

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA123/2020  
[2021] NZCA 442**

**BETWEEN**

**HAOYU GAO  
First Appellant**

**SMILING FACE LIMITED  
Second Appellant**

**XIA XUE  
Third Appellant**

**AND**

**ZESPRI GROUP LIMITED  
Respondent**

Hearing: 27 and 28 April 2021

Court: Kós P, Brown and Goddard JJ

Counsel: E St John, D L-C Liu and S Moore for Appellants  
L A O’Gorman, L C Sizer and A N Birkinshaw for Respondent

Judgment: 7 September 2021 at 12 pm

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**JUDGMENT OF THE COURT**

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- A The appeal is allowed to the extent recorded in [144] of this judgment but is otherwise dismissed.**
- B The orders at [202(b)–(c)] of the High Court judgment are quashed.**
- C Orders that Mr Gao is to pay damages to Zespri in the sum of NZD 12,081,150 in respect of the first cause of action and that Smiling Face is to pay damages to Zespri in the sum of NZD 12,081,150 in respect of the second cause of action are substituted.**
- D There is no order for costs.**
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# REASONS OF THE COURT

(Given by Kós P)

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[1] Zespri Group Ltd holds exclusive rights to sell reproductive material of, and to propagate for commercial production, the G3 and G9 varieties of golden kiwifruit under the Plant Variety Rights Act 1987.<sup>1</sup> Mr Gao, his wife Ms Xue and their company Smiling Face Ltd grew G3 kiwifruit on an orchard in New Zealand under licence from Zespri.

[2] Zespri alleged Mr Gao sold and then exported G3 and G9 to China from 2012 onwards, purported to license those varieties for the whole of China, and engaged in conduct that breached Zespri's exclusive rights. It commenced this proceeding in July 2018 against the appellants, seeking an injunction against future infringements and damages of NZD 31 million. The trial took place in November 2018.

[3] In a judgment delivered in February 2020, Katz J held Zespri proved Mr Gao and Smiling Face (a) supplied G3 and G9 to a Mr Shu (and purported to license him to exploit those varieties throughout the whole of China), (b) entered into a joint venture to exploit and sell G3 and G9 in China with a Mr Yu (including planting a 6 ha "demonstration park" in Xichang — in Sichuan, China — on which G3 supplied by Mr Gao was planted), and (c) offered to sell G3 to a Mr Li, while also finding that (d) Mr Gao and Ms Xue breached the terms of their G3 Licence Agreements with Zespri.<sup>2</sup>

[4] The Judge awarded damages of NZD 14,894,100 against Mr Gao and Smiling Face each for (a) to (c) above (acts which infringed Zespri's statutory rights). She also awarded damages of NZD 10,824,300 against Mr Gao and Ms Xue jointly for (d) above (acts which infringed Zespri's contractual rights).<sup>3</sup>

[5] This judgment addresses the appeal from that decision.

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<sup>1</sup> In this judgment, the PVR Act. See s 17(1).

<sup>2</sup> *Zespri Group Ltd v Gao* [2020] NZHC 109 [High Court judgment] at [120]. See also the summary of key factual findings at [192]–[195].

<sup>3</sup> At [171] and [187].

## The Plant Variety Rights Act 1987

[6] There is no material challenge to the Judge’s summary of the PVR Act and its effect.<sup>4</sup>

[7] The development of a new plant variety can be lengthy and expensive. Plant variety rights (PVRs) provide plant breeders with the exclusive right to control the commercialisation of a new variety. This encourages investment in plant breeding and development.

[8] The PVR Act was enacted in 1987, bringing New Zealand’s plant variety rights regime into line with the 1978 version of the International Convention for the Protection of New Varieties of Plants.<sup>5</sup> New Zealand has not yet implemented the revised 1991 version of the Convention which enlarges PVRs. A bill to achieve that outcome was introduced to Parliament in May 2021.<sup>6</sup> Under the relevant 1978 version of the Convention, equivalent PVRs are granted in a large number of signatory countries throughout the world.<sup>7</sup> PVRs may be granted in respect of varieties of any kind of plant other than algae and bacteria.<sup>8</sup> The word “variety” is used in the sense of a cultivar or cultivated variety of plant clone, hybrid, stock or line capable of reproduction, and not in the sense of a botanical variety.<sup>9</sup> PVRs will be granted if the variety is new, distinct, homogeneous and stable.<sup>10</sup>

[9] Provisional protection applies from the day an application is made.<sup>11</sup> A PVR lasts for 23 years from the date of grant of the PVR in the case of woody plants and their rootstocks (including kiwifruit varieties) and for 20 years for all other plant varieties.<sup>12</sup>

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<sup>4</sup> At [16]–[22].

<sup>5</sup> International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised at Geneva on 10 November 1972 and on 23 October 1978 1861 UNTS 281 (opened for signature 23 October 1978, entered into force 8 November 1981) (in this judgment, the 1978 UPOV Convention). The original 1961 Convention established the International Union for the Protection of New Varieties of Plants (UPOV).

<sup>6</sup> Plant Variety Rights Bill 2021 (35-1).

<sup>7</sup> 1978 UPOV Convention, art 3.

<sup>8</sup> PVR Act, s 2 (definition of “plant”).

<sup>9</sup> Section 2 (definition of “variety”).

<sup>10</sup> Section 10(2)(d).

<sup>11</sup> Section 9.

<sup>12</sup> Section 14(2).

[10] The exclusive rights of a PVRs grantee are set out in s 17 of the PVR Act, which relevantly provides:

**17 Rights of grantees**

- (1) Subject to section 19, a grantee shall have the exclusive right—
  - (a) to produce for sale, and to sell, reproductive material of the variety concerned:
  - (b) if that variety is a plant of a type specified by the Governor-General by Order in Council for the purposes of this paragraph, to propagate that variety for the purposes of the commercial production of fruit, flowers, or other products, of that variety:
  - (c) subject to any terms and conditions that grantee specifies, to authorise any other person or persons to do any of the things described in paragraph (a) or paragraph (b).
- ...
- (3) A grant may be assigned, mortgaged, or otherwise disposed of; and may devolve by operation of law.
- (4) The rights of a grantee under a grant are proprietary rights, and their infringement shall be actionable accordingly; and in awarding damages (including any exemplary damages) or granting any other relief, a court shall take into consideration—
  - (a) any loss suffered or likely to be suffered by that grantee as a result of that infringement; and
  - (b) any profits or other benefits derived by any other person from that infringement; and
  - (c) the flagrancy of that infringement.
- ...
- (8) Where, in any proceedings for the infringement of the rights under this section of a grantee, it is proved or admitted that an infringement was committed but proved by the defendant that, at the time of that infringement, the defendant was not aware and had no reasonable grounds for supposing that it was an infringement, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of that infringement, but shall be entitled instead to an account of profits in respect of that infringement.
- (9) Nothing in subsection (8) affects any entitlement of a grantee to any relief in respect of the infringement of that grantee's rights under this section other than damages.

By virtue of s 17(3) and (4), PVRs are a form of personal property and may be sold, licensed or assigned. The holder of a PVR may license others to produce fruit, flowers and other products for sale, and to sell propagating material of the protected plant variety.<sup>13</sup> Licensing is commonly rewarded by payment of royalties. The holder of a PVR may, under s 17(4), bring civil action against anyone infringing these rights.

[11] Vegetatively-propagating fruit-producing plants (such as kiwifruit) have been specified by Order in Council for the purposes of s 17(1)(b).<sup>14</sup> Vegetative propagation is any form of asexual reproduction occurring in plants in which a new plant grows from a fragment of the parent plant, including the grafting and budding of fruit trees.

### **Background**

[12] The background facts may be drawn from the judgment appealed. There are limited challenges to factual findings, but where relevant we will identify them specifically.

#### *The G3 golden kiwifruit variety*

[13] Zespri commercialised a variety of golden kiwifruit, Hort 16A, in the early 2000s. It was highly successful, but susceptible to the Psa3 bacteria, a virulent strain of plant disease that destroys kiwifruit plants, and in particular Hort 16A. This Court has looked at the effects of Psa3 on the New Zealand kiwifruit industry before, in *Attorney-General v Strathboss Kiwifruit Ltd*.<sup>15</sup> As we observed there, from 2010 Psa3 swept through kiwifruit orchards in the Bay of Plenty region. The disease could not be eradicated. Vines were torn out. It took several years for the industry to re-establish itself.<sup>16</sup>

[14] At the time of the Psa3 outbreak, Zespri had invested in research to identify new kiwifruit varieties. As the Judge put it:<sup>17</sup>

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<sup>13</sup> Section 19.

<sup>14</sup> Plant Variety Rights (Grantees' Rights) Order 1997, cl 2(a).

<sup>15</sup> *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247. See in particular [1], [24]–[31] and [44]–[48].

<sup>16</sup> At [1].

<sup>17</sup> High Court judgment, above n 2, at [5].

By mid-2010 more than 50,000 potential new varieties had been examined as part of Zespri's research programme. More than 10,000 varieties made the initial short list, 40 went to initial growing trials, four made it to on-orchard trials and underwent on-orchard, storage, shipping and taste tests, and three reached the stage of the pre-commercial trials. Those three included the G3 and G9 varieties.

[15] Psa3 meant that the commercialisation of alternative disease-resistant varieties was critical. Zespri accelerated the commercialisation of the G3 variety, which was tolerant to the Psa3 virus. G3 is currently the only proven, commercial variety resistant to Psa3.<sup>18</sup> In 2012 Zespri offered licences to its Hort16A growers to switch to G3. As the Judge observed, the recovery programme for the kiwifruit industry through G3 has been very successful. G3 is attractive to consumers and has achieved significant market premiums at much higher volumes. It has extended storage characteristics, is cost-effective and environmentally friendly to grow and pack. As the Judge stated, "it has driven grower returns and orchard values to record levels".<sup>19</sup>

[16] Zespri holds exclusive rights to commercialised G3 and G9 under the PVR Act. In June 2009 it applied for registration of its rights for G3 and G9 in the United States, and in 2010 it applied for registration in other overseas countries, including China. All such rights have since been granted to Zespri.<sup>20</sup> Relevantly, PVRs for G3 and G9 in China have been granted, running for 20 years from 1 May 2016.

### *The appellants*

[17] Shortly before Psa3 was gaining a foothold in New Zealand, the first and third appellants, Mr Gao and Ms Xue, established a kiwifruit contracting business, the second appellant, Smiling Face. It serviced kiwifruit orchards around Ōpōtiki. As the Judge observed, the disruption to the industry caused by the Psa3 outbreak put Mr Gao and Ms Xue under significant financial pressure. But their business survived, and they managed to purchase their own kiwifruit orchard in 2013.<sup>21</sup>

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<sup>18</sup> G9 has since been "decommercialised".

<sup>19</sup> High Court judgment, above n 2, at [7].

<sup>20</sup> At [8].

<sup>21</sup> At [10].

[18] Licences to grow G3, and to sell the fruit produced, were granted to Mr Gao and Ms Xue in July and September 2013 and July 2014.<sup>22</sup>

*G3 goes to China*

[19] In early 2016, Zespri became aware that G3 was being grown in the Hubei and Sichuan areas of China. What happened next is explained in the judgment:<sup>23</sup>

After hearing industry rumours that G3 and G9 were being planted in China, Zespri engaged private investigators. Based on information received from those investigators, in December 2016 Zespri sent two senior managers, Shane Max and Sheila McCann Morrison, to China to make their own enquiries. They met with Shu Changqing (Mr Shu), a kiwifruit grower identified by Zespri's private investigators. Mr Shu openly admitted that he was growing G3 and G9 on four orchards and took Mr Max and Ms McCann Morrison to see three of those orchards. He declined to tell them, however, where he had obtained G3 and G9 from.

Zespri subsequently laid a complaint with the police, who executed search warrants at the premises of Mr Gao and Smiling Face. Zespri subsequently obtained copies of various documents seized by the police, pursuant to a request under the Official Information Act 1982. Zespri also later obtained court orders for the cloning and search of Mr Gao's computer. Found on that computer, and elsewhere, were a number of documents that Zespri alleges link Mr Gao and Smiling Face to commercial kiwifruit activities in China including, in particular, in relation to the G3 and G9 varieties.

[20] In a comprehensive judgment, the Judge made the following factual findings.

*Admissions made by Mr Gao*

[21] The Judge found Mr Gao had made a number of admissions of having acted dishonestly in relation to G3 and G9. Those admissions were "made in circumstances where plausible denial was not an available option, in light of the contemporaneous documents".<sup>24</sup>

[22] First, Mr Gao admitted to agreeing to a request from Mr Shu in August 2012 to take G3 and G9 budwood to China with him, for delivery to Mr Shu.<sup>25</sup>

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<sup>22</sup> At [173].

<sup>23</sup> At [11]–[12] (footnotes omitted). As we note subsequently, there is a challenge to the admissibility of Mr Shu's statements. It is dealt with under Issue One.

<sup>24</sup> At [48].

<sup>25</sup> At [48(a)].

[23] Secondly, Mr Gao admitted to signing two documents at the request of Mr Shu in October 2012. The first was what the Judge called the “False Licence Agreement”, which (inter alia) purported to give Mr Shu full intellectual property rights to the G3 and G9 varieties for the whole of China. The second was a receipt for the payment of the first instalment of the licence fee in the sum of RMB 1 million (NZD 200,000). Mr Gao’s explanation for these documents was, in essence, that they were fraudulent documents aimed at deceiving prospective investors in Mr Shu’s orchard into believing that Mr Shu had a valid licence to grow G3 and G9 on his orchard for which he had paid a (significant) licence fee.<sup>26</sup>

[24] Thirdly, Mr Gao admitted to, in late November 2015, entering into an agreement over WeChat (a communications app) with Mr Li, a kiwifruit grower based in China, to sell him 1,000 G3 “sprouts” (budwood) for RMB 300,000 (NZD 60,000). He subsequently told Mr Li that the budwood would be arriving in China at the end of January 2016. Mr Li withdrew from the deal, however, once he discovered (not from Mr Gao) that Mr Gao was not licensed to sell G3. The Judge noted, not without irony, that Mr Gao was angry at Mr Li’s withdrawal from the agreement and accused him of a lack of honesty.<sup>27</sup>

[25] Fourthly, Mr Gao admitted to, in 2016, suggesting to an associate that he steal a particular kiwifruit variety that he (Mr Gao) had provided to an orchard in China and gave him detailed instructions on where to find it.<sup>28</sup>

*Dealings with, and supply of budwood to, Mr Shu*

[26] The Judge was satisfied that Mr Gao agreed to supply G3 and G9 budwood to Mr Shu in August 2012.<sup>29</sup> Ultimately, that finding was not in dispute by the end of the trial, or before us on appeal.

[27] However, there were challenges maintained against the Judge’s reliance on statements attributed to Mr Shu, on the basis these were inadmissible hearsay. We note

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<sup>26</sup> At [48(b)].

<sup>27</sup> At [48(c)].

<sup>28</sup> At [48(d)].

<sup>29</sup> At [85(a)].

the relevant statements at [29] and [48] below and we address that challenge under Issue One.

[28] Secondly, the Judge found that Mr Gao exported G3 and G9 budwood from New Zealand in August 2012 and supplied it to Mr Shu in China. She rejected Mr Gao's claim in evidence that he reneged on his promise to do so. Mr Shu, a senior figure in the Hubei kiwifruit industry, had probably sought Mr Gao out specifically to obtain G3 or G9 budwood from him. Mr Gao was concerned about his future because of the Psa3 outbreak. The fact that Mr Shu reimbursed Mr Gao's airfare was consistent with Mr Gao having performed the promise, as was the continuing business relationship between the two men.<sup>30</sup>

[29] Thirdly, following Mr Gao's visit, Mr Shu resigned from his employment to develop his own orchard interests. Mr Shu freely admitted growing G3 and G9 to two of Zespri's witnesses, namely Mr Max and Ms McCann Morrison.<sup>31</sup> The Judge found that following Mr Gao's supply of G3 and G9 budwood to Mr Shu in August 2012, Mr Shu facilitated the planting of those varieties at four different orchards, commencing with his family orchard at Chibi (1.3 ha) in 2012, and then spreading to Xianning 1 (13.3 ha), Xianning 2 (33 ha) and Wuhan (120 ha).<sup>32</sup> As at 2016 G3 and G9 was growing at all four orchards.<sup>33</sup>

[30] Fourthly, although the False Licence Agreement was not genuine — and signed in October 2012 but post-dated to August 2012<sup>34</sup> — the Judge was satisfied the reference in it to Smiling Face or Mr Gao providing G3 and G9 budwood to Mr Shu in August 2012 was true. A related marketing proposal also supported the conclusion that G3 and G9 were established on an orchard associated with Mr Shu following Mr Gao's August 2012 visit.<sup>35</sup>

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<sup>30</sup> At [85(b)].

<sup>31</sup> At [85(b)].

<sup>32</sup> Importantly, these are the land areas, not crop areas. We consider the Judge's findings as to size in Issue Two.

<sup>33</sup> High Court judgment, above n 2, at [85(h)–(i)].

<sup>34</sup> At [85(c)].

<sup>35</sup> At [85(b)]. The Judge found the purpose of the False Licence Agreement and receipt was to deceive prospective investors in Mr Shu's orchard into believing that the G3 and G9 varieties being grown on that orchard were lawfully licensed, and that Mr Gao was aware of that purpose when he signed the documents: at [85(d)].

[31] Fifthly, what the Judge described as “somewhat panicked text message exchanges” between Mr Shu and Mr Gao in November 2016 supported the conclusion Mr Gao was the source of Mr Shu’s unauthorised cultivation of Zespri’s G3 and G9 varieties.<sup>36</sup>

[32] Sixthly, the Judge found Mr Gao received consideration for supplying the G3 and G9 budwood to Mr Shu, and signing the False Licence Agreement and receipt, but she could not determine the precise quantum of that consideration.<sup>37</sup>

[33] Seventhly, the Judge rejected Mr Gao’s claim that his actions were “innocent” because he did not know, prior to acquiring a G3 licence for his own orchard in 2013, that Zespri held the PVRs for G3 and G9. That was, the Judge said, implausible and inconsistent with the surreptitious nature of Mr Gao’s conduct. Mr Gao was a kiwifruit contractor working on a number of orchards during the height of the Psa3 crisis, which Zespri was proactively trying to manage. It was not credible that someone closely involved in the kiwifruit industry at that time (or possibly any time) could have genuinely believed that they were lawfully entitled to sell or export G3 and G9 to China. And even after Mr Gao had signed his first G3 licence, he continued his efforts to sell G3 to growers in China, and to profit from its propagation in China.<sup>38</sup> We agree, and Mr St John, for the appellants, did not seriously seek to persuade us otherwise.

*Dealings with, and supply of budwood to, Mr Yu*

[34] The Judge was satisfied that Mr Gao had entered into a joint venture with Mr Yu in relation to the development of the Liangshan Yi orchard/demonstration park.<sup>39</sup> She found Mr Gao invested funds in the joint venture, and rejected as implausible his evidence that a sum of RMB 350,000 (NZD 70,000) advanced was a loan. He was an investor with a proprietary interest in the joint venture — a “partner”, as he described himself to Mr Li.<sup>40</sup> The Liangshan Yi orchard is just over 6.6 ha in size.<sup>41</sup>

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<sup>36</sup> At [85(b)].

<sup>37</sup> At [85(g)].

<sup>38</sup> At [86].

<sup>39</sup> At [99(a)].

<sup>40</sup> At [99(b)].

<sup>41</sup> At [92].

[35] Secondly, the Judge was satisfied that Mr Gao supplied G3 to the joint venture to plant on the Liangshan Yi orchard. The Judge said the totality of the evidence supported that conclusion, including:

- (a) The primary purpose of the joint venture was to introduce and develop a Psa3-resistant kiwifruit variety for sale to third parties.<sup>42</sup> That variety, the Judge found, was G3. The Judge rejected as incredible Mr Gao’s evidence that this could have been some other (unspecified) variety, possibly from a country other than New Zealand.<sup>43</sup>
- (b) The joint venture proceeded, including acquiring an interest in land. Mr Gao invested very significant funds in the joint venture, including funds borrowed from family members, which would have been unlikely to occur unless Mr Gao knew that the joint venture had access to the “raw material” (a Psa3-resistant kiwifruit variety) that it needed to achieve its objectives.<sup>44</sup>
- (c) Mr Gao’s role as “technology officer” was to supply G3 budwood to the joint venture, with the intention that it be subsequently produced, promoted and sold to third parties as a Psa-resistant kiwifruit variety. He was the only party based overseas and had ready access to G3 through his work in New Zealand.<sup>45</sup>
- (d) Prior to Mr Gao entering into the Liangshan Yi joint venture he had provided G3 budwood to Mr Shu.<sup>46</sup>
- (e) Mr Gao admitted offering to provide G3 budwood to Mr Li, a year or so after investing in the joint venture, for the purposes of an orchard Mr Li wished to establish. Mr Gao told Mr Li he had experience in such matters due to his partnership in the Liangshan Yi orchard.<sup>47</sup>

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<sup>42</sup> At [99(e)(i)].

<sup>43</sup> At [99(c)].

<sup>44</sup> At [99(e)(iii)].

<sup>45</sup> At [99(d)].

<sup>46</sup> At [99(e)(v)].

<sup>47</sup> At [99(e)(iv)].

*Dealings with Mr Li*

[36] The Judge found that Mr Gao had offered to sell G3 budwood to Mr Li, a Chinese kiwifruit grower, and had entered an agreement for the sale of G3 budwood.<sup>48</sup> Indeed, Mr Gao admitted doing so.

[37] Mr Li however withdrew from the arrangement when he discovered Mr Gao lacked authority to sell G3 budwood to him.

*Dealings with Mr Yuan*

[38] The Judge found that Mr Gao and Mr Yuan entered into a joint venture agreement in November 2015, when Mr Gao was visiting China, to exploit two exclusive kiwifruit varieties supplied by Mr Gao, starting with a 6 ha area in Shanggao, China.<sup>49</sup> The Judge “strongly suspect[ed]” the two exclusive kiwifruit varieties Mr Gao agreed to supply were G3 and G9.<sup>50</sup> The agreement, which was in evidence, provided that in exchange Mr Gao was to receive a 30 per cent shareholding in the venture.<sup>51</sup>

[39] The Judge was unable on the evidence to determine whether supply in terms of the agreement proceeded.<sup>52</sup> This allegation was therefore not relevant to the first or second causes of actions or damages.<sup>53</sup> We discuss it no further.

*Dealings with Mr Yang*

[40] On 5 January 2017 Mr Gao incorporated Jiangxi Jiashang Agriculture Development Company Ltd in China which operated the Jiashang Agriculture orchard. When inspected shortly before trial, Zespri found no evidence of G3 or G9 growing in the Jiashang Agriculture orchard. The Judge accordingly found the evidence fell short of establishing that Mr Gao has exploited or attempted to exploit G3 and G9

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<sup>48</sup> At [112].

<sup>49</sup> At [106].

<sup>50</sup> At [113].

<sup>51</sup> At [106(b)].

<sup>52</sup> At [113].

<sup>53</sup> At [120].

through Jiashang Agriculture.<sup>54</sup> Again, this meant the allegation was irrelevant to the first and second causes of action and we need not address it further.<sup>55</sup>

### **Issues on appeal**

[41] Six issues arise on appeal:

- (a) **Issue One:** Did the Judge err in finding hearsay statements made by Mr Shu were admissible?
- (b) **Issue Two:** Did the Judge err in assessing the size of Mr Shu's orchards?
- (c) **Issue Three:** Did the Judge err in making adverse credibility findings?
- (d) **Issue Four:** Did the Judge err in finding the G3 and G9 varieties would not have reached Mr Shu in China but for Mr Gao's actions in New Zealand?
- (e) **Issue Five:** Did the Judge err in applying the PVR Act extra-territorially?
- (f) **Issue Six:** Did the Judge err in fixing damages?

### **Issue One: Hearsay — Did the Judge err in finding hearsay statements made by Mr Shu were admissible?**

[42] The Judge held the statements made by Mr Shu in China to Mr Max and Ms McCann Morrison were hearsay statements.<sup>56</sup> Nonetheless, the Judge ruled the statements admissible under s 18 of the Evidence Act 2006. The Judge considered the circumstances relating to the statements made by Mr Shu provide reasonable assurance they were reliable. Mr Shu had a capacity for dishonesty but he had no motive to lie about growing G3 and G9 varieties and likely did not lie given he took

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<sup>54</sup> At [118].

<sup>55</sup> At [120].

<sup>56</sup> Schedule to the High Court judgment, above n 2, [High Court judgment schedule] at [31].

Mr Max and Ms McCann Morrison to his orchards.<sup>57</sup> The hearsay statements were also wholly consistent with other evidence in the case including photographs and video taken by Mr Max and Ms McCann Morrison, the False Licence Agreement and messages between Mr Shu and Mr Gao.<sup>58</sup>

[43] The Judge also considered Mr Shu to be unavailable as a witness. The issue was whether Mr Shu would not willingly give evidence for Zespri, as a resident in China cannot be subpoenaed to give evidence in New Zealand.<sup>59</sup> Mr Shu was unwilling to be a witness for Zespri unless Zespri partnered with him in relation to his G3 and G9 growing operation in China — something Zespri was unwilling to do.<sup>60</sup> Documentary evidence and Mr Gao's evidence in cross-examination demonstrated Mr Shu's loyalty was to Mr Gao not Zespri.<sup>61</sup>

### *Submissions*

[44] The appellants submit neither limb of the s 18 test was met. First, they submit the Judge erred in finding the circumstances relating to the statements provide reasonable assurance they are reliable. There are effectively no records of the meetings between Zespri and Mr Shu, nor any contemporaneous notes taken by Mr Max or Ms McCann Morrison. There is no evidence as to the qualifications or notes of the interpreter used to speak to Mr Shu who speaks no English.<sup>62</sup> As Chinese is not a literal language, the statements cannot be reliable without evidence as to the interpreter's ability. Zespri's failure to disclose documents that may exonerate or assist Mr Gao meant the Judge should have drawn a negative inference as to the reliability of the statements Zespri sought to rely on.<sup>63</sup> Finally, the appellants submit the Judge should have been cautious of the evidence of Zespri's witnesses as their evidence is said to have been unfair and pejorative.

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<sup>57</sup> At [33].

<sup>58</sup> At [34].

<sup>59</sup> At [37].

<sup>60</sup> At [38]–[39].

<sup>61</sup> At [40]–[43].

<sup>62</sup> We note there are in fact some (limited) handwritten notes recorded by the interpreter in Chinese which have been translated into English, along with the video referred to at [48] below.

<sup>63</sup> Citing *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [155]; *Payne v Parker* [1976] 1 NSWLR 191 (CA) at 200–201; and *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

[45] Second, the appellants submit the Judge erred in finding Mr Shu unavailable in three respects. First, the Judge uncritically accepted Ms McCann Morrison's evidence Mr Shu would not be a witness unless Zespri entered a commercial settlement with him. Again, there is no record of any such discussion, nor of the translator's notes and qualifications. Next, the Judge erred in finding it open to and incumbent on the appellants to call Mr Shu if they wished to challenge his hearsay statements. The Judge cited no authority for this proposition. She also assumed wrongly that Mr Shu was loyal to Mr Gao when Zespri appeared to have a relationship with him. Finally, that Mr Shu is a resident outside New Zealand does not make him not compellable.<sup>64</sup>

[46] For its part, Zespri submits the relevant statements (or some of them) are not hearsay at all. Rather, they revealed common knowledge or were offered either to support unintended inferences or for reasons other than to prove the truth of what was said.<sup>65</sup> The discussions Mr Shu had (via a translator) with Mr Max and Ms McCann Morrison are said not to be assertions intended to be believed that Mr Shu was growing G3 or G9, but simply that he had technical skills in growing those varieties. They could, Ms O'Gorman submits, be "evidentially relevant and can be *evidence* of a fact (i.e. having a tendency to prove he was growing G3 and G9), without being an intended *assertion* of that fact". The same was said to be true of his assertions about the size and maturity of his orchards.

### *Discussion*

[47] We reject each of these submissions. It is convenient to start with the last of them — that advanced by Zespri.

[48] The exact statements concerned are set out in a schedule to the judgment appealed. In essence it is that Mr Shu told Mr Max and Ms McCann Morrison that in 2015 the Xianning 2 orchard had produced eight tonnes of G3 and G9, with a high yield. According to Mr Shu, the G9 was harvested in September and the G3 from early to mid-October, and the G3 and G9 plant material present at Xianning 2 had been obtained

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<sup>64</sup> Citing *Solicitor-General v X* [2009] NZCA 476 at [35].

<sup>65</sup> Relying on *R v Holtham* [2008] 2 NZLR 758 (HC); and *R v Twist* [2011] EWCA Crim 1143, [2011] 3 All ER 1055.

by him from Xianning 1. Further, a video taken on a later visit with Mr Shu at his Wuhan orchard records a conversation between the translator, Ms Tang, and Mr Shu in which Mr Shu explains that he had planted around 700 m<sup>2</sup> of G3 seedlings in a particular field. He also made statements that led Mr Max to believe the Wuhan orchard was approximately 120 ha in size.<sup>66</sup>

[49] The Judge had no difficulty in concluding that these statements are hearsay in nature. Nor do we. The statements were assertions by Mr Shu that he was growing G3 (and G9). They were relied on by Zespri at trial to prove he was doing so, in support of its claim that Mr Gao had supplied this material to Mr Shu. The Judge relied on the statements to reach just that conclusion: see [29] above.

[50] We turn now to the appellants' first argument, concerning the reliability of the statements. The requisite enquiry is a gate-keeping one: it is whether the evidence is reliable enough for a judge to consider and draw his or her own conclusions as to weight.<sup>67</sup> We do not think the Judge erred in her assessment as to this threshold reliability requirement. The statements were made spontaneously in the presence of Mr Max and Ms McCann Morrison (and their translator, Ms Tang), whom he knew represented Zespri and were investigating whether he was growing G3 and G9 without authorisation. As Ms McCann Morrison said in evidence:

Mr Shu did not seem at all worried by this. He responded that he had a licence to do so from New Zealand, which he had already shown to Zespri's investigators.

This was a document said to be substantially similar to the False Licence Agreement. While Mr Shu acted dishonestly in other respects, these were admissions made against interest. As the Judge observed:<sup>68</sup>

... if he had wished to lie about this issue it is highly unlikely he would have been willing to take Mr Max and Ms McCann Morrison to visit his orchards to view his growing operation first hand.

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<sup>66</sup> High Court judgment schedule, above n 56, at [30]. Mr Shu's statement recorded at [30(b)] as to the size of the Xianning 2 orchard appears to have been made to Zespri's investigators, rather than to Mr Max or Ms McCann Morrison, and is inadmissible hearsay.

<sup>67</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [18.02].

<sup>68</sup> High Court judgment schedule, above n 56, at [33].

Further, as the Judge observed, Mr Shu’s statements were amply corroborated. She referred to the personal observations of Mr Max and Ms McCann Morrison, the photographs and video they took, the False License Agreement, the messages exchanged between Mr Shu and Mr Gao, and Ms McCann Morrison’s evidence of the context in which the orchard visits took place — namely that Mr Shu wanted to be Zespri’s “man in China” — which went unchallenged in cross-examination.<sup>69</sup>

[51] Dealing now with more peripheral points made by the appellants as to reliability, the absence of contemporaneous documentation is a matter going to weight. The Judge expressly held that she had no concerns about the credibility of any of the witnesses called by Zespri.<sup>70</sup> Finally, the medium of translation does not itself clothe a translated statement with a hearsay character.<sup>71</sup> In this case, we are not dealing with double hearsay.<sup>72</sup> We accept that in *Tsang Chi Ming v Uvanna Pty Ltd (t/as North West Immigration Services)* the Federal Court of Australia considered proof of the accuracy of the translation is necessary, but the Court also considered such proof may arise in civil cases by inference.<sup>73</sup> The provision for proof by inference gives scope, we think, to assess the need for proof of accuracy against the circumstances. We consider then that the accuracy of translation is a matter going to weight. The translated statements, as we noted earlier, were amply corroborated. This suggests the translation, at least on significant matters, was sufficiently accurate for the Judge to have regard to Mr Shu’s statements. There are limited records of the translation for Mr St John to assess or impugn, but we think it would suffice to show material differences between the translated statements and extrinsic evidence. Apart from generalised complaints, Mr St John did not offer examples of mistranslation, or potential mistranslation, undermining the admissibility of the hearsay statements of Mr Shu via Mr Max and Ms McCann Morrison.

[52] Finally, we turn to unavailability. The Judge was entitled to accept, as she did, the evidence of Ms McCann Morrison on Mr Shu’s commercial requirements to give

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<sup>69</sup> At [34].

<sup>70</sup> High Court judgment, above n 2, at [45].

<sup>71</sup> *Tsang Chi Ming v Uvanna Pty Ltd (t/as North West Immigration Services)* (1996) 140 ALR 273 (FCA) at 280.

<sup>72</sup> See, for example, *Key v R* [2010] NZCA 115.

<sup>73</sup> *Tsang Chi Ming v Uvanna Pty Ltd (t/as North West Immigration Services)*, above n 71, at 280.

evidence. That is the core complaint Mr St John makes, but Ms McCann Morrison’s evidence does not seem to us to have been seriously undermined. In any case, it was corroborated by other evidence. Mr Gao admitted asking Mr Shu not to give documentary evidence to Zespri — an exchange evident in messages put in evidence. Mr Gao himself stated in evidence that Mr Shu did not want to come to New Zealand (but might give written evidence, which is beside the present point). As the Judge observed:<sup>74</sup>

There is extensive evidence in this case that establishes that Mr Shu colluded with Mr Gao to surreptitiously obtain G3 and G9 plant material from New Zealand and subsequently propagate that material in China, in the full knowledge that he was not lawfully licensed to do so. Mr Shu created false documents to mislead both investors and local officials as to the lawfulness of what he was doing. Given this context, it is not surprising that Mr Shu was unwilling to give evidence for Zespri (or provide it with copies of relevant documents) in the absence of a commercial agreement.

[53] We agree. We are not persuaded the Judge erred in concluding Mr Shu was unavailable as a witness. Mr Shu was “compellable” in the sense that word is used in the Evidence Act.<sup>75</sup> But the Judge was right to find he was unavailable, inasmuch as he was outside New Zealand and it was not reasonably practicable for him to give evidence.<sup>76</sup> It was common ground he could not be the subject of testimonial compulsion. Moreover, there was persuasive evidence that he was a co-conspirator with Mr Gao, had agreed with Mr Gao not to hand over documents to Zespri and had advised Ms McCann Morrison that he would not voluntarily give evidence without a commercial settlement or “partner” agreement. In this context the possibility that remote hearing technology might be used is beside the point; the evidence of Ms McCann Morrison is sufficient to establish, on the balance of probabilities, that Mr Shu was unwilling to give evidence and, being beyond compulsion, thereby unavailable.

### *Conclusion*

[54] The hearsay statements of Mr Shu were admissible in evidence at trial.

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<sup>74</sup> High Court judgment schedule, above n 56, at [42].

<sup>75</sup> Evidence Act 2006, ss 16(2)(e) and 71. See *Haunui v R* [2020] NZSC 153 at [38]; and *Solicitor-General v X*, above n 64, at [35].

<sup>76</sup> Section 16(2)(b).

**Issue Two: Orchard sizes — Did the Judge err in assessing the size of Mr Shu’s orchards?**

[55] During their visits to the Chibi, Xianning 2 and Wuhan orchards, Mr Max and Ms McCann Morrison took photographs which are in evidence. Also in evidence are satellite images of the relevant areas with the locations of those photographs superimposed.

[56] The Judge noted the evidence of Mr Max and Ms McCann Morrison that the Chibi orchard is relatively small, at about 1.3 ha, based on their own physical observations, supported by photographic evidence. The Judge accepted that evidence as reliable, noting Mr Max and Ms McCann Morrison were not challenged on it.<sup>77</sup>

[57] The Judge went on to consider Mr Max and Ms McCann Morrison’s evidence that the first stage of the Xianning 2 orchard was 13.3 ha, based on a sign to that effect they saw and photographed, and later had translated, at the orchard.<sup>78</sup> The Judge also noted Mr Max and Ms McCann Morrison made their own physical observations of the Xianning 2 orchard and took photographs.<sup>79</sup>

[58] As to the size of the Wuhan orchard, the Judge noted that Mr Shu told Mr Max and Ms McCann Morrison that the Wuhan orchard was approximately 120 ha. This assessment was said to be consistent with the scale of the orchard as they observed it. Mr Max also said that Mr Shu was in fact quite emphatic about the size of the orchard, which was a source of pride for him.<sup>80</sup>

[59] The Judge based the size of the Xianning 1 orchard on a statement in Mr Shu’s Marketing Proposal, which he sent to Mr Gao, that the size of his “Demonstration Park” (which she understood to be Xianning 1) was 13.3 ha.<sup>81</sup>

[60] The Judge accordingly assessed the size of Mr Shu’s orchards on which G3 and G9 were alleged to have been planted as follows:<sup>82</sup>

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<sup>77</sup> High Court judgment, above n 2, at [74].

<sup>78</sup> At [79].

<sup>79</sup> At [81].

<sup>80</sup> At [84].

<sup>81</sup> At [85(i)], n 38.

<sup>82</sup> At [85(i)].

- (a) Chibi — 1.3 ha;
- (b) Xianning 1 — 13.3 ha;
- (c) Xianning 2 — 33 ha; and
- (d) Wuhan — 120 ha.

### *Submissions*

[61] In their notice of appeal, the appellants objected to the Judge's findings as to the land areas of the four orchards planted by Mr Shu, alleging they were based on inadmissible opinion evidence. At the hearing, the admissibility point was subsumed into a broader challenge to the sufficiency of the evidence as to size, relevant as it is to the assessment of damages.<sup>83</sup> The appellants submit neither Mr Max nor Ms McCann Morrison had relevant expertise so as to give an assessment of the size of the orchards they visited. Nor could their evidence as to size be admissible as lay opinion evidence, neither having given any real evidence as to how they arrived at the orchard sizes they asserted.

[62] Secondly, as to the sufficiency of the broader evidence as to size, the appellants emphasise that in what notes of the meetings with Mr Shu exist, the references to land areas do not match up with the accepted areas, and more fundamentally it is impossible to tell to what they refer to. As to the satellite evidence relied on by Zespri in this Court, though in evidence, Zespri did not rely on it in the Court below and there is no evidence as to what the satellite images show.

[63] For its part, Zespri submits the observations as to size of Mr Max and Ms McCann Morrison are properly admissible either as fact evidence or as lay opinion evidence under s 24 of the Evidence Act. As to the former, size is visually noticeable rather than an inference drawn from facts. As to the latter, detailed factual accounts of size, as with distance, are difficult to convey; hence opinions as to size are admissible. Further, the appellants did not raise this issue of admissibility at trial.

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<sup>83</sup> See Issue Six below.

[64] Zespri also submits that the photographs and satellite imagery of the orchard sites substantiate the evidence in their affidavits as to the size of the orchards. Zespri concedes that there is no scale or measurements on those satellite images but submits that can be added after the event. As to Xianning 1, Zespri concedes the size offered in evidence by Mr Max is otherwise purely based on the inadmissible hearsay evidence of Zespri's investigators as Mr Max and Ms McCann Morrison did not visit that orchard. As to Xianning 2, a translation of a photograph of a sign at the orchard referring to the construction of a 13.3 ha demonstration site substantiates the size alleged. As to the Wuhan orchard, that is further substantiated by the (admissible) hearsay statements of Mr Shu to Mr Max and Ms McCann Morrison.

*Discussion — general observations*

[65] We make six general observations before turning to the evidence relating to each of Mr Shu's orchards.

[66] First, we note that on the face of the judgment, as well as the evidence, the Judge's summary of the orchard sizes at [85] of her judgment is in error. The evidence she set out and on which she relies states the Xianning 2 orchard is 13.3 ha, rather than 33 ha. Mr Max in his affidavit states the Xianning 1 orchard is 33 ha. We think this error occurred due to an error elsewhere in Mr Max's affidavit where he appears erroneously to refer to Xianning 2 as being 33 ha. There is no suggestion the two Xianning orchards are the same size. We proceed on the basis that the Judge transposed the sizes of the Xianning 1 and 2 orchards in error.

[67] Secondly, we think much of the difficulty in assessing the evidence as to size stems from the manner in which the affidavit of Mr Max mixes personal observations with the hearsay statements of Zespri's earlier investigators in China. The Judge ruled these statements inadmissible where the challenged passages were clearly hearsay, but noted that many statements were not expressly identified as being sourced from Zespri's investigators. There was insufficient factual foundation to support

an inference such statements originated from Zespri's investigators, rather than Mr Max's own personal observations.<sup>84</sup> The Judge continued:<sup>85</sup>

... there is admissible evidence as to the size of the various orchards (based on the personal observations of Mr Max and Ms McCann Morrison and documents discovered by the defendants). It cannot therefore be inferred that their evidence as to the size of the orchards is based exclusively (or at all) on hearsay information conveyed by Zespri's investigators.

[68] We accept this is the correct approach. On the face of Mr Max's evidence, at times the obvious inference appears to be that the exact stated sizes of the orchards are derived from statements by Zespri's investigators as there is no explanation of how Mr Max arrived at such a figure.<sup>86</sup> But in the absence of evidence as to that inference, or cross-examination on this point, we do not find the exact figures themselves would be inadmissible hearsay. Rather, we think issues as to the lack of explanation as to how they are arrived at go to weight.

[69] Thirdly, the admissibility objection does not seem to have been taken in the High Court. Rather the focus was on the reliability of the evidence as to size. But that is not an answer. The onus remains on a plaintiff, in this case Zespri, to adduce admissible evidence. We also note that the issue may not have arisen given it is, to an extent, parasitic on the Judge's hearsay rulings which were determined following the trial.

[70] Fourthly, and turning to the admissibility issue proper, neither Mr Max nor Ms McCann Morrison are survey experts for relevant purposes and on appeal Zespri did not attempt to persuade us otherwise. We consider their evidence as to perceived area was lay opinion evidence admissible under s 24 of the Evidence Act (just as is lay evidence of perceived colour, speed or distance). There may be limits as to how specific a statement of measurement can be, without an explanation of how that assessment was reached, before it can no longer properly be regarded as lay opinion evidence. But as will become evident, we need not address that to dispose of this issue.

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<sup>84</sup> High Court judgment schedule, above n 56, at [18].

<sup>85</sup> At [19].

<sup>86</sup> We focus here on Mr Max's evidence as Ms McCann's evidence was largely subsidiary to it.

[71] Fifthly, and relatedly, the exact area of the orchards was not material to liability. Rather, area was relevant to assessment of damages applying the user principle, which we discuss under Issue Six. Ultimately, we are satisfied the remedy here does not depend on exact measurement.<sup>87</sup>

[72] Finally, we consider little weight, if any, can be given to the satellite imagery relied on by Zespri. It contains no scale or means to ascertain the size of the orchards. The actual extent of the orchards is not demarcated and not always apparent. There is little in this evidence that substantiates the general sizes of the orchards, let alone the specific sizes alleged by Zespri.

*Discussion — orchard sizes*

[73] We turn then to consider the evidence as to the size of each of Mr Shu's orchards in turn.

[74] First, the Chibi orchard. Mr Max described the Chibi orchard on evidence as "relatively small" at 1.3 ha. No explanation as to how that figure was arrived at is in evidence, but we consider such a size — just 114 m<sup>2</sup> — could be assessed by observation by an average person. The photographic evidence corroborates this assessment. We consider there to be sufficient evidence to establish the Chibi orchard is around 1.3 ha in size — exactness not being required for the assessment of damages.

[75] Secondly, Xianning 1. As noted, Mr Max and Ms McCann Morrison did not visit this site. They made no personal observation as to perceived size in respect of this orchard. The satellite imagery of this orchard in evidence only sets out its location, but does not show the boundaries, or for that matter the size, of the orchard. The Judge appears to have avoided this issue by relying on the reference in Mr Shu's Marketing Proposal to the "Demonstration Park" being 13.3 ha. As we explain at [66] above, and discuss further below, the evidence points to Xianning 2 being 13.3 ha. Mr Max's own evidence was that Xianning 1 was 33 ha, but we put that to one side, he never having visited it. We consider it more likely that the "Demonstration Park" referred to is Xianning 2. That would be consistent with the description on the sign at that orchard

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<sup>87</sup> See [141] below.

we discuss below. There is no evidence, then, to establish that the Xianning 1 orchard is 33 ha, or any other size. We return to this issue when we discuss the assessment of damages in Issue Six.

[76] Thirdly, Xianning 2. Mr Max’s only observation was that it was “more substantial” than the Chibi orchard. The translated sign photographed by Mr Max and Ms McCann on their visit to Xianning 2 indicates that the orchard is 13.3 ha. That statement, if relied on for the truth of its contents as evidence the orchard is 13.3 ha, is hearsay. We are not satisfied it is properly admissible as a business record under s 19 of the Evidence Act. But it is admissible as evidence of the mere fact Xianning 2 was described as covering 13.3 ha (whether or not that was true). The fact of that description suggests Xianning 2 is the “Demonstration Park” referred to in Mr Shu’s Marketing Proposal. The hearsay statement of Mr Shu in that document that the “Demonstration Park” is 13.3 ha is admissible to prove the truth of its contents.<sup>88</sup> Recourse to the satellite imagery is unnecessary. We are satisfied the Xianning 2 orchard covers 13.3 ha.

[77] Finally, the Wuhan orchard. Given we have found the statements by Mr Shu to Mr Max and Ms McCann Morrison were properly admissible, so too are his statements that the Wuhan orchard covered 120 ha. Mr Max’s observations that the “scale” of the orchard was consistent with that figure are admissible lay opinion evidence, and corroborate Mr Shu’s statements as the Judge rightly noted. We are satisfied the Wuhan orchard covers 120 ha.

### *Conclusion*

[78] The Judge erred in finding sufficient evidence proving the size of the Xianning 1 orchard on the balance of probabilities. The Judge also appears to have mistakenly stated the Xianning 2 orchard covered 33 ha — we are satisfied it covered 13.3 ha. Finally, the Judge did not err in her assessment of the size of the remaining

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<sup>88</sup> Whether under the s 18 general hearsay exception or under s 19 as a business record, Mr Shu being unavailable.

orchards.<sup>89</sup> It follows that Zespri had proved to the required standard that Mr Shu’s orchards totalled 134.6 ha, and Liangshan Yi a further 6.67 ha, totalling 141.3 ha.

**Issue Three: Credibility — Did the Judge err in making adverse credibility findings?**

[79] The Judge found Mr Gao a “very unimpressive witness”: “On his own evidence, [he] revealed himself to be a person who lacks a moral compass and does not place a high value on honesty”.<sup>90</sup> His evidence was described as “often evasive and implausible”.<sup>91</sup> The Judge considered his evidence lacked credibility “on most of the contentious issues”, although she went on to make specific credibility findings as required.<sup>92</sup>

[80] The Judge considered Ms Xue intelligent and articulate. Her evidence was forthright and credible on non-contentious issues, but often lacked credibility on contentious issues.<sup>93</sup>

*Submissions*

[81] The appellants submit the Judge erred in finding Mr Gao lacked credibility. Mr Gao’s admission to being involved in the False License Agreement demonstrated rather than undermined his credibility. The Judge did not give examples where Mr Gao’s evidence was evasive or implausible. Some of the Judge’s findings are said to simply be unfair. In particular, it was plausible Mr Gao travelled to China to acquire more knowledge on kiwifruit management — China is the leading supplier of kiwifruit and Mr Gao has limited English.

[82] The appellants also submit the Judge erred in finding Ms Xue lacked credibility. The Judge appeared to have wrongly confused Ms Xue, her qualifications and her credibility with that of a different Ms Xu in a contemporaneous judgment.<sup>94</sup>

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<sup>89</sup> For the avoidance of doubt, we note the size of the 6.67 ha Liangshan Yi orchard is not at issue, Mr Gao having confirmed its size in cross-examination.

<sup>90</sup> High Court judgment, above n 2, at [43].

<sup>91</sup> At [43].

<sup>92</sup> At [43].

<sup>93</sup> At [44].

<sup>94</sup> *R v Xu* [2018] NZHC 1433, [2018] 3 NZLR 626 at [159]–[160].

The Judge took 15 months to deliver her judgment, suggesting she could not meaningfully consider the credibility of the witnesses.

### *Discussion*

[83] Credibility is a matter where considerable caution must be exercised before reaching a different conclusion to the trial Judge.<sup>95</sup> She saw the witnesses, and saw the evidence play out before her. We did not. Something in the nature of a material failure of process or evidence analysis apparent from the written record is needed to overcome that customary caution an appellate court must exercise in assessing the trial judge's credibility findings.

[84] No such material failing is evident in the Judge's analysis. To the contrary, the dim view she took of the credibility of Mr Gao's evidence is amply justified on the evidence. We have set out at [21]–[25] above admissions the Judge found Mr Gao made. These findings were not dissected and demolished on appeal. The only challenge to these findings was to the Judge's finding set out at [25] above. Mr St John submitted at the hearing that Mr Gao only told the associate where to find a particular kiwifruit variety but did not encourage him to steal it. That is a distinction without a difference. It also ignores the Judge's finding that Mr Gao "suggested" the associate steal the variety. Mr Gao undoubtedly did so on the evidence. The only other specific complaint made concerned the Judge's finding that Mr Gao's claim he returned to China to acquire more knowledge on kiwifruit management for his own orcharding activities was implausible, given he was growing G3 and the best sources of knowledge and cultivation of that variety lay in New Zealand.<sup>96</sup> That finding was entirely open to the Judge to make; it has not been shown to lack foundation.

[85] Moreover, other aspects of Mr Gao's evidence corroborate the adverse findings summarised at [79] above. That evidence demonstrated that, in addition to the admitted acts summarised at [21]–[25] above, he had made false statements in his curriculum vitae and had destroyed evidence.

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<sup>95</sup> *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]; *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at [58]–[59]; and *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38]–[40].

<sup>96</sup> High Court judgment, above n 2, at [63].

[86] The Judge’s error in relation to the identity of Ms Xue is of course concerning. The Judge appeared to have drawn on conclusions she reached in relation to another Ms Xu in a criminal case she had heard around six months prior to this case, and attributed to Ms Xue the chemical engineering degree Ms Xu had.<sup>97</sup> It is not clear why exactly the Judge made that error. But the particular error concerns a peripheral detail. The Judge’s findings on credibility of Ms Xue, which are far more positive than in relation to Mr Gao, are not undermined by that error and were open to her to make.

[87] Finally, the delay here, while exceeding ordinary norms, was not such as to call in question the soundness of the judgment. Pointing to an isolated, peripheral error is insufficient to call into question the soundness of the judgment appealed. It might be otherwise if frequent and repeated factual error could be pointed to, but that was not done here. As Lord Scott observed in *Cobham v Frett*, if delay is to be relied on in attacking a judgment:<sup>98</sup>

... a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.

This is not such a case.

### *Conclusion*

[88] The Judge’s credibility findings were ones she was entitled to make.

### **Issue Four: Causation — Did the Judge err in finding the G3 and G9 varieties would not have reached Mr Shu in China but for Mr Gao’s actions in New Zealand?**

[89] The Judge held Mr Gao’s offers to sell or provide G3 and G9 were “a necessary precursor” to the subsequent sales and/or provision of those varieties to Mr Shu and Mr Yu in China. If Mr Gao had not taken steps in New Zealand to harvest or obtain

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<sup>97</sup> Ms Xue held arts and education degrees.

<sup>98</sup> *Cobham v Frett* [2001] 1 WLR 1775 (PC) at 1783–1784. This statement has been adopted more recently in *Ramnarine v Ramnarine* [2013] UKPC 27, [2014] 1 FLR 594 at [21]; and *Idea Services Ltd v Clark* [2014] NZCA 97, (2014) 11 NZELR 619 at [11]–[12].

G3 and G9 budwood, and then arrange its export, those varieties would never have reached Mr Shu and Mr Yu in China.<sup>99</sup>

### *Submissions*

[90] The appellants submit the Judge erred in finding Mr Gao provided G3 or G9 budwood to Mr Shu. Zespri lacked evidence of Mr Gao supplying the budwood to Mr Shu. Mr Gao and Ms Xue did not grow G9. The False Licence Agreement and receipt for the licence fee purportedly paid were said to be the only evidence Mr Gao supplied the varieties. In contrast, Mr Shu may have obtained G3 and G9 budwood when visiting New Zealand himself at an earlier date. Alternatively, G3 is grown under licence in other countries and Mr Shu could have obtained it elsewhere.

### *Discussion*

[91] We begin by noting that, self-evidently, the appellants only challenge the Judge's finding in relation to Mr Shu's obtaining of G3 and G9. The Judge's finding that Mr Yu obtained G3 and G9 from Mr Gao is therefore not at issue in this appeal and we do not discuss it further.

[92] Turning to Mr Gao's dealings with Mr Shu, we have set out the relevant findings of the Judge at [26]–[33] above. We focus now on acts committed by the first and second appellants in New Zealand.

[93] First, in his own evidence Mr Gao acknowledged receiving (in New Zealand) a request by Mr Shu to bring G3 and G9 budwood to China when he travelled there, and agreeing to do so, before leaving New Zealand on 28 August 2012:

Several days prior to my departure, [Mr] Shu through QQ told me that he would like me to bring him some G3 and G9 budwood as a favour. As I had already purchased my airfare, and as I was in the process of looking for kiwifruit related work in China, to muddle through this, I told him that I would. I was worried that if I had “torn the face” with him, he might not host me, and not reimburse me for my airfare.

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<sup>99</sup> High Court judgment, above n 2, at [135]. It should be noted that although the Judge referred to “China” generally in that paragraph of her judgment, it was common ground before us that Zespri's pleading was focused on Mr Shu and Mr Yu's enterprises: the four orchards listed at [29] above as well as the orchard referred to at [34] above.

Mr Gao alleged he reneged on that agreement, but the Judge did not believe him. For the reasons noted at [28] above, we agree that was a conclusion amply justified on the evidence.

[94] Secondly, the Judge concluded that Mr Gao (in performance of the promise made in New Zealand) then exported the G3 and G9 budwood from New Zealand and then supplied it to Mr Shu. The False Licence Agreement and receipt are documentary testimony to exactly that effect. At the hearing, Mr St John made much of the fact that Zespri could not locate the money Mr Shu is said to have paid Mr Gao, despite having extensive access to his financial records. Given the ease with which money can be held in secondary banking and non-banking locations, we do not think that is the knock-out blow Mr St John painted it as, particularly in the face of all the evidence to the contrary. Again, we are satisfied these are conclusions justified on the evidence.

[95] Thirdly, although there was documentary travel evidence of Mr Shu visiting New Zealand for a week in late April 2012, there is no sound basis available to infer he used that opportunity himself to smuggle G3 or G9 budwood out of New Zealand. If he had, why then ask Mr Gao to bring budwood four months later, in August 2012? Nor did Mr Gao assert that alternative narrative in evidence. On Mr Gao's account he told Mr Shu he "forgot" to bring the budwood, but he did not suggest Mr Shu did not mind because he already had the budwood as a result of his visit four months earlier. And of course the False Licence Agreement attributed supply to Mr Gao or Smiling Face.<sup>100</sup>

### *Conclusion*

[96] The Judge's conclusions summarised at [89] above were inferred properly from the evidence adduced at trial.

### **Issue Five: Extraterritoriality and jurisdiction — Did the Judge err in applying the PVR Act extraterritorially?**

[97] The Judge held the following acts occurred in New Zealand:<sup>101</sup>

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<sup>100</sup> See [30] above.

<sup>101</sup> High Court judgment, above n 2, at [58] and [123]–[124].

- (a) Mr Gao's offer to sell G3 and G9 budwood to Messrs Shu, Yu and Li;
- (b) Mr Gao's execution, on behalf of Smiling Face, of the False Licence Agreement prepared by Mr Shu; and
- (c) in the case of the sales made to Messrs Shu and Yu, preparation of the G3 and G9 budwood for export, including growing and/or harvesting it, preparing it for transit, making and implementing shipping arrangements (or packing it in his luggage, if Mr Gao carried it personally).

[98] Acceptance of the offers in (a), making of the offer (by Mr Shu) to enter the False Licence Agreement in (b), and receipt of the G3 and G9 budwood in (c) (by Messrs Shu and Yu) all occurred in China.

[99] The Judge held s 17 of the PVR Act gave Zespri these exclusive rights:<sup>102</sup>

- (a) to produce for sale, to offer to sell, and to sell G3 and G9 reproductive material;
- (b) to propagate G3 and G9 for the purposes of commercial production of kiwifruit; and
- (c) to authorise any other person to do (a) or (b).

[100] To the extent conferred by the PVR Act, these rights were territorial, rather than extraterritorial. That is, the PVR Act applied to things done, and people in, New Zealand and not elsewhere; the PVR Act did not expressly or impliedly confer extraterritorial rights.<sup>103</sup>

[101] In an important section of her reasoning, the Judge considered the appellants' argument that Mr Gao's New Zealand-based actions, including purporting to authorise

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<sup>102</sup> At [37].

<sup>103</sup> At [27]–[29], citing *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [36]–[37] and [41].

Mr Shu to grow G3 and G9 in China, could not constitute an infringement of Zespri's rights under the PVR Act applying the reasoning of the United States Court of Appeals for the Ninth Circuit in *Subafilms v MGM-Pathe Communications Co.*<sup>104</sup> But the Judge rejected the Court of Appeals' reasoning.<sup>105</sup>

[102] The Judge held that any acts within New Zealand that diminished Zespri's enjoyment of those exclusive rights would be infringing, even if forming "part of a chain of conduct", some parts of which occurred outside of New Zealand.<sup>106</sup> That was not because subsequent acts in relation to G3 in China were governed by New Zealand law, or within the jurisdiction of the New Zealand courts. Rather, liability arose from Mr Gao's conduct within New Zealand that diminished the value of those exclusive rights conferred within New Zealand and recognised in overseas Convention countries, including China.<sup>107</sup> That approach did not mean the High Court had to rule on liability for acts within China; "that is entirely a matter for the Chinese [c]ourts".<sup>108</sup> There was no suggestion by the appellants that China was a more appropriate forum. Mr Gao and Ms Xue were domiciled in New Zealand, and subject to its jurisdiction.<sup>109</sup> But the effect of the Judge's reasoning was that execution of the False Licence Agreement by Mr Gao and Smiling Face in New Zealand, purporting to authorise Mr Shu to exploit G3 and G9 throughout China, breached Zespri's rights under the PVR Act because they diminished the value of those rights within New Zealand.<sup>110</sup>

### *Submissions*

[103] Mr Liu (who argued this part of the appeal for the appellants) submitted, very candidly, there was "no doubt" Zespri's *Chinese* PVRs had been infringed, and that based on the Judge's factual findings, "the appellants have acted quite appallingly". But those rights were not pleaded as the basis for the appellants' liability, and so the claims should be dismissed. As it was common ground the PVR Act had no

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<sup>104</sup> *Subafilms Ltd v MGM-Pathe Communications Co* 24 F 3d 1088 (9th Cir 1994) (en banc).

<sup>105</sup> High Court judgment, above n 2, at [32]–[36].

<sup>106</sup> At [38].

<sup>107</sup> At [38]. The same or similar rights might be recognised by China, but that was not material.

<sup>108</sup> At [39].

<sup>109</sup> At [40].

<sup>110</sup> See, for example, at [120(a)] and [136].

extraterritorial effect, the rights enforceable by Zespri were solely those enjoyed by Zespri in New Zealand. Those rights did not include the exclusive right to export G3 and G9. This had four consequences.

[104] First, the relevant PVRs did not create an exclusive right in Zespri to produce for sale, and to sell, G3 and G9 in overseas jurisdictions, propagate G3 and/or G9 for the purposes of commercial production in overseas jurisdictions or authorise or licence any other persons to do those things in overseas jurisdictions. Secondly, Zespri's pleaded claims related to its PVRs in New Zealand; there was no claim advanced based on breach of PVRs in China. Thirdly, an act done in New Zealand purporting to authorise commercial sale and propagation of G3 and G9 outside New Zealand — such as execution of the False Licence Agreement — cannot infringe Zespri's New Zealand PVRs. Fourthly, taking the three preceding points together the Judge could not award damages based on a notional licence fee for plantation of the two varieties in China. The infringing conduct “could only have infringed ... and diminished the value of Zespri's Chinese [PVRs], which has not been pleaded”.

[105] For Zespri, Ms O’Gorman submitted her client’s claim “was solely against appellants within the personal jurisdiction of the High Court (New Zealand residents and a New Zealand-registered company), for actions undertaken by them in New Zealand to diminish the value of Zespri’s exclusive rights in G3 and G9”. The basis of the claim, and the judgment, Ms O’Gorman said, is the imposition of liability for infringing acts that occurred in New Zealand. That is, those listed at [97] above. It followed that the claim did not relate, at least directly, to acts committed in China: those listed at [98] above, and any ensuing propagation of G3 in that country.

### *Discussion*

[106] We start with the precise legal nature of the rights conferred by the PVR Act. It is common ground that the PVR Act does not create rights extraterritorially. We are satisfied that mutual concession is correct.

[107] It follows the relevant rights conferred by s 17(1) all concern exclusive rights to do things *in New Zealand*. That is, to “produce for sale [in New Zealand]”, “to sell

[in New Zealand]”, “to propagate ... for ... commercial production [in New Zealand]”, and to “authorise” others to do those things in New Zealand.<sup>111</sup>

[108] Two considerations lead inevitably to that conclusion. The first is the legislative text and context. The grant of the exclusive rights given in s 17 follows application to the Commissioner of Plant Variety Rights in New Zealand (ss 5–10). Section 12 makes clear that what is being sought is a “grant in New Zealand”, although priorities may coat-tail earlier equivalent applications made in other convention jurisdictions. While the key provision for present purposes, s 17, is to an extent opaque on the reach of the grant, s 17(5) and (6) — concerning importation into New Zealand of material protected by rights granted under the PVR Act — indicate it is the effect on rights held in New Zealand that constitute the infringing conduct.<sup>112</sup> It follows we read s 17(1)(a) and (b) in the way set out in the preceding paragraph: that is, it creates exclusive rights to sell, and to propagate commercially, *in New Zealand*. Importantly, in s 17(1)(c) therefore it creates an exclusive right to authorise others to do just that and no more: to sell, and to propagate commercially, *in New Zealand*.

[109] Context supports the inference of the PVR Act being limited territorially, that context being the 1978 UPOV Convention. Article 11 provides for serial registration in different states: a breeder may choose the member state in which he or she files his or her first application for protection, and thereafter apply for protection in other member states. Article 12 provides the breeder enjoys (limited) rights of priority in other member states subject to compliance with certain procedural requirements and time frames.<sup>113</sup> But importantly, art 11(3) states:

(3) The protection applied for in different member States of the Union by natural or legal persons entitled to benefit under this Convention shall be independent of the protection obtained for the same variety in other States whether or not such States are members of the Union.

In other words, that PVRs are granted in a variety in one member state does not automatically give PVRs in that variety in another member state, or necessarily mean

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<sup>111</sup> The latter assumes some importance when we come shortly to consider the Judge’s finding that execution of the False Licence Agreement (in New Zealand) purportedly authorising exploitation of G3 and G9 by Mr Shu (in China) infringed Zespri’s rights under the PVR Act.

<sup>112</sup> That conclusion concerns the scope of protected rights. It does not mean that conduct offshore cannot infringe rights within New Zealand and be actionable where jurisdiction exists.

<sup>113</sup> Reflected in the PVR Act, ss 12 and 13.

that PVRs will be granted in that variety upon an application in that member state. The 1978 UPOV Convention, then, establishes a framework of similar but independent territorial PVRs regimes which are linked only through (limited) rights of priority of registration. This context, to which the PVR Act was to give effect, is consistent with the PVR Act having no extraterritorial effect: if a breeder wishes to protect PVRs in a foreign jurisdiction, an application in that jurisdiction with the benefit of rights of priority is the contemplated avenue.

[110] Secondly, the presumptive position at common law is that a statute has territorial-only effect unless extraterritorial reach is provided for expressly or by necessary implication.<sup>114</sup> It follows, the Supreme Court said in *Poynter v Commerce Commission*, that an enactment “will generally apply to things done and people in the territory to which it extends, and no further”.<sup>115</sup> In *Poynter* the legislation provided, inter alia, that:<sup>116</sup>

This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

Mr Poynter, an Australian resident, was said to have been party to an unlawful anticompetitive arrangement to fix the price of timber preservatives supplied in New Zealand. Any material acts on his part occurred in Australia. The Supreme Court upheld his protest to jurisdiction: the provision cited above was an exhaustive statement of the intended extraterritorial effect of the Act.<sup>117</sup> It had been amended iteratively since original enactment.<sup>118</sup> Mr Poynter did not fall within it.

[111] In this appeal, neither express words nor necessary implication suggest the PVR Act has extraterritorial reach. Rather, words and context compel the opposite conclusion.

[112] We turn now to what was pleaded. The first and second causes of action were pleaded on the basis that Mr Gao and Smiling Face breached Zespri’s PVR rights

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<sup>114</sup> *Poynter v Commerce Commission*, above n 103, at [15], [36]–[45] and [78].

<sup>115</sup> At [36].

<sup>116</sup> Commerce Act 1986, s 4(1).

<sup>117</sup> *Poynter v Commerce Commission*, above n 103, at [15] and [62].

<sup>118</sup> At [17] and [40].

under the PVR Act by “offering to sell, selling and/or supplying reproductive material of those varieties ... for commercial purposes”. Zespri’s closing submissions at trial were, *inter alia*, that entry into the False Licence Agreement undermined Zespri’s exclusive right to sell G3 and G9 and to “authorise the propagation of the G3 and G9 varieties for the purposes of commercial production of kiwifruit”. It is that submission that produced the Judge’s conclusion that Mr Gao’s (and Smiling Face’s) actions in purporting to authorise Mr Shu to grow G3 and G9 in China constituted an infringement of Zespri’s rights under the PVR Act.<sup>119</sup>

[113] That conclusion is not one with which we can agree.

[114] Ms O’Gorman, attempting to uphold this part of the judgment, asserts that Zespri’s claim was confined to those acts listed at [97] above, and that none of those acts gave extraterritorial effect to the PVR Act. But that submission does not justify the Judge’s conclusion — one Zespri had invited her to make — that entry into the False Licence Agreement (in New Zealand), thereby purporting to authorise Mr Shu to grow G3 and G9 (in China), constituted an infringement of Zespri’s rights under the PVR Act.

[115] Smiling Face assumed two essential obligations under the False Licence Agreement. The first was the physical supply of “plant materials” (being G3 and G9 budwood) to Mr Shu in China. In fact, it may be doubted that part of the agreement was operative: entry into the agreement (which was backdated) post-dated supply of budwood by Mr Gao to Mr Shu in August 2012.<sup>120</sup> The Judge made no finding of any other supply of protected material to Mr Shu. But there can be no doubt that obligation, if operative, would have involved a sale of protected material in New Zealand, and therefore a breach of s 17(1)(a) of the PVR Act.

[116] The second obligation assumed was the purported transfer to Mr Shu of PVRs in those varieties, permanently and throughout China. In consideration, Smiling Face was to receive a fee of RMB 10 million (equivalent to NZD 2 million), ten per cent to be paid immediately and the balance out of profits earned by Mr Shu. That obligation

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<sup>119</sup> See [101] above.

<sup>120</sup> See [28] and [30] above.

involves the purported authorisation of acts in China, including propagation. Were the purported authorisation of propagation of these varieties in New Zealand, it would fall within s 17(1)(c). But because it relates to China, it does not, for the reasons given above at [108]. It follows that to the extent the Judge found the signing of the False Licence Agreement was an infringing act separate to the sale of G3, that finding was incorrect.<sup>121</sup>

[117] We turn now to the decision of the United States Court of Appeals for the Ninth Circuit in *Subafilms Ltd v MGM-Pathé Communications Co.*<sup>122</sup> In that case the defendant, a United States corporation, had without licence of its own purported to authorise licensees abroad to distribute videocassettes of the 1968 film, *Yellow Submarine*.<sup>123</sup> The Court of Appeals held the United States Copyright Act, lacking extraterritorial effect, did not prohibit “assertedly infringing conduct [that] consists solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad”.<sup>124</sup> Considering academic criticism of that decision, the Judge declined to apply it in the case on appeal.<sup>125</sup> We take a different view, however. Rather, we find the scheme of the PVR Act is consistent with the underlying premise in the *Subafilms* decision: the protected, exclusive rights granted by the PVR Act are confined to New Zealand.<sup>126</sup> That, ultimately, is the limited legislative scheme adopted in the PVR Act as it stands now — a consequence of the UPOV Convention, based as it is on separate state-based registrations of rights.

[118] A hypothetical example illustrates the difficulty with Zespri’s argument that authorisation in New Zealand of propagation in China breaches Zespri’s New Zealand PVRs. Suppose a New Zealand company, A, develops a new variety for which it obtains New Zealand PVRs registration. The rights are also registered in other countries, including the United States, as contemplated by the 1978 UPOV Convention. A wishes to exploit the new variety in New Zealand, but not in

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<sup>121</sup> High Court judgment, above n 2, at [120].

<sup>122</sup> *Subafilms Ltd v MGM-Pathé Communications Co.*, above n 104.

<sup>123</sup> In which, apparently, the Beatles travel in a yellow submarine to Pepperland to free it from the music-hating Blue Meanies.

<sup>124</sup> *Subafilms Ltd v MGM-Pathé Communications Co.*, above n 104, at 1089.

<sup>125</sup> High Court judgment, above n 2, at [34]–[36], relying on the critical analysis by Paul Goldstein and P Bernt Hugenholtz (eds) *International Copyright: Principles, Laws and Practice* (3rd ed, Oxford University Press, New York, 2013) at 129.

<sup>126</sup> See [107]–[111] above.

the United States. It sells the United States PVRs to another New Zealand company, B. A also supplies reproductive material to B in New Zealand, which B exports under licence to the United States. B enters into licensing agreements with United States growers and agrees to sell reproductive material to them. B negotiates and concludes those agreements from its headquarters in New Zealand. Doing so of course does not infringe A's New Zealand PVRs.

[119] Now suppose that C, another New Zealand company, purports to grant a licence to cultivate the new variety to a grower in the United States. A has no complaint about C's conduct, because its New Zealand PVRs are not infringed. That remains the case even if C's conduct all occurred in New Zealand. That also remains the case even if C's conduct causes loss to A, for example because A is entitled to a share of the revenue that B earns from exploitation of the new variety in the United States. The lawfulness of C's conduct turns on whether it breaches B's United States PVRs; the New Zealand PVRs are irrelevant. If C has breached B's United States PVRs, B will have a claim against C; A will not. B will likely be able to bring that claim before a New Zealand court, which will have personal jurisdiction over C (a New Zealand company), and B can plead and prove its rights under United States law, as well as the infringement of those rights.

[120] Returning to the present case, the purported authorisation by the appellants of conduct in China does not infringe Zespri's New Zealand PVRs. Zespri might have been able to bring a claim in New Zealand in reliance on its rights under Chinese law (though we did not have any evidence before us about the scope of those rights, or the consequences of their infringement). But it did not do so.

[121] Finally, for reasons we will consider in further detail in the next section of this judgment, the fact that the conduct in this case has an international dimension, including the objective of propagating G3 and G9 in China, does not mean the pleaded unlawful acts undertaken in New Zealand in breach of s 17(1)(a) are not actionable. The acts listed at [97(a) and (c)] above are acts committed in New Zealand in breach of the exclusive right of Zespri to sell its protected varieties, whether by way of export or otherwise. Although the Bill currently before Parliament enlarges the scope of restricted acts to include "exporting", neither of those acts were gratuitous or were

done solely to enable the appellants to make use of G3 and G9 outside New Zealand themselves.<sup>127</sup> Each involved “sale” to a third party in the sense defined in s 2 of the PVR Act: “any disposition for valuable consideration and any offer for sale”. In relation to Mr Yu, that consideration appears to have been an interest in the Liangshan Yi orchard joint venture.

[122] We exclude from this analysis, however, entry into the False Licence Agreement — the act listed at [97(b)]. The act of purporting to authorise exploitation of G3 and G9 in China does not fall within s 17(1)(c). Furthermore, we are not persuaded the remaining sale component of that agreement had operative effect in fact.

### *Conclusion*

[123] We conclude the Judge erred in holding entry into the False Licence Agreement infringed the PVR Act. That apart, she did not err in her assessment of the territorial effect of the PVR Act.

### **Issue Six: Remedy — Did the Judge err in fixing damages?**

[124] The Judge accepted Zespri’s submission that, once infringing conduct in New Zealand was proven, it was entitled to full compensatory damages. That included damages “flowing from exploitation abroad of the domestic acts of infringement committed by Mr Gao and Smiling Face”.<sup>128</sup> The Judge held that was consistent with this Court’s approach in *New Zealand National Party v Eight Mile Style, LLC*, as well as United States authority.<sup>129</sup>

[125] Secondly, when assessing damages, the Judge considered the starting point was the mandatory considerations in s 17(4):<sup>130</sup>

- (4) The rights of a grantee under a grant are proprietary rights, and their infringement shall be actionable accordingly; and in awarding

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<sup>127</sup> Plant Variety Rights Bill, cl 14(3)(d).

<sup>128</sup> High Court judgment, above n 2, at [150].

<sup>129</sup> At [151], referring to *New Zealand National Party v Eight Mile Style, LLC* [2018] NZCA 596, [2019] 2 NZLR 352; *WesternGeco LLC v Ion Geophysical Corp* 585 US \_ (2018), 138 S Ct 2129 (2018); and *Los Angeles News Service v Reuters Television International Ltd* 149 F 3d 987 (9th Cir 1998).

<sup>130</sup> At [153].

damages (including any exemplary damages) or granting any other relief, a Court shall take into consideration –

- (a) any loss suffered or likely to be suffered by that grantee as a result of that infringement; and
- (b) any profits or other benefits derived by any other person from that infringement; and
- (c) the flagrancy of that infringement.

There was insufficient evidence to quantify the profits derived by the appellants, but they would be “greatly eclipsed by the loss/damage to Zespri”.<sup>131</sup> The appellants’ conduct was “premeditated, calculated and flagrant”.<sup>132</sup> Zespri’s loss was also difficult to assess. The Judge said it was “simply not possible to quantify ... on a traditional basis”.<sup>133</sup> Relying on this Court’s *Eight Mile Style* decision, damages calculated on a user principle, based on a notional royalty, were appropriate here.<sup>134</sup> To quantify damages the Judge applied the competitively-established licence fee to propagate G3 in New Zealand (NZD 171,000 per ha) to the 174.2 ha Zespri had shown G3 and G9 was growing on in China.<sup>135</sup> That totalled NZD 29,788,200.<sup>136</sup>

[126] Thirdly, s 17(4) required consideration of Zespri’s likely future losses also. G3 plantings could easily expand throughout and beyond the current orchards, but the Judge considered Zespri should reasonably be expected to take action to prevent the proliferation of G3 in China under the equivalent Chinese PVRs legislation.<sup>137</sup>

[127] Fourthly, the Judge then opted to reduce the initial damages amount by 50 per cent to account for the fact that only a portion of each orchard was planted in G3 or G9 and that Zespri could take action to enforce its PVRs in China to mitigate future loss.<sup>138</sup> That gave a final damages total of NZD 14,894,100.<sup>139</sup>

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<sup>131</sup> At [154].

<sup>132</sup> At [155].

<sup>133</sup> At [156].

<sup>134</sup> At [158] and [160], citing *New Zealand National Party v Eight Mile Style, LLC*, above n 129.

<sup>135</sup> At [161]–[166]. These were the four orchards associated with Mr Shu and the Liangshan Yi orchard. See [73]–[78] above. We have found the proven area to be 141.3 ha: see [78] above.

<sup>136</sup> At [170].

<sup>137</sup> At [168]–[169].

<sup>138</sup> At [170].

<sup>139</sup> At [171].

[128] Finally, the Judge held Mr Gao’s breach of the G3 Licence Agreements caused Mr Yu to receive G3 budwood which was planted in the Liangshan Yi orchard and prevented Zespri having the opportunity to take steps to prevent Mr Shu planting G3 at the Wuhan orchard.<sup>140</sup> The Judge also assessed damages for breach of the G3 Licence Agreements via the user principle — but applied to the smaller area of 126.6 ha and again discounted by 50 per cent. The result was damages of NZD 10,824,300.<sup>141</sup> Ms Xue was held jointly liable with Mr Gao for those damages.<sup>142</sup>

### *Submissions*

[129] The appellants challenge application of the user principle, and a notional licence fee, to assess damages for the infringement of Zespri’s New Zealand PVRs in circumstances where the propagation notionally licensed is in China. They submit the Judge misapplied the reasoning of the United States Supreme Court in *WesternGeco LLC v Ion Geophysical Corp.*<sup>143</sup> There the defendant’s domestic patent infringement had injured the claimant domestically. Here, the appellants submit, the Judge failed to consider whether Zespri actually suffered or was likely to suffer the pleaded loss, which was in effect based on the unpleaded diminution of the value of PVRs in China.

[130] Secondly, and assuming their conduct falls within s 17 of the PVR Act, the appellants submit the Judge should have taken an “ordinary and pragmatic” approach to damages, rather than applying the user principle. Zespri did not demonstrate actual loss, and the appellants did not benefit from their actions. There was no evidence the False Licence Agreement was given effect to. The Judge was wrong to find it implausible the licence fee went unpaid. The Judge ought to have followed the approach of the High Court in *Cropmark Seeds Ltd v Winchester*

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<sup>140</sup> At [181]–[182]. The G3 Licence Agreements (July and September 2013 and July 2014) post-dated the sale of protected budwood to Mr Shu (August 2012).

<sup>141</sup> At [186]–[187].

<sup>142</sup> At [180].

<sup>143</sup> *WesternGeco LLC v Ion Geophysical Corp*, above n 129.

*International (NZ) Ltd* and this Court in *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* and awarded (nominal) exemplary damages only.<sup>144</sup>

[131] Thirdly, the appellants submit damages under the G3 Licence Agreements ought to be nominal only, for reasons similar to those in the preceding paragraph. Further, the licence agreement was limited to the G3 variety and there was no evidence as to the proportion of the orchards planted with G3. Any breach of the reporting clause could not cause loss as Zespri became aware of Mr Shu’s activities in 2016 in any event but did nothing to stop his activities.

### *Discussion*

[132] We are unpersuaded the Judge erred in principle in fixing damages. We make six points.

[133] First, s 17(4) offers a broad suite of remedies — compensatory, exemplary and coercive — comparable with those ordinarily available at common law in responding to economic torts (of which PVRs infringement is one). It may usefully be compared to the more unbundled ss 120–122 of the Copyright Act 1994. Exemplary (or “additional”) damages stand in their own realm. Although amply justifiable given the appellants’ conduct — as their counsel acknowledged — they are not in issue in this appeal. Account of profits, a restitutionary remedy, is mandated where PVRs infringement is innocent: s 17(8). Innocent this conduct was not, and the appellants’ profit, if any, is unproven.

[134] Secondly, the remedy granted to Zespri — compensatory damages fixed by the user principle — lies within s 17(4) and is normal where there is an expropriation and use of intellectual property rights, and either the plaintiff’s loss or the defendant’s profit is elusive.<sup>145</sup> The former we have already noted; the latter is conceded by Zespri: demand exceeds supply and it cannot point to any diversion of sales.<sup>146</sup> Nonetheless,

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<sup>144</sup> *Cropmark Seeds Ltd v Winchester International (NZ) Ltd* HC Timaru CIV-2003-476-8, 28 September 2004; and *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* CA226/04, 5 December 2005.

<sup>145</sup> See, for example *New Zealand National Party v Eight Mile Style, LLC*, above n 129; and *Napier Tool & Die Ltd v Oraka Technologies Ltd* [2016] NZCA 554, [2017] 2 NZLR 611 at [74].

<sup>146</sup> High Court judgment, above n 2, at [139].

the appellants' expropriation of its rights disrupt its global strategy for the exploitation of its monopoly PVRS in G3 and exposes it to potentially uncontrollable competition as the material sold by the appellants proliferates in offshore jurisdictions. The underlying rationale of the user principle is that damages should compensate the right-holder for the unilateral expropriation of the value inherent in the right to control exploitation.<sup>147</sup> As the United Kingdom Supreme Court put it in *One Step (Support) Ltd v Morris-Garner*, the defendant "takes something for nothing, for which the owner was entitled to require payment".<sup>148</sup> In requiring payment for the expropriated right, the remedy serves a compensatory function, essentially putting the plaintiff in the position they would have been in had the wrong — the expropriation and use — not been committed. It is immaterial that the plaintiff would not willingly have licensed the defendant, a point made tellingly by Lord Shaw's famous equine example in *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson*.<sup>149</sup>

If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise."

As Lord Shaw continued, absent a remedy (in the example, the price of hire of the horse) "the law, when appealed to, would be standing by and allowing the invader or abstracter to go free".<sup>150</sup> A similar paradox was pointed to by Earl Halsbury LC in *The Mediana*, a collision case involving the plaintiff's lightship and in which the plaintiff harbour board happened conveniently to have a spare such vessel available to it.<sup>151</sup>

Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?

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<sup>147</sup> *New Zealand National Party v Eight Mile Style, LLC*, above n 129, at [26]–[28]; and *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 (HL) at 824–825 per Lord Wilberforce.

<sup>148</sup> *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 at [95(1)].

<sup>149</sup> *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18 at 31, quoted by Lord Reed in *One Step (Support) Ltd v Morris-Garner*, above n 148, at [28].

<sup>150</sup> *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson*, above n 149, at 32.

<sup>151</sup> *The Mediana* [1900] AC 113 (HL) at 117.

[135] Thirdly, the user principle presumes a hypothetical negotiation between the parties. It assumes a degree of reason on both sides, and the wherewithal to pay on the part of the defendant. As Lord Wilberforce observed in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*:<sup>152</sup>

In some cases it is not possible to prove either (as in 1) that there is a normal rate of profit, or (as in 2) that there is a normal, or established, licence royalty. Yet clearly damages must be assessed. In such cases it is for the plaintiff to adduce evidence which will guide the court. This evidence may consist of the practice, as regards royalty, in the relevant trade or in analogous trades; perhaps of expert opinion expressed in publications or in the witness box; possibly of the profitability of the invention; and of any other factor on which the judge can decide the measure of loss. Since evidence of this kind is in its nature general and also probably hypothetical, it is unlikely to be of relevance, or if relevant of weight, in the face of the more concrete and direct type of evidence referred to under 2. But there is no rule of law which prevents the court, even when it has evidence of licensing practice, from taking these more general considerations into account. The ultimate process is one of judicial estimation of the available indications.

Further to the very last point there made by Lord Wilberforce, this Court in *Eight Mile Style* approved the observations of the authors of *Copinger and Skone James on Copyright* that in applying the user principle to fix a notional licence fee by way of compensatory damages, the court may have to call into play “inference, conjecture and the like”, and apply “a sound imagination and the practice of the broad axe”.<sup>153</sup>

[136] Fourthly, we consider the Judge was correct to look for comparable evidence of licence fees for the propagation of G3 in New Zealand. The infringements here are the acts listed at [97(a) and (c)] above. These are infringements of Zespri’s New Zealand PVRs, as we have noted already.<sup>154</sup> Had the budwood been sold to Messrs Shu and Yu for propagation in New Zealand, damages referable to the relevant domestic licensing regime would surely have been assessed. The proposition that they are not however payable merely because the budwood was immediately exported does not appeal. Indeed, it has no more attraction than the arguments made (notionally) by

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<sup>152</sup> *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd*, above n 147, at 826.

<sup>153</sup> *New Zealand National Party v Eight Mile Style, LLC*, above n 129, at [29], quoting Gillian Davies, Nicholas Caddick and Gwilym Harbottle (eds) *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell, London, 2016) vol 1 at [21–292]. See also Andrew Burrows *Remedies for Torts, Breach of Contract & Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 321–332.

<sup>154</sup> At [114]–[122] above.

the thoughtless equestrian in *Watson, Laidlaw* and (actually) by the owners of the negligent vessel *The Mediana*, noted two paragraphs earlier. Nor are we persuaded that excluding the False Licence Agreement from the range of actionable infringements makes a material difference, because it was the sale of the protected budwood that caused loss, not the false grant of non-existent exploitation rights, nor the post-dated agreement to supply after the fact. Exclusion of the False Licence Agreement does not, logically, alter the damages assessable.

[137] But in any case, the answer lies in the reasoning underlying the decision of the United States Supreme Court in *WesternGeco LLC v Ion Geophysical Corp.*<sup>155</sup> In that case the plaintiff owned patents for a sea floor survey system. The defendant made a competing system, assembled and sold overseas, but manufactured from components made in the United States. The plaintiff's claim, under the Patent Act, to loss of profits beyond the United States was upheld by a majority of seven to two in the Supreme Court. The majority held that the cause of action was complete by injury occurring within the United States, the unlawful copying of componentry by the defendant. The location of the infringing sales by the defendant, and their displacement of similar sales by the plaintiff, did not give extraterritorial effect to the Act.<sup>156</sup>

[138] So, too Zespri. It is a neat misunderstanding of the law to imagine that merely exporting the budwood sold in breach of Zespri's New Zealand PVRs renders the infringing parties immune to damages here. The infringing acts were undertaken in New Zealand. Compensatory damages remain assessable here notwithstanding the export of the infringing budwood to China. The fact the Judge calculated damages by reference to the acreage offshore (and discounted them given the prospect of mitigation through regulatory or legal action in China) should not obscure the foregoing reality. Payment of a notional licence fee follows as a consequence of the appropriation of Zespri's New Zealand PVRs in New Zealand. This does not amount, as the appellants suggest, to the enforcement of Chinese, rather than New Zealand, PVRs.

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<sup>155</sup> *WesternGeco LLC v Ion Geophysical Corp.*, above n 129.

<sup>156</sup> At 8–9.

[139] Fifthly, we therefore consider the Judge was entitled to rely on the competitive tender value in 2016 for G3 licences in New Zealand. That value, set at \$171,000 per ha (GST-exclusive), represents a rational proxy for a hypothetically-negotiated sale of the infringing budwood. Zespri contended for that sum at trial. It did not contend for a premium based on impending export into a jurisdiction in which control of proliferation and quality may be harder to effect, so we put that aside. We have given some thought to whether damages should have been calculated by reference to the acreage the appellants enabled to be cultivated. No objection based on extraterritoriality can be made to that course, for reasons given. Ultimately, we have resolved that it is the correct approach. Had the hypothetical negotiation taken place, the area to have been licensed for cultivation would have been a determining factor. It is not for the infringing parties, faced with the enormity of the price, to now repent the bargain. The deal is done by reason of their actions, and the law simply backfills the price, no matter how large or small. However, as noted earlier, we differ from the Judge on the proven area, finding it to be 141.3 ha, rather than 174.2 ha.<sup>157</sup> We do not consider the Judge was bound to apply the earlier decision of this Court in *Winchester International (NZ) Ltd v Cropmark Seeds Ltd*.<sup>158</sup> In that case the plaintiff did not pursue its claim for compensatory damages, being content with declaratory relief and a small award by way of exemplary damages.<sup>159</sup>

[140] Sixthly, as this Court made clear in *Eight Mile Style*, it is the actual infringement that matters: “The period of the [notional] licence is the period of actual infringement”.<sup>160</sup> It also follows that “delay on the part of the claimant in asserting its rights” may be relevant.<sup>161</sup> In most cases in which damages are assessed via the user principle the infringing activity will have been brought to an end by injunctive relief or concession on the part of the infringer. In *Eight Mile Style* it was the latter: the infringer, a political party, used the infringing soundtrack in a political party television advertisement 186 times over an eleven-day period in the lead-up to the 2014 general election. It stopped using it five days after receiving a letter before action

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<sup>157</sup> See [78] above.

<sup>158</sup> *Winchester International (NZ) Ltd v Cropmark Seeds Ltd*, above n 144.

<sup>159</sup> See *Cropmark Seeds Ltd v Winchester International (NZ) Ltd*, above n 144, at [35].

<sup>160</sup> *New Zealand National Party v Eight Mile Style, LLC*, above n 129, at [29], quoting *Copinger and Skone James on Copyright*, above n 153, at [21–292].

<sup>161</sup> *New Zealand National Party v Eight Mile Style, LLC*, above n 129, at [29], quoting *Copinger and Skone James on Copyright*, above n 153, at [21–292].

by the right-holder's lawyers. The limited duration of use and the fact that only part of the copyright song was infringed were factors expressly taken into account by this Court in reducing damages from the award made in the High Court.<sup>162</sup> Relatedly, as the damages are compensatory in nature, mitigation of loss is required. Hence the earlier-noted relevance of delay in assertion of rights. As Moore-Bick LJ observed in *Uzinterimpex JSC v Standard Bank plc*, a case concerning conversion of goods:<sup>163</sup>

To say that a person whose goods have been wrongfully seized by another is not obliged to negotiate with the person who has taken them, ... has some attraction, but only because in many cases it will be unreasonable to expect him to do so. That is particularly true if one takes as an example the person whose property is stolen by a thief. Is he obliged to negotiate with the thief to purchase its return? Probably not, because it would be offensive to ordinary notions of morality to expect him to do so, but, if he had the chance to recapture his property without risk to himself, he might reasonably be expected to take it. All this indicates that arguments of the kind under consideration are not really directed at the existence of a duty to mitigate but at the nature of the duty and the kind of action that the victim can reasonably be expected to take to avoid or reduce his loss.

As Assoc Prof Alvin See has observed of that reasoning:<sup>164</sup>

In such a situation, it would surely be reasonable to expect A to inform the relevant enforcement authority. If A's car is taken for a month-long joyride by B, and assuming that the enforcement authority could reasonably be expected to recover the car from B within a week had A been prompt in making a report, A's recoverable loss should be assessed by reference to one week's detention.

[141] In this case we think the Judge was correct in applying a 50 per cent discount to the damages assessed, not only because the acreages were not fully planted in G3 and G9 but more relevantly because of the expectation that Zespri could be expected to act on its rights, even if that required action to enforce different rights — that is, those PVRs held in China.<sup>165</sup> We think the former of little significance in the hypothetical negotiation, but inexactitude in measurement of the four remaining orchards taken into account is also accounted for by this discount. If the assessment

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<sup>162</sup> *New Zealand National Party v Eight Mile Style, LLC*, above n 129, at [125].

<sup>163</sup> *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep 456 at [55].

<sup>164</sup> Alvin W-L See "User damages and the limits of compensatory reasoning" [2018] LMCLQ 73 at 94.

<sup>165</sup> High Court judgment, above n 2, at [170].

is rough and ready, it is no more than the fall of the “broad axe” referred to earlier.<sup>166</sup> We heard no more compelling proposition from the appellants.

[142] Finally, we are not persuaded the Judge erred in relation to her assessment of damages for Mr Gao’s contractual breach of the 2013 and 2014 G3 Licence Agreements — for which Ms Xue is jointly liable— summarised above at [128]. The argument was not advanced with any vigour before us. However, we should clarify that this award of damages compensates part of the same loss compensated by damages awarded in the PVR claims. The awards are not cumulative.

### *Conclusion*

[143] In our view, the Judge did not err in principle in fixing damages in this case.

[144] The Judge did however err in using a notional licence area of 174.2 ha, rather than 141.3 ha. That alters the damages awarded under the first and second causes of action only, against Mr Gao and Smiling Face. That damages award, of NZD 14,894,100, must therefore be reduced to NZD 12,081,150.

### **Result**

[145] The appeal is allowed to the extent recorded in [144] of this judgment but is otherwise dismissed.

[146] The orders at [202(b)–(c)] of the High Court judgment are accordingly quashed.

[147] Orders that Mr Gao is to pay damages to Zespri in the sum of NZD 12,081,150 in respect of the first cause of action and that Smiling Face is to pay damages to Zespri in the sum of NZD 12,081,150 in respect of the second cause of action are substituted.

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<sup>166</sup> At [135] above.

[148] The appellants succeeded only on a narrow liability point, which did not alter quantum, and separately on a narrow quantum point. For the most part, their appeal has failed. In those circumstances we make no order for costs.

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