that the livestock collected from the Onion Road property comprised all of the animals subject to the GSA. They believed the defendants held further livestock at a property owned by Mr Kalev Crossland on Otanga Valley Road near Raglan. Mr McCollum went to that property and uplifted a number of animals in September and October 2013. The defendants maintain that none of these animals were subject to the GSA.

[8] In April 2011 the receivers obtained valuations for the 201 cows they had uplifted from the Onion Road property. They sold these to the plaintiffs in May 2011 at a price calculated in accordance with the valuations. The plaintiffs have never purchased the two year old heifers uplifted from the Onion Road property or the livestock uplifted from Otanga Valley Road.

[9] The defendants acknowledge that they failed to repay the amount that they owed to the plaintiffs and that the plaintiffs were therefore entitled to appoint the receivers. They also acknowledge that the receivers were entitled to sell the 201 cows they uplifted from the Onion Road property. They claim, however, that the receivers breached their duty to obtain the best price obtainable for those cows at the time of the sale. They also allege that the plaintiffs have retained the balance of the livestock without paying for them at all. Their counterclaim for damages reflects these allegations.

The issues

[10] The proceeding raises the following issues:

1. What sum do the defendants owe the plaintiffs in respect of the advance made in July 2011?

2. Did the GSA provide the plaintiffs with security over livestock other than those described in the list attached to the GSA?

3. Did the defendants breach other obligations under the loan agreement and GSA and, if so, what are the consequences of that breach?

4. Did the plaintiffs breach their statutory duty to obtain the best price reasonably obtainable as at the time of the sale to the plaintiffs?

5. If so, what loss did the plaintiffs suffer as a result?

6. What is the status of the two year old heifers uplifted from the Onion Road property?

7. What is the status of the livestock uplifted from Otanga Valley Road?

8. What was the value of the two year old heifers uplifted from Onion Road and the livestock uplifted from Otanga Valley Road?

9. Have the defendants suffered consequential losses as a result of the plaintiffs uplifting and retaining the two year old heifers from the Onion Road property and the livestock uplifted from Otanga Valley Road?

What sum do the defendants owe the plaintiffs in respect of the advance made in July 2011?

[11] The scope of the plaintiffs' claim was refined considerably during the course of the hearing. The defendants accept that they owed the plaintiffs the sum of

$285,056 as at the date upon which the plaintiffs appointed the receivers. The defendants also accept that the plaintiffs advanced a further sum of $15,000 to meet the initial costs and disbursements associated with the receivership. As a result, the defendants accept they owed the plaintiffs a core debt of $300,056.

[12] The only area of dispute in relation to the plaintiffs' claim relates to further expenses that the plaintiffs maintain they incurred in enforcing their rights under the GSA. The defendants also contend they should be entitled to a credit in respect of income derived by the plaintiffs from the sale of milk solids produced by the 201 cows prior to their sale to the plaintiffs. I now deal with each of these items.

Payment of $6200 to Mr Crossland

[13] The plaintiffs say that Mr Crossland would not permit them to uplift the stock from his property unless they paid the outstanding grazing charges in the sum of $6200. The defendants say that the livestock at Otanga Valley Road was not secured by the GSA and that they did not owe Mr Crossland any monies. For those reasons they say the plaintiffs should never have uplifted stock from Otanga Valley Road, and should never have paid Mr Crossland any money. They therefore contend that they should not be liable in respect of this item.

[14] Later in this judgment I conclude that the livestock pastured at Otanga Valley Road were not secured under the GSA.[1] For that reason the plaintiffs were not entitled to seize the stock, and cannot seek reimbursement from the defendants for any costs incurred in doing so. This aspect of the plaintiffs' claim fails as a result.

Travel costs

[15] The plaintiffs seek reimbursement of the sum of $1800 in respect of travel costs. This comprises six claims of $300 each for trips that Mr McCollum made to Hamilton and/or Raglan. Mr McCollum confirmed in evidence that this is a claim for compensation for the time that he spent in making the trips to assist in locating or uplifting the defendants' livestock.

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1 At [49].

[16] Mr McCollum has not attempted to explain how he arrived at the amount he claims in respect of each trip, but more importantly he has not provided a legal basis for this aspect of his claim. It does not form part of the receivership costs because it relates to the time that he spent personally attempting to enforce the plaintiffs'rights under the GSA. There is no contractual basis for requiring the defendants to meet these costs and they must be deducted from the plaintiffs' claim.

Service fee

[17] The plaintiffs seek reimbursement of the sum of $200 relating to the costs incurred in serving papers on the defendants. A fee paid to a professional process server would usually form part of the costs of enforcing a claim, but as I understand the position the fee claimed in the present case relates to services performed by Mr McCollum. That being so, the defendants are not required to pay it.

Solicitors' costs

[18] The plaintiffs originally sought reimbursement of the sum of $8,073 in respect of legal fees paid to their solicitors. During the hearing Mr Nabney was able to demonstrate that this sum formed part of the amount owing as at the date the receivers were appointed. I took Mr Kemp to accept that fact on behalf of the plaintiffs. This claim fails as a result.

Bankruptcy costs

[19] The plaintiffs sought reimbursement in respect of the sum of $9,000 in respect of "bankruptcy costs". They did not, however, establish what the claim was for. It appears to have been a contingency sum set aside to meet the costs of enforcing a judgment against the defendants by way of bankruptcy proceedings. Matters have not yet reached that stage. For that reason this aspect of the claim cannot succeed.

Credit in respect of income earned by the plaintiffs from milk production derived from the herd before they purchased it from the receivers?

[20] After the receivers uplifted the herd from Onion Road on 13 February 2013, they entrusted it to the care of the plaintiffs. The plaintiffs transported the animals to their property at South Head in Northland. Mr McCollum accepted that the plaintiffs then derived income from milk produced by the herd until they purchased the herd in May 2013. The plaintiffs did not pay this income to the receivers, so it has not been deducted from the amount owing to the plaintiffs by the defendants.

[21] I accept that this income needs to be taken into account when assessing the amount owing by the defendants to the plaintiffs, and I did not take Mr Kemp to dispute that fact.

[22] Mr McCollum accepted in evidence that the plaintiffs received income totalling $55,426 from the sale of milk solids produced by the herd during this period. In order to produce that income they incurred expenditure that the defendants accept must be deducted from that sum. Mr McCollum produced records during the hearing showing that the plaintiffs spent $12,850 on wages, $20,000 on lease payments and $3,945 on agricultural supplies. This leaves a balance of $18,631.

[23] I am conscious that Mr McCollum only had a very limited time during the course of the hearing within which to gather together his records of expenditure. For that reason I propose to allow a further sum of $3,631 to guard against the likelihood that he also incurred other expenditure that he was not able to point to in the limited time available. I therefore reduce the sum owing by the defendants to the plaintiffs by $15,000 to reflect the income the plaintiffs received from the sale of milk solids before they purchased the herd in May 2013.

Result

[24] The plaintiffs' core claim therefore amounts to $285,056 together with interest as provided for in the term loan agreement.

Did the GSA provide the plaintiffs with security over livestock other than those described in the list attached to the GSA?

[25] The GSA provided the plaintiffs with security over the defendants' livestock in the following terms:

> **This General Security Agreement (GSA):**
>
> …
>
> C. records
>
> The granting of a **security interest** by the **debtor** [the defendants] in favour of the **secured party** [the plaintiffs] in respect of all of the **debtor's** right, title and interest in the following property (referred to as **collateral**);
>
> *Complete one option below. If none or more than one is selected or an option is incomplete, then the **debtor** agrees that Option 2 applies;*

D.J.T. *JM*	D.J.T. ✓ JRM	any and all of the **debtor's** property marked or described in the Schedules.
	Option 1 (initial here)	*If this option is selected, then only the property that is selected in the Schedules is subject to this **security interest.***
		all of the **debtor's** present and after acquired property, being all the **debtor's:** (a) **personal property**; and (b) all **other property**
	Option 2 (initial here)	*If this option is selected, then all the **debtor's** property is subject to this **security interest.***
		all of the debtor's present and after acquired property, <u>excluding</u> the debtor's **personal property** noted in the Schedules (if any) as being excluded.
	Option 3 (initial here)	*If this option is selected, then all the **debtor's** property is subject to this security interest except for the **personal property** that is marked as excluded in the Schedules.*

[26] Schedule B to the GSA provided:

> **Schedule B – Goods Livestock**
>
> Complete only those sections that are relevant (if any). The **debtor** must indicate the purpose for which goods are being used, whether inventory, consumer goods or equipment. If **collateral** is to be <u>excluded</u>, it must be marked appropriately.

Description of livestock
JERSEY cows as described below and according to The Schedule attached: 173 mixed aged milking cows 26 mixed aged Bulls

15 Culls 75 Rising 1 year Heffers 53 Rising 2 year Heffers Brand and/or mark		
Brand Registration District	Firemark/Earmark/Hidemark Number	
2/27800	Brass tag KWWY; MQYW & others as per Schedule.	
Location		
120 SOUTH HEAD HELENSVILLE ☐ **excluded collateral**		*D.J.T.* *JRM* (Initial here)

D.J.T.
JRM

[27] Annexed to the GSA was a 12 page document dated 29 June 2011 and headed "Herd List Sorted by Cow Number". This listed 332 cows, each of which was identified by name and birth identification number. The list also recorded the sex, breed and date of birth of each animal, as well as (in the case of females) the date upon which it had calved. By way of example, the first ten entries on the list were as follows:

JNM									**PTPT Code**: KWWY	
D.J.T.									**Herd Code**: 2/27800	
Animals Included: 332			Whole Herd						**Current as at:** 29/06/2011	
Cow Number	Birth ID	Birth Date	Start Date	Year Born	Sex	Breed	Pedigree	Calved	Dried Off	Name
1	KWWY-02-2	06/08/2008	01/06/2008	2002	F	J		15/06/2010	01/06/2008	Beauvue Rich Isa
2	KWWY-02-3	12/09/2002	01/06/2008	2002	F	J		09/08/2010	01/06/2008	BeauvueRich Lanis
3	HLP-02-40	04/08/2002	18/09/2008	2002	F	J		24/07/2010		Golden Oak Grants Fanny
4	KWWY-08-77	08/10/2008	01/07/2010	2008	F	J12		02/10/2010		Beavue Beauty Davinia
5	KWWY-03-2	25/09/2003	01/06/2008	2003	F	J8		19/08/2010		Beauvue Beauty Dimple
6	KWWY-03-4	26/11/2003	01/06/2008	2003	F	J8		07/09/2010	01/06/2008	Beauvue Beauty Nexus
7	KWW-06-4	29/09/2006	01/06/2008	2006	F	J4		25/09/2010		Beauvue Lads Dream
8	DQGJ-00-68	27/08/2000	01/06/2008	2000	F	J12		23/08/2010	01/06/2008	Glenvue Lady Nina
9	BHKJ-00-61	12/08/2000	01/06/2008	2000	F	J		25/08/2010	01/06/2008	Beledene Pauls Lanis
10	DQGJ-00-56	05/09/2000	01/06/2000	2000	F	J		27/08/2010	01/06/2008	Glenvue Lady Patricia

…

[28] For the plaintiffs, Mr Kemp submits that the security provided by the GSA necessarily extended not only to the livestock specifically listed in the Schedule to the GSA but also to their progeny and to other livestock subsequently added to the herd.

[29] Mr Kemp bases this submission principally on the ground that the cows listed in the Schedule represent no more than a snapshot of the animals owned by the

defendants as at 29 June 2011. Both parties must be taken to have known that as time went on the defendants would sell some of those cows in the ordinary course of business and that others would die or be culled from the herd. The number of cows in the herd would be maintained and supplemented, however, through the birth of calves and the acquisition of other animals. As a result, Mr Kemp submits that both parties must have intended the GSA to extend to progeny and livestock subsequently acquired. If that were not the case, the level of security available to the plaintiffs would diminish significantly as time went on.

[30] Mr Kemp also relied upon the evidence given by Mr McCollum and that given by one of the receivers, Mr Manning. Mr McCollum said he had always assumed that the GSA extended to progeny, and entered into the arrangement with the defendants on that basis. Mr Thompson, on the other hand, maintained that he and Ms MacBeth never intended the GSA to extend beyond the livestock specifically described in the Schedule. In particular, he said that they never intended the plaintiffs to have security over the progeny of that livestock.

[31] Mr Manning, who has some experience in receiverships in the dairy industry, said in his original affidavit that "it is generally accepted that a general security agreement is valid security for the animals either born after the date of that agreement or falling into the next corresponding year category". Under cross-examination, he said he had seen other GSA's that expressly included progeny. He had never seen a GSA that did not include progeny.

[32] The plaintiffs' argument on this point has some attraction, because natural attrition meant that the value of the plaintiffs' security would inevitably erode as time went on. Unless the security created by the GSA extended to progeny and other animals introduced to the herd, the plaintiffs would eventually be at risk of having insufficient security for the amount that the defendants owed.

[33] I consider, however, that the scope of the security provided by the GSA must be determined having regard to the wording used in the document. The most important feature about the wording of the document is that the parties selected

Option 1 when they defined the scope of the security interest created by the GSA.[2] Option 1 expressly provided that security attached only to the property described in the Schedules to the agreement. The parties could have selected Option 2 or Option 3, both of which provided security over subsequently acquired property, but they did not. In selecting Option 1, the parties confined the scope of the GSA to the livestock described in the Schedules to the agreement.

[34] The GSA contains two Schedules that are relevant in this context. The first is Schedule B, which forms part of the standard form GSA.[3] Under the heading "Description of livestock", Schedule B states "JERSEY COWS as described below & according to the Schedule attached." Below that statement is a list of five categories of cows totalling 342 animals. These comprise 173 mixed age milking cows, 26 mixed age bulls, 15 culls, 75 rising one year old heifers and 53 rising 2 year old heifers.

[35] The list of livestock that was attached to the GSA is obviously the Schedule referred to in Schedule B under the heading "Description of livestock". As I have already noted, this lists 332 individual animals. There is an obvious discrepancy between the number of animals listed in Schedule B to the GSA and those described in the list of livestock attached to the GSA. Schedule B refers to 342 animals whilst the list attached to the GSA only describes 332 animals. For present purposes the list must be taken to be correct because it identifies individual animals whereas Schedule B only describes livestock in generic terms. Importantly, however, neither Schedule B nor the list attached to the GSA refers to progeny or livestock to be acquired in the future. In the absence of any express reference to progeny, the wording of the GSA did not extend security beyond the livestock described in the list attached to the GSA.

[36] Mr Kemp endeavoured to counter this difficulty by submitting that the GSA must necessarily extend to progeny because it did not "expressly or by implication exclude progeny from being security". This submission overlooks the wording used in Option 1. Option 1 expressly states that only the property that is selected in the

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2 Set out above at [25].
3 Set out above at [26].

Schedules to the GSA is subject to the security interest created by the GSA. The fact that progeny was not mentioned in the Schedules meant that it was therefore expressly excluded from the security created by the GSA.

[37] Faced with this hurdle, Mr Kemp urged me to find that the GSA contained an implied term to the effect that it extended to progeny and livestock subsequently acquired. He submitted that this was necessary in order to make the agreement work.

[38] I decline to accede to this request. First, it does not form part of the plaintiffs' pleadings and was not relied upon until after the evidence had concluded. More importantly, however, I am not satisfied that the proposed term satisfies the recognised criteria for an implied term.

[39] This was a commercial agreement between two parties having considerable experience in the dairy industry. As the Court of Appeal observed in *Forivermor Ltd v ANZ Bank New Zealand Ltd,* the circumstances in which a court may imply a term in a commercial context are governed by the question of what a reasonable person would consider both parties must have meant to happen in circumstances not expressly address by the contract.[4] In some cases a term may be implied to reflect usage or custom within a particular field or industry. In such cases the importation of terms rests on the assumption that it represents the intention of the parties unless they expressly depart from it. It is not sufficient for a claimant to say that such terms are well known. Rather, "what must be notorious is the fact that the relevant term is customary in contracts of this kind."[5]

[40] Mr Manning's evidence suggests that progeny are generally included within the scope of security interests created by GSA's in the dairy industry. His evidence is based on the fact that the GSA's he has seen expressly refer to progeny whereas the GSA in the present case does not. He does not provide any details as to the number of GSA's that he has seen or the circumstances in which they were given. Standing alone, Mr Manning's evidence is not sufficient to establish that such a provision is

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4 *Forivermor Ltd v ANZ Banking Group New Zealand Ltd* [2014] NZCA 129 at [42].
5 At [44].

customary or notorious in contracts of this kind. In the absence of evidence to this effect I am not prepared to imply the proposed term into the GSA on the basis of custom or usage.

[41] In some cases the courts are prepared to imply a term into a contract in order to provide it with business efficacy. That will generally only occur where the term is so obvious that it goes without saying.[6] In *Forivermor,* the Court of Appeal observed that this test may be no more than "a useful indicator of what a reasonable person would have understood the contract to mean".[7]

[42] The plaintiffs face several hurdles in this context. The first is that the GSA works perfectly well without the implication of the term because it provides the plaintiffs with security over such of the original livestock as remained in the defendants' possession at any given time. Although the value of the plaintiffs' security was liable to erode over time through the sale of livestock and natural attrition, Clauses 17(b) and (i) of the Memorandum of General Terms and Conditions provided them with a measure of protection. They provide:

> **17. LIVESTOCK**
>
> This clause applies if any of the collateral is or includes livestock. The party granting the security agrees to:
>
> …
>
> (b) **number**: not change the quality, character or description of the livestock save in the ordinary course of business but no sale will be made to reduce the number of the stock described in this instrument;
>
> …
>
> (i) **value of livestock**: if in the reasonable opinion of the security holder, the fair market value of the livestock has declined, the party granting the security will on demand provide the security holder with additional security to the satisfaction of the security holder or repay all or part of the secured moneys; and

[43] Mr Kemp submitted that the effect of Clause 17(b) was to extend the security created by the GSA to progeny but I reject that submission. Clause 17(b) creates a

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6 See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

7 *Forivermor Ltd v ANZ Banking Group New Zealand Ltd*, above n 4, at [45] citing *Hickman v Turn and Wave Ltd* [2011] NZCA 100, [2011] 3 NZLR 318 at [248].

contractual obligation on the part of the defendants to preserve the size and overall character of the herd that comprises the secured collateral. It does not, however, provide the plaintiffs with security over livestock that are not described in the list attached to the GSA. If the defendants breached the obligations contained in the clause the GSA provided the plaintiffs with remedies including, potentially, the right to call up the loan and appoint receivers. I consider that the inclusion of Clauses 17(b) and (i) points against the GSA extending security to animals not described in that list.

[44] Furthermore, I consider that the proposed term would be in conflict with the express provision in Option 1 that security was only to extend to the livestock described in the Schedules to the agreement. The courts will not imply a term into a contract where it conflicts with an express term.[8]

[45] For these reasons I do not consider it appropriate to imply a term into the GSA extending it to cover progeny.

[46] Relying upon s 45(1)(b) of the Personal Property Securities Act 1999 (PPSA), Mr Kemp next submitted that the security interest created by the GSA extended to the "proceeds" of the collateral secured by the instrument. I have no difficulty with that submission as a matter of principle, but the plaintiffs have never sought to claim an interest in the proceeds of sale of any secured livestock. If Mr Kemp's submission is to the effect that the term "proceeds" includes progeny of livestock, I respectfully disagree. In this context I consider that the term "proceeds" plainly relates to goods or money produced by the process of sale or disposal rather than natural reproduction. Furthermore, the definition of "proceeds" in s 16(1) of the PPSA provides that the term "proceeds" does not include animals merely because they are offspring of the animals that are the collateral under a contract to which the Act applies.

[47] Finally, Mr Kemp referred me to Clause 4(c)(i)(B) of the Memorandum of General Terms and Conditions, which provides:

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8 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, above n 6, at 283.

EXTENT OF SECURITY INTERESTS

…

(c) Over all property

If this instrument is a general security agreement over all of the property of the party granting the security then the party granting the security grants to the security holder a security interest, and where any part of the secured moneys is used to acquire rights in collateral, a purchase money security interest, in and over:

(i) **personal property**: all its personal property of any kind or nature and wherever it may be situated, that is either presently or in the future will be owned, held, leased, under the control or in the possession of the party granting the security and by way of example and not limitation includes:

…

(B) **inventory**: all inventory which by way of example and not limitation includes goods acquired or held for sale or lease or furnished or to be furnished under contracts of rental or service, all raw materials, work in process, finished goods, returned goods, repossessed goods, *all livestock and the young thereof after conception,* all crops (planted or otherwise) and timber, and all packaging materials, supplies and containers relating to or used or consumed in connection with any of the foregoing;

…

(Emphasis added)

[48] Mr Kemp submitted that the second highlighted clause meant that the security created by the GSA extended to the progeny of the animals described in the list annexed to the GSA. This submission ignores the fact that, as the first highlighted passage makes clear, the clause applies only to general security agreements given "over all of the property of the party granting the security". The fact that these parties selected Option 1 and not Option 2 means that Clause 4(c)(i)(B) does not apply to the GSA in the present case.

[49] I have therefore concluded that the GSA did not provide the plaintiffs with security over livestock other than those described in the list attached to the GSA. For that reason the plaintiffs did not hold security over the progeny of the livestock listed in the agreement, or over other livestock in the possession of the defendants.

Did the defendants breach other obligations under the GSA and, if so, what are the consequences of those breaches?

[50] The plaintiffs allege that the defendants breached several of their obligations under the GSA. In particular, they allege that the defendants failed to adequately tag the livestock with herd management tags and they failed to provide the plaintiffs with additional security when required to do so.

Failure to use herd management tags

[51] Herd management tags are plastic ear tags that allocate identification numbers to individual animals solely for herd management purposes. These are not necessarily affixed for life and may, for example, be changed if the animal is sold. In that event, the new owner is likely to affix a new tag to the cow's ear. Herd management tags are to be distinguished from the brass identification tags that contain the animal's birth identification number. These remain attached to the inside of the cow's ear for the duration of its life. The information recorded on the brass tag is held by one of the two national livestock herd testing organisations, CRV Ambreed and the Livestock Improvement Corporation (LIC). Those organisations also arrange for the information to be held on a national database known as MINDA. Authorised persons are able to gain access to herd data from this database.

[52] The plaintiffs allege, and the defendants accept, that the defendants' livestock did not have herd management tags. As a result, Mr McCollum was required to spend some considerable time inspecting each animal in order to identify it using the brass identification number. This was not an easy task because many of the brass tags, which are attached to the cow's inner ear, were dirty and difficult to read.

[53] Considerable time was taken during the hearing dealing with this issue. It arises because Clause 17(c) of the Memorandum of General Terms and Conditions provides as follows:

> (c) **brand**: ensure that all livestock subject to this instrument carry at all times only the brands, earmarks, and marks specified in this instrument;

[54] The plaintiffs rely on the fact that the list of livestock attached to the GSA numbered each cow sequentially. They say they believed that these numbers were herd management numbers, and maintain that the defendants were obliged to tag each animal with the number referred to in the list. They also contend that it is best practice for dairy farmers to attach a plastic ear tag to each cow designating it with a herd management number. Mr McCollum said that the failure of the defendants to follow this procedure resulted in the plaintiffs wasting considerable time through having to use the brass identification tags to identify individual animals.

[55] Mr Thompson acknowledged that the defendants did not use herd management tags, but said they did not need to because they were familiar with all their cows. Mr Thompson also said that he knew of several other dairy farmers who did not use herd management tags for the same reason.

[56] I do not consider this issue to be of any material importance. First, it is difficult to see how the allocation of a number to each cow in the list attached to the GSA created an obligation on the defendants to tag each animal with the same herd management number. That is particularly so given that Schedule B to the GSA did not refer to management tags. It referred only to the brass identification tags.

[57] More importantly, however, Mr McCollum accepted that he was eventually able to identify virtually all of the animals by inspecting their brass tags. This did not cause the receivers to incur any additional expense because the identification process was conducted by Mr McCollum. As a result, and even if the GSA required the defendants to allocate each cow a herd management tag, the plaintiffs did not suffer any loss through the defendants' decision not to follow that course.

Failure to provide additional security

[58] This claim is based on an alleged breach of Clause 17(i) of the Memorandum of General Terms and Conditions,[9] which required the borrower to provide the lender with additional security if in the reasonable opinion of the lender the fair market value of the secured livestock has declined.

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[9] Set out above at [42].

[59] On 11 April 2013 the receivers' solicitors wrote to the defendants' solicitors as follows:

> 2. In broad terms, we understand that there are approximately 253 head of stock in the Receivers possession, of which your client claims that between 52-55 are first time calvers and, your client claim's, are not secured by the GSA. The exact number and mix of the stock is yet to be ascertained while the Receiver's agents complete the tagging process and we await the previously requested information from your client.
>
> 3. If your clients claim were accepted, which it is not, it would follow that the Receivers have in their possession approximately 200 of the 342 head of stock specifically referred to in the GSA. Your client has since advised that they still have 6 bulls and 13 cows in their possession which were specifically referred to in the GSA. On these broad numbers, it appears that there are somewhere between 120 and 130 head of stock not accounted for.
>
> 4. While having previously asserted that the 52-55 first time calvers are not secured by the GSA, your clients have yet to provide any evidence to support this assertion.
>
> 5. Once again, putting aside the 52-55 first time calvers for the moment and assuming the Receivers collected the 6 bulls and 13 cows, the Receivers and the security holder are of the opinion that the fair market value of the approximately 219 head of stock is not sufficient to repay all of the secured moneys. To make up this shortfall we, on behalf of the Receivers and the security holder, demand additional security to the satisfaction of the Receivers and the security holder.
>
> 6. While the Receivers and the security holder will accept the 52-55 first time calvers (assuming they are not secured by the GSA, which is disputed), there is still likely to be a considerable shortfall.
>
> 7. In order that arrangements can be made to obtain additional security to the satisfaction of our client and the security holder, please provide us with a sworn statement of financial position from your clients by Wednesday, 17 April 2013.

[60] The plaintiffs maintain that the defendants failed to respond to the request contained in this letter, and that in doing so they breached their obligations under Clause 17 (i).

[61] I do not accept this submission for two reasons. First, I do not consider that the request amounted to a requirement that the defendants provide additional security. Rather, it was a request for further information so that the plaintiffs could form an opinion as to whether they should require the defendants to provide

additional security. Failure to respond to that particular request would therefore not amount to a breach of Clause 17(i).

[62] Secondly, the submission overlooks the fact that the defendants did in fact respond to the letter. On 17 April 2013 the defendants' solicitors replied to the letter as follows:

> Our clients are of the opinion that the stock that is currently in the receivers possession exceeds the debt.
>
> By way of your letter of 11 April, it appears that the receivers do not think this is the case and that there will be a shortfall. We therefore assume that to make these statements the receivers have had to carry out a valuation of the stock that is in their possession. As you have provided no details in your letter of the current value of the stock or the perceived shortfall please provide us with this information and valuations that the receivers are relying on in making these assertions.
>
> I look forward to receiving this information.

[63] If the plaintiffs provided the defendants with a response to this letter it was not produced in evidence.

Other alleged breaches

[64] The plaintiffs also contend that the defendants breached their obligations under the GSA by moving livestock without the plaintiffs' consent, allowing the livestock uplifted from Otanga Valley Road to be abandoned or left in poor condition, allowing those livestock to become subject to a possessory lien in favour of Mr Crossland and failing to account to the plaintiffs in writing for the number, age and sex of the livestock secured by the GSA.

[65] The claims relating to the Otanga Valley Road livestock cannot succeed because I have held that the GSE did not create a security over those animals. Even if proved, the remaining claims could not give rise to additional loss for the plaintiffs. The liability of the defendants did not extend beyond the amount owing to the plaintiffs under the term loan agreement. Given that the defendants accept they are liable to the plaintiffs for that amount, other breaches become irrelevant because they do not give rise to fresh liability for sums over and above the amount owing under the term loan agreement.

Did the plaintiffs breach their duty to sell the livestock that they seized under the GSA for the best price reasonably obtainable as at the time of the sale to the plaintiffs?

[66] This aspect of the defendants' counterclaim relates to the 201 mixed age jersey cows the plaintiffs uplifted from the Onion Road property. The receivers sold these animals to the plaintiffs pursuant to an agreement for sale and purchase dated 31 May 2013. Under this agreement the receivers sold "201 unrecorded mixed age Jersey cows" to the plaintiffs for the sum of $204,200. This equated to an average sale price of $1015 per head.

[67] The two year old heifers that the receivers had uplifted from the Onion Road property were also in their possession at this time, but the ongoing dispute as to whether those animals were subject to the GSA appears to have prompted the receivers to exclude them from the agreement for sale and purchase.

[68] There is no dispute regarding the duty that a receiver owes when selling property such as the livestock seized under the GSA. Section 19 of the Receiverships Act 1993 (the Act) provides:

> **19 Duty of receiver selling property**
>
> A receiver who exercises a power of sale of property in receivership owes a duty to—
>
> (a) The grantor; and
>
> …
>
> to obtain the best price reasonably obtainable as at the time of sale.

[69] This duty is similar to that imposed on mortgagees by s 176 of the Property Law Act 2007. The purpose of its predecessor, s 103A of the Property Law Act 1952, has been described as being to protect the vulnerability of those to whom the duty is owed. This arises from the lack of incentive for a mortgagee to obtain the full value of the property over and above the sum needed to clear the mortgage debt.[10]

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[10] *Applefields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 at [56].

[70] In setting the sale price, the receivers relied upon three valuations they obtained at the end of April 2013. The first of these was dated 26 April 2015 and was prepared by Mr Duncan McNab, a land use consultant (the McNab valuation). He observed that a high producing and fully recorded dairy herd would be valued at between $1,700 and $1,800 per head. An unrecorded dairy herd would sell for $600 to $700 per head. In this context a recorded dairy herd is a herd comprising animals that have an established breeding and production history.

[71] Mr McNab based his valuation on a visual inspection of the dairy herd that he carried out on 25 April 2013. He also valued the herd on the basis that it was unrecorded. He took into account, however, the fact that there was at that time a shortage of dairy cows and there had also been a sharp increase in demand for New Zealand dairy produce. Taking those factors into account, Mr McNab valued the herd at $925 per head.

[72] The second valuation was dated 30 April 2013 and was prepared by Mr J Yearbury, a livestock representative employed by PGG Wrightson Ltd. Like the McNab valuation, the PGG Wrightson valuation was based on a visual appraisal of the herd in the paddock. Mr Yearbury valued the herd on an unrecorded basis because no information of relevance about the herd was available. He ascribed a value of $1,100 per head in respect of 170 cows who were agreed to be in calf. He ascribed a value of $500 per head in respect of the remaining cows who were not.

[73] In addition, on 30 April 2011 Mr McCollum forwarded to the receivers an email he had received the previous day from Mr Dean Harris, a stock agent employed by Fonterra's retail subsidiary RD1. Mr Harris noted that he had not viewed updated profiles for the herd, and had not been able to verify the age of cows in the herd. Notwithstanding this he considered that the herd would be valued at $1250 to $1350 per head.

[74] The defendants take issue with the reliance placed by the receivers on these three valuations. In particular, they say that the receivers ought to have known that the herd needed to be valued on the basis that it was a recorded herd. They point out that as early as 7 March 2013 the receivers had obtained a printout from CRV

Ambreed containing details, including birth identification numbers, of the cows in the defendants' herd. This demonstrated clearly that all of the cows in the herd had a recorded breeding history. Mr Manning also accepted in evidence that he could easily have obtained details of the herd's production history from CRV Ambreed.

[75] Mr Nabney submits that the receivers ought to have appreciated from the comments made in the McNab and PGG Wrightson valuations that there was a significant difference between the value of a recorded herd and that of an unrecorded herd. They should also have been aware that a herd's production history was an important factor in assessing its value. Furthermore, the receivers already had sufficient material in their possession to know that the defendants' herd had a documented breeding history. They ought to have known that with minimal effort they could also have obtained the herd's production history. For that reason he submits that the receivers breached their duty to obtain the best price reasonably obtainable when they failed to make further enquiries and agreed to sell the herd to the plaintiff on the basis of the McNab and PGG Wrightson valuations.

[76] I uphold Mr Nabney's arguments on this point. The receivers plainly ought to have turned their mind to the possibility that the valuations had been prepared on an incorrect basis. That is particularly so given the fact that the proposed sale was to the plaintiffs and not on the open market. At the very least the receivers ought to have asked the defendants whether breeding and production figures were available for the herd. Had they done so, the defendants would undoubtedly have reminded them of the information held by CRV Ambreed. The defendants had an obvious interest in ensuring that the receivers obtained the best price possible for the herd. Even if the defendants had refused to co-operate, the receivers had the ability as the defendants' agents to seek the information directly from CRV Ambreed. If the receivers had taken these elementary steps it is highly unlikely that they would have sold the herd to the plaintiffs on the basis that the herd was unrecorded.

[77] Mr Kemp argued that the failure by the defendants to use herd management tags hampered the receivers' ability to obtain a better price for the herd. I reject that submission because it overlooks the fact that Mr McCollum had identified all the

animals and placed his own herd management tags on them before he purchased them from the receivers.

[78] Furthermore, the receivers had earlier undertaken a desktop valuation of the defendants' herd when they were appointed as receivers by the bank. This ascribed values of $750 per head to 75 rising one year old heifers and $1750 per head to 53 rising two year old heifers. It ascribed a value of $2000 per head to 173 other cows in the defendants' herd. When asked whether the valuations received in April 2013 "set alarm bells ringing", Mr Manning confirmed that they did. He said, however, that the desktop valuation prepared during the earlier receivership was based on the premise that the defendants' herd was a recorded herd. He felt that it would be unsafe to proceed on the same premise in April 2013 given the difficulty the receivers had encountered in identifying the stock uplifted from the Onion Road property.

[79] I do not consider this to be an adequate explanation. The receivers clearly knew in 2011 that the defendants' herd was a recorded herd. The list attached to the GSA also contained the birth identification numbers for the animals secured under the GSA. The CRV Ambreed schedule in the receivers' possession contained the same information. Furthermore, identification of the 201 cows uplifted from the Onion Road property had been completed by 22 April 2013. The receivers should therefore have been on notice that they were still dealing with a recorded herd. As a result, they ought to have appreciated that it would be unwise to sell the animals on any other basis. That is particularly so given the fact that they were considering a sale to the plaintiffs rather than a third party.

[80] These factors persuade me that the receivers breached their duty under s 19 of the Act to sell the herd to the plaintiffs for the best price obtainable at the time of the sale.

What loss did the defendants suffer as a result of the sale at undervalue?

[81] The plaintiffs adduced evidence regarding the value of the herd from Mr John Dickson, a livestock consultant with more than 49 years experience in the livestock industry. In March and April 2013 he viewed the 201 cows that the receivers sold to

the plaintiffs in his capacity as a livestock consultant and buyer for several dairy farming operations.

[82] Mr Dickson notes from documents provided by the plaintiffs that 42 of the 201 cows were not in calf as at 22 April 2013. He considers this to be a high proportion, and says that only two to three per cent of cows would generally not be in calf by April. He says that this would reduce the value of the herd significantly because the cows that were not in calf in April 2013 would not be able to calve again until July or August the following year. He also says it would be uneconomic for a farmer to hold cows that are not in calf for a full year. Most farmers would sell them and buy replacement cows that are in calf. By the end of the trial counsel and their experts agreed that these 42 cows had a market value of $500 per head, or $21,000 in total.

[83] Mr Dickson was of the view that the remaining cows were worth about $1000 per head exclusive of GST. He based his initial valuation on the prices obtained for the sale of comparable herds around this period as well as the physical condition of the herd. He did not take into account the breeding and production history of the herd. When these were put to him in cross-examination, he said that they demonstrated that the herd was of average quality.

[84] Mr Dickson also accepted in cross-examination that he had viewed the cows after they had been taken to Northland from Onion Road, and acknowledged that they had a production history that was average for a Waikato herd. He was not prepared to re-visit his valuation taking into account the production figures for the herd as at 18 January 2013. He preferred to adhere to the valuation he had reached in April 2013 based on the material that was available to him at that time. The effect of Mr Dickson's evidence was therefore that in April 2013 the 159 cows that were in calf had a total value of $159,000 exclusive of GST.

[85] The defendants relied upon the evidence of Mr Darryl Houghton and Mr Graeme Leech. Mr Houghton is a senior auctioneer with NZ Farmers Livestock Ltd. He has had 27 years experience buying and selling dairy herds including Jersey herds. He did not inspect the defendants' herd, and instead gave evidence as to

prices achieved nationally during the 2012 and 2013 years. Using information obtained from his employer's database, Mr Houghton said that his employer sold 7 Jersey herds in the 2012/2013 dairy season at an average value of $1875 per head. He said that these prices were consistent with the national average market value of $1923 during the 2012 year and $1627 for the 2013 year up until 31 May 2013.

[86] Mr Leech has been involved in the pedigree livestock industry for approximately 50 years. During that period he has acted as the agent for both vendors and purchasers of dairy cattle. He has had significant experience in buying and selling Jersey cows over the last 15 years. His expertise lies in selling individual cows rather than entire herds.

[87] Mr Leech inspected the defendants' herd in January 2013, and observed the cows to be in good condition at that time. Mr Leech disagrees with Mr Dickson's assessment of the value of the herd. Based on their production figures and overall condition he believes the in calf cows would have been worth between $1850 and $2050 in May 2013.

[88] For reasons I shall outline shortly, I do not consider it necessary to determine whether Mr Dickson's valuation should be preferred to that of Mr Leech. I consider, however, that Mr Dickson's valuation suffers from the obvious handicap that he was not prepared to revise it in light of the production history of the herd as at 13 January 2013. The production figures produced by CRV Ambreed as at that date show that the herd had produced an average output of 2483 litres of milk during the first six months of the milking season. This produced an average of 210 kilograms of milk solids. Projecting these figures out to the end of the milking season four months later, the herd would produce an average of approximately 330 to 340 kilograms of milk solids per head for the season. This is broadly in line with the production achieved by the herd for the 2009 year. During that year the herd produced an average of 385 kilograms of milk solids per head. Mr Leech considered that these were extremely good production figures for a Jersey herd.

[89] In addition, Mr Dickson maintained that the breeding worth (BW) and production worth (PW) values attributed to the herd by CRV Ambreed were so low

that the herd should be regarded as unrecorded. All the experts agreed that the BW and PW values of a herd can assist in setting the value of a herd. Mr Dickson said that for some unknown reason CRV Ambreed and LIC do not respect pedigree cows and attribute low BW and PW values to them. Although I understand this aspect of Mr Dickson's evidence, I was not able to understand why he says that the low BW and PW values require the herd to be regarded as unrecorded. On this point I prefer the evidence of Mr Houghton. He considered that the existence of breeding and production histories, and in particular the former, was the criterion that determined whether a herd should be valued on a recorded or unrecorded basis.

[90] Had the receivers turned their minds to this issue, they would have concluded that the sale price to the plaintiffs needed to be calculated on the basis that the herd was recorded. Had they done that, they would have been entitled to use the valuations they had already obtained to set the sale price. The McNab valuation recorded that well recorded and high producing cows would fetch between $1700 and $1800 per head. The PGG Wrightson did not deal with that issue. I note that the McNab valuation does not differ greatly from the lower end of Mr Houghton's assessment that the cows were worth between $1850 and $2050 per head.

[91] Three factors would have entitled the receivers to accept a sale price that was slightly lower than the figure referred to in the McNab valuation. The first is that the evidence suggests that the defendants' herd may not have fallen within the definition of a high producing herd. It may instead have been an average to above average producing herd. The second is that the plaintiffs were prepared to purchase the entire herd. I accept Mr Dickson's evidence that in an arms length transaction the buyer will often not be prepared to do that. The buyer may not wish, for example, to purchase animals that do not appear to be in good physical condition. For that reason a modest discount is necessary to reflect the fact that the plaintiffs were prepared to purchase the entire herd regardless of the physical condition of individual animals.

[92] Thirdly, the herd was being sold in Northland. Mr Dickson pointed out that although dairy farming is conducted in Northland, it is not as prevalent as it is in the Waikato, Bay of Plenty and Taranaki regions. For that reason the sale of livestock in

Northland does not attract the same prices as will be the case in those regions. Mr Dickson said that cows tend to sell for approximately $200 per head more in the main dairy regions than they do in Northland.

[93] Taking these factors into account, I consider that the receivers should have insisted on a sale price of not less than $1550 per head in respect of the 159 cows who were in calf. The total sale price would therefore have been $246,450. If the plaintiffs had not been prepared to pay that price, the receivers could have sold the herd on the open market.

[94] I also accept Mr Manning's evidence that the receivers would have incurred advertising and selling costs of between $8,000 and $10,000 if they had been required to sell the herd on the open market. An allowance of $9,000 should be made to reflect this factor.

[95] Taking into account the sum of $21,000 for the 42 cows that were not in calf, the plaintiffs should therefore have been required to pay the sum of $258,450 for the 201 cows that were subject to the GSA. It follows that the defendants suffered loss in the sum of $54,250 as a result of the failure by the receivers to obtain the best attainable price at the time of the sale.

What is the status of the two year old heifers uplifted from the Onion Road property?

[96] There is a dispute regarding the number of animals uplifted from the Onion Road property. Mr Thompson maintains that the plaintiffs seized 54 first time calvers, or two year old heifers, from the property. Mr Manning and Mr McCollum contend that they uplifted 50 animals. On this point I accept the evidence for the plaintiffs because it is supported by the cartage dockets relating to the livestock taken from the Onion Road property. These record that 50 animals were transported away from the property. I also accept Mr McCollum's evidence that three of these animals belonged to a third party, Mr David Bell.

[97] It is common ground that the remaining 47 animals were all born after the parties entered into the GSA, and were progeny of the livestock described in the list attached to the GSA.

[98] Mr Kemp responsibly accepted that the plaintiffs only had a right to uplift and sell livestock that were subject to the security created by the GSA. He also accepted that the plaintiffs would be liable to the defendants in conversion if they uplifted and sold livestock that were not subject to the security created by the GSA.

[99] Given my finding that the GSA did not extend to progeny, the plaintiffs did not have the right to uplift the livestock held at the Onion Road property. The defendants are accordingly liable to the defendants in conversion in respect of those animals.

What is the status of the livestock uplifted from the Otanga Valley Road property?

[100] There is also a dispute regarding the number of animals uplifted from the Otanga Valley Road property. Mr McCollum maintains that he uplifted a total of 43 animals during the two visits he made to the Otanga Valley Road property. Mr Thompson disagrees. He says that in September 2013 Mr McCollum uplifted 15 two year old heifers, six mixed age bulls and an empty three year old cow from that property, and that in October 2013 Mr McCollum uplifted a further 30 yearling heifers and one bull.

[101] As in the case of the two year old heifers removed from the Onion Road property, I propose to determine this issue having regard to the documentary evidence that is available in the form of the cartage dockets. These show that on 22 September 2013 14 heifers and six bulls were transported from the Otanga Valley Road property. I take the former to be the two year old heifers to which Mr Thompson refers. The cartage records also show that 27 yearling heifers were transported from the same property on 19 October 2013.

[102] The plaintiffs have not sought to argue that the livestock uplifted from the Otanga Valley Road property were subject to the security created by the GSA.

Furthermore, the receivers have never had any involvement with these animals. Rather, the plaintiffs appear to accept Mr McCollum uplifted them as a "self help" measure after he discovered the defendants were holding far fewer animals on the Onion Road property than expected. That being the case, the plaintiffs cannot justify their retention of these animals and are liable to the defendants in conversion in respect of them.

What was the value of the two year old heifers uplifted from the Onion Road property and the livestock uplifted from Otanga Valley Road?

[103] Counsel agreed that the measure of damages for conversion is generally the value of the goods that were converted. It is therefore necessary to ascribe values to the 47 two year old heifers uplifted from the Onion Road property and the livestock uplifted from Otanga Valley Road.

The two year old heifers uplifted from the Onion Road property

[104] Mr Leech said that an in-calf heifer with a recorded history would have achieved a price of between $1800 and $1900 in May 2013. Although these animals would not have a production history, he said that a prospective buyer would look at the breeding and condition of the individual animals to assess their likely future performance.

[105] Mr Houghton said that sales by his employer produced $1500 to $1700 per head for rising in-calf two year old heifers. He said that nationally such animals fetched an average of $1620 as at 31 May 2012 and $1343 as at 31 May 2013.

[106] For the defendants, Mr Dickson said that two year old heifers in calf would have an average value of approximately $850 per head plus GST. Those not in calf would have a value of $600 per head because they would be viewed as cull animals. He based these values on the assumption that the animals were unrecorded or that their BW and PW figures were low.

[107] In determining the value of these animals I take into account several factors. First, I accept Mr McCollum's evidence that 40 of the heifers were in calf. Seven

were not. I also proceed on the basis that the animals were recorded because they were progeny of the cows described in the list attached to the GSA. Thirdly, I bear in mind the fact that the average national price for animals of this type as at 31 May 2013 was $1343. I consider, however, that prices paid in regions such as the Waikato, Bay of Plenty and Taranaki may have skewed these prices.

[108] Taking these factors into account, I fix a value of $1150 per head for the 40 heifers that were in calf and $600 per head for the seven that were not. The total value of these animals was therefore $50,200.

The livestock uplifted from Otanga Valley Road

[109] Counsel and the valuers agreed that the 14 two year old heifers uplifted from Otanga Valley Road on 22 September 2013 had a value of $600 per head exclusive of GST. I therefore fix a value of $8,400 in respect of those animals.

[110] Similarly, the parties agreed that the 27 yearling heifers uplifted from the same property on 19 October 2013 had a value of $400 plus GST. I fix a value of $10,800 in respect of those animals.

[111] The plaintiffs did not attempt to ascribe a value to the six bulls uplifted from Otanga Valley Road on 22 September 2013. For the defendants, Mr Leech valued the five 2 year old bulls at between $2,000 and $2,500 per head, and ascribed a value of $1,500 to the remaining 15 month old bull. He noted, however, that these values depended on the bulls having a good pedigree.

[112] There is no evidence as to the pedigree of the bulls. For that reason I approach the value of these animals conservatively. I fix a value of $1500 in respect of each of the five 2 year old bulls and $750 in respect of the 15 month old bull. I therefore fix a total value of $8,250 exclusive of GST in respect of the six bulls uplifted from Otanga Valley Road on 22 September 2013.

Consequential losses

[113] The defendants seek to recover consequential losses that they have suffered as a result of the conversion of the 47 heifers from the Onion Road property and those uplifted from Otanga Valley Road. The losses take the form of lost income from milk that the stock produced after they were converted by the plaintiffs.

[114] The law in this area remains unsettled. For present purposes the two alternatives appear to be recovery of losses that were foreseeable and recovery of losses flowing directly from the wrongful conduct.[11] It is not necessary to delve further into this issue because both alternatives produce the same result. Furthermore, I did not take Mr Kemp to dispute the proposition that a loss of income that would have been derived from milk produced by converted livestock is recoverable. It is clearly foreseeable and it also occurs as a direct result of the act of conversion.[12]

[115] Based on the herd's production figures as at 18 January 2013, Mr Thompson said that he expected each of the two year old heifers uplifted from the Onion Road property to produce at least 300 kilograms of milk solids during the 2013/2014 season. I consider that to be reasonable based on the production achieved by the herd up until January 2013. The average payout for milk solids during the 2013/2014 season was $8.40 per kilogram. Using those figures but adjusting them to relate to 47 animals, the loss of income for that season would amount to $118,440.

[116] Mr Thompson estimated that during the 2014/2015 season the same animals would produce no less than 320 kilograms of milk solids per head. Given a lower payout for that season of $4.40 per kilogram, lost income would amount to $66,176.

[117] I am prepared to accept the defendants' claim in respect of the 2013/2014 year as being reasonable subject to one qualification. There must remain the reasonable possibility that some of the 47 heifers uplifted from the Onion Road property would die or otherwise be rendered incapable of producing milk during that

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[11] *Kuwait Airways Corporation v Iraqi Airways Corporation (No's 4 and 5)* [2002] 2 AC 883 at 1097.

[12] See in this context the approach taken in *Hadley v Senk* [1919] GLR 122.

season. To guard against that possibility I propose to award damages based on lost production from 44 cows during the 2013/2014 season. This means that I fix damages for consequential losses in respect of that season at $110,880.

[118] Similarly, but with two qualifications, I accept the defendants' approach to lost income during the following season. In the absence of evidence as to why production of milk solids would have increased during the 2014/2015 season, I do not propose to make allowance for that possibility. I also consider it likely that there would have been further attrition of the herd during that season through death, illness or sale of livestock. For that reason I propose to award damages on the basis of lost income from milk production by 38 cows. As a result, I fix damages for consequential losses for the 2014/2015 season at $50,160.

Summary

[119] As a consequence of the findings I have made I calculate the amounts owing by the parties to each other as follows:

Amount of claim	$285,056	
Less value of 201 cows covered by GSA	$258,450	
Balance owing		$ 26,606
Counterclaim		
Value of 47 two year old heifers (Onion Road)	$ 50,200	
Value of livestock from Otanga Valley Road	$ 27,450	
- Loss of milk production for 2013/2014 season	$110,880	
- Loss of milk production for 2014/2015 season	$ 50,160	$238,690

Interest

[120] As the above table demonstrates, the defendants continued to owe the plaintiffs the sum of $26,606 after the plaintiffs had acquired the 201 cows secured by the GSA. Given that fact, interest continues to run in accordance with the term loan agreement on that sum from 30 May 2013 until the date of payment. I leave it to counsel to determine that amount by agreement. If they are unable to reach agreement they have leave to file concise memoranda dealing with that issue.

[121] Counsel did not address me in relation to the issue of interest that might be payable in respect of any of the sums awarded on the counterclaim. Counsel should endeavour to reach agreement regarding that issue, but have leave to file concise memoranda dealing with that issue as well.

Leave reserved

[122] I reserve leave to the parties to file memoranda in the event that I have inadvertently omitted to deal with any of the issues raised by the pleadings.

Costs

[123] The plaintiffs have partly succeeded on their claim and the defendants have succeeded substantially in respect of the counterclaim. For that reason my initial impression is that the defendants are the successful parties and are entitled to an award of costs on a category B basis together with disbursements as fixed by the Registrar. Should either party take a different view, counsel have leave to file succinct memoranda (ie no more than five pages in length) addressing the issue of costs.

Lang J

Solicitors:
Kemp, Auckland
Lyon O'Neale Arnold, Tauranga
Counsel:
W T Nabney, Tauranga