*Lexcray Pty Ltd v Northern Territory of Australia* [1999] NTSC91

| | |
|---|---|
| PARTIES: | LEXCRAY PTY LTD<br><br>v<br><br>NORTHERN TERRITORY OF AUSTRALIA |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY |
| FILE NO: | 33 of 1993 (9303729) |
| DELIVERED: | 30 August 1999 |
| HEARING DATES: | 20, 21, 24, 28, 31 August; 1-4, 7-11, 14-18, 21-25 September; 23-28, 30 November and 1-4 December 1998 |
| JUDGMENT OF: | Kearney J |

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Plaintiff: | M. Maurice QC, P. Durack |
| Defendant: | T. Riley QC, S. Southwood |

*Solicitors:*

| | |
|---|---|
| Plaintiff: | Cridlands |
| Defendant: | Solicitor for the Northern Territory |

| | |
|---|---|
| Judgment category classification: | |
| Judgment ID Number: | kea99001 |
| Number of pages: | 92 |

kea99001

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Lexcray Pty Ltd v Northern Territory of Australia* [1999] NTSC91
No. 33 of 1993 (9303729)

No. 33 of 1993 (9303729)

BETWEEN:

**LEXCRAY PTY LTD**
Plaintiff

AND:

**NORTHERN TERRITORY OF AUSTRALIA**
Defendant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 30 August 1999)

**General background**

[1] The plaintiff is a family company; Mr Bob Dunbar, his wife Lois, and their son Rod are its directors and shareholders. The plaintiff is the registered proprietor of Pastoral Lease No 526 in the Katherine region, a property known as 'Nutwood Downs'. It had commenced negotiations to purchase this property from Vesteys about June 1983. It signed a contract and paid a deposit on 22 December 1993 and completed the purchase on 20 March

1984. The purchase price included the cattle then depastured on the property, guaranteed by Vesteys to number at least 8000 head.

[2] In essence, the plaintiff claims in these proceedings that it purchased Nutwoods Downs because of certain misrepresentations made to it by Dr Graham Calley about the effect of the Brucellosis and Tuberculosis Eradication Campaign ("the BTEC") on the property. Dr Calley, at the time the Senior Veterinary Officer in the Department of Primary Production ('DPP') now the Department of Primary Industries and Fisheries ('DPIF') of the Northern Territory Government, was officer in charge of the BTEC in the Territory. The other principal component of the plaintiff's claim is that the financial compensation it received from the defendant for its cattle slaughtered in the course of implementing the BTEC on Nutwood Downs, was less than it was entitled to receive.

**What is the BTEC?**

[3] The nature, history and organizational structure of the BTEC are conveniently set out in a document "Strategic Plan for BTEC in the Northern Territory 1990–92", produced in 1990. Pages 8-10 of that document state that the BTEC:-

> "… is a national program aimed at eliminating brucellosis and tuberculosis from cattle and buffalo [in Australia]. It is the largest animal disease eradication program ever conducted in Australia, costing $582.6 million to date, and likely to cost $705.8 million before scheduled completion of the eradication phase in 1992. The program has had a major impact on the cattle industry in all States. This impact is very obvious in the NT.

Both diseases were known to have occurred in the Australian herd from at least the 1920's. State/Territory governments had implemented various programs prior to the commencement of the national program in 1970. Initially these programs were designed to protect human health and reduce production losses, but later the need to protect Australia's export markets became paramount.

In 1970 agreement was reached on funding of the program on a national basis, with the Commonwealth matching State/Territory funding on a dollar-for-dollar basis. In November 1973, the Commonwealth introduced a levy on beef producers to recover the Commonwealth contribution to BTEC operational costs. There have been various modifications to the levy, and it now is a levy on slaughter and export of live animals.

In 1982, the Australian Agricultural Council ('AAC', a meeting of State and Commonwealth Agriculture Ministers) set up a national planning group to prepare a comprehensive operational and administrative plan. In that plan the target date of 1992 was set to achieve eradication of both diseases. The NT planned to achieve freedom from brucellosis in 1990, and freedom from tuberculosis south of the 16$^{th}$ parallel by 1990, and freedom north of the 16$^{th}$ parallel by 1992.

Total costs of BTEC for 1983-1992 in the NT was expected [in 1982] to be $92.5m (in 1982 dollars). A range of assistance measures was proposed to meet extra costs imposed on producers by BTEC, especially those in pastoral areas.

…

In 1983 the NT Department of Primary Production produced its 'Plan for Eradication of Brucellosis and Tuberculosis from Cattle and Buffalo in the Northern Territory' [the 'Calley Plan']. A similar plan was produced in 1981 which, while accepted by industry, was criticised for the costs it would impose.

In 1984 an agreement was signed between the Commonwealth of Australia and the Northern Territory of Australia relating to the eradication of brucellosis and tuberculosis in cattle and certain buffalo [in the Territory] for the period 1984-1992. It embodied financial, administrative and technical arrangements for the conduct of the program. This agreement forms the basis of the current program.

### *The Cattle and Buffalo Industries in the NT*

The beef and dairy cattle industry is an important part of the NT economy producing $135 million of income in 1988/89 including sale of cattle interstate ($91.3 million); sale of cattle to NT export abattoirs ($15.5 million); export of live cattle ($15.8 million); and sale of cattle to domestic abattoirs ($7.8 million).

In addition, the production of cattle hides (1988/89) was valued at $3.6 million, and value added at the domestic and export abattoirs totalled approximately $15.3 million.

In the NT, the cattle industry accounts for 66% of the total value of NT primary production, and 2.7% of the gross value of the total production of all sectors of the NT economy.

The cattle industry is located on 260 rural holdings with a total cattle population of some 1.5 million. To put this in its national perspective, the Australian beef and dairy cattle industries consist of 43351 holdings (including mixed enterprises like cattle/grain and sheep/cattle) with 23.5 million cattle and a total production of $4.7 billion.

…

### *Decision Making, Policy and Management [in BTEC]*

At a national level, the Standing Committee of Agriculture ('SCA') – a Commonwealth/State Committee of permanent heads of Agriculture Departments – has the major decision making role.

The BTEC Committee (consisting of officers in charge of the program in each State/Territory and the Commonwealth, and representatives of the cattle industry) reports to SCA on matters of policy and financial management. The Animal Health Committee (made up of Chief Veterinary Officers of each State/Territory and the Commonwealth) advises the BTEC Committee on technical aspects of the program.

At the NT level, the Minister of Primary Industry and Fisheries is Chairman of the BTEC Industry Management Committee which has representatives from the cattle and buffalo industries, Northern Land

Council, NT Department of Primary Industry and Fisheries (DPIF) and DPIE, Canberra. The role of the Committee is to assist the Minister in developing policy and reviewing the progress of the campaign.

DPIF has responsibility for the technical and financial management of BTEC [in the Territory]. Stock Inspectors are the staff with the most day-to-day contact with stock owners and are responsible for supervising activities such as testing, destocking and movement of cattle within and outside the NT. Veterinarians ensure that technical standards are complied with and, with Stock Inspectors, assist stock owners in developing and implementing approved programs.

Stock Inspectors and Veterinarians employed by DPIF have a range of legal powers under the Stock Diseases Act. These powers enable them to carry out necessary BTEC activities or to require stock owners to carry out certain activities.

*BTEC is a cooperative program between the cattle and buffalo industries, and the Commonwealth and Territory governments. The individual stock owner is responsible for achieving eradication of tuberculosis on their property. The success of the program depends on their continued support.*

As well, private veterinary practitioners, abattoir management, stock agents, transport operators, aircharter operators and many others play an important role in the program." (emphasis added)

[4] I consider that the defendant accurately describes the BTEC in the Territory in par 4A(h) of its Defence as:

"… a cooperative exercise undertaken by the Australian Cattle Industry, the Commonwealth and the Territory, which in the short term required the contribution of resources by the Commonwealth, the Territory and the Cattle Industry with the objective of producing benefits for individual pastoralists (including the plaintiff) and the Cattle Industry as a whole, which benefits were expected to exceed the cost of [sic, to] individual pastoralists."

[5] It is not disputed that by 1983 the Territory Minister of Primary Production was the Minister responsible for the conduct of the BTEC in the Territory, and the DPP (now the DPIF) was the responsible implementing Department.

[6] As noted in par [3], the DPP in March 1983 had produced a plan for the eradication of brucellosis and tuberculosis from cattle and buffalo in the Northern Territory. This became known as "the Calley plan" after Dr Calley, the DPP veterinary officer then in charge of the BTEC in the Territory, who said he "supplied most of the material for it" (tpt p 1558). The plan is comprehensive and detailed; it extends to 109 pages, plus extensive appendices; a partial summary of its contents appears at pars 3 (c)–(d)(i)–(xiii) of the defendant's submissions in reply, doc 250. In par 1.2 the plan identified its objective as the eradication of both diseases from the Territory "by 1992, by working in close co-operation with the Territory cattlemen". It described in par 1.4.4 the methods to be used; they focussed on "the introduction of Approved Programs". Par 2.2.5 dealt inter alia with compensation; this was payable under Compensation Contracts with the DPP for cattle destocked under Approved Programs, by Orders to Destock. Compensation rates were set for each category of stock; the rates were to be "reviewed by the Minister twice yearly". It was stated that –

> "The basis of compensation for all categories of stock, except unmusterables, is the on farm value of an equivalent disease-free animal valued at the use to which the slaughtered animal was put, plus freight and slaughter levy, and less any residual value of the diseased carcass."

As to this "basis", I note that at tpt p 1566 Dr Calley explained the distinction between "market value", and the "on-farm" value of an animal valued "at the use to which the slaughtered animal was put". He said that for example a breeder cow could be valued only by her product, her calves, and various contingencies relating to her calving, and the calf becoming a saleable steer, were therefore taken into account when valuing that cow "at the use to which [it] was put". This assessment led to an "on-farm" value for the animal which involved a reduction factor of 25% from an estimated saleyard price, in the first half of 1983. At tpt p 1565 Dr Calley also gave 3 practical reasons why it was "impossible to pay straight saleyard prices for destocked cattle". I accept his evidence on these matters.

The plan provided that unmusterable cattle were to be compensated for at a reduced rate. The "principles governing compensation for destocking" are set out in Appendix D, which states:

> "(ii) Payments will be based on the following principles:
>
> .....
>
> c) The value of each class of animal (including unmusterables) for compensation purposes will be that laid down in the schedule drawn up periodically in discussion with industry."

A proforma Destocking Compensation Agreement is at Appendix E.

Par 2.6 sets out a "detailed plan" for tuberculosis eradication in the Katherine region. Nutwood Downs is located in the Elsey and Gulf sub-regions of the Katherine region. Par 2.6.1 states:

> "The Elsey and Gulf sub-regions have low cattle populations, rugged terrain and with some exceptions poor management. *Except on a few properties the eradication strategy will centre around partial or total destocking*. The numbers retained on a property, if any, must depend on the extent of country which can be fenced securely, the carrying capacity (including improved pastures) of that country, and the competence of the management." (emphasis added)

Confirming this "strategy", par 2.6.8 stated in part:

> "In the Elsey and Gulf sub-region, destocking is expected to be the dominant strategy on most properties."

That is, as opposed to destocking as an ancillary to eradication testing.

Par 4.1.2 discussed the two means of eradication – test-and-slaughter, and destocking – and the requirements for success; it stressed that "It is important that cattle production and turnoff be maintained as far as possible during the period of eradication". It noted that: "Commonly, test-and-slaughter programmes are combined with an increased turnoff of aged animals". It also noted that –

> "Successful eradication on a station requires a commitment by the station management to carry out the [eradication] activities to a required standard, as well as having a commitment to completing the programme. A commitment to a test-and-slaughter programme will generally involve a longer time period than a destocking programme. The choice of means must take account of the future commitment of station management to the programme."

In par 4.1.4 dealing with "co-operation and commitment from the pastoralists", the plan said:

> "Failure of a test-and-slaughter programme to eradicate the diseases will necessitate the use of destocking for final eradication. Thus [in that case] both the Government and the station will incur not only the costs of test-and-slaughter, but also the costs associated with destocking. Effective station management is essential to a test-and-slaughter programme, that is, *fencing must be adequate and properly maintained to segregate the herd, mustering and testing must be efficient, and there must be correct accounting for all the animals tested*." (emphasis added)

While the defendant admits in par 4B of its Defence that the Calley plan "was published to pastoralists in the Northern Territory including the plaintiff", its fuller implications are in dispute in this litigation.

[7] I note that Mr Riley QC of senior counsel for the defendant, when making some general observations in the course of final addresses, submitted that the plaintiff's claims must be considered in the context that the BTEC was an industry-based scheme, established by the cattle industry for its own benefit and proved by its results to have been successful (tpt pp.2274-5). I accept that general description of the BTEC. I turn to the plaintiff's claims.

**The Claims in the Statement of Claim**

[8] During the course of the trial, leave was granted (initially on 24 August 1998, and again at later stages) for the plaintiff to amend its Statement of Claim. Ultimately, it extended to some 137 pages. The defendant was

granted corresponding leave to amend its Defence. A "key to pleadings" document was handed up on 31 August 1998 by Mr Maurice QC of senior counsel for the plaintiff, as a useful guide listing the various causes of action upon which the plaintiff then relied, separating out the elements of which they were comprised, and indicating where those elements were formulated in the pleadings.

[9] During the course of the trial the plaintiff informed me that it no longer intended to rely upon some of the matters it had pleaded, and indicated some of them. On 3 December 1998 the plaintiff formally abandoned certain parts of its case, as pleaded. In the result it no longer sought to rely on the following 17 causes of action which it had pleaded in its Amended Consolidated Statement of Claim (herein 'sc'):

(a) As to what allegedly occurred at the June 1983 meeting between Mr Bob Dunbar and Dr Calley, referred to in sc par 6: the allegations pleaded in sc pars 6(c)(i), (ii), (iii), (iv) and (v), 6A, 6B, 6C, 6D, 6E, 6F, 11 and 27A, are abandoned insofar as they constituted a cause of action in *fraud* arising from what Dr Calley was there alleged to have advised Mr Dunbar, and represented to him.

(b) As to what allegedly occurred at the January 1984 meeting between Messrs Bob and Rod Dunbar and Dr Calley, referred to in sc par 8: the allegations pleaded in sc pars 11, 11A, 11B, 11C, 11D and 27C(a), are abandoned insofar as they constituted a cause of action in *fraud* arising

from what is pleaded in sc par 8 as "the January 1984 Representations" by Dr Calley.

(c) As to the "Further January 1984 Representations" by Dr Calley referred to in sc par 9: the allegations pleaded in sc pars 9(c)(i), (ii), (iii), (iv), (v), (vi) and (vii), and 11, 11B, 11C, 11D and 27C(a), are abandoned insofar as they constituted a cause of action in *fraud* arising from those representations.

(d) As to "the 1988 Representations" referred to in sc par 42B: sc pars 42F, 42I, 42K, 42L and 45A are abandoned insofar as they founded a cause of action in *fraud* arising from sc par 42B(a), which pleads what Dr Sykes of the defendant is alleged to have "impliedly represented" and advised in his letter to the plaintiff of 18 January 1988.

(e) As to what allegedly occurred at a meeting on 8 June 1984 between the Dunbars and three officers of the defendant, referred to in sc par 15 as "the June 1984 threats": the allegations in sc pars 15(a), (b) and (c), and 32A, 36, 37, 38, 39, 40, 43 and 43C are abandoned insofar as they constituted a cause of action for *negligent misrepresentation* by the defendant on that occasion.

(f) As to "the August 1984 Representations" referred to in sc par 17(a): the allegations in sc pars 17(a), (b), (c) and (d), 30A and 32A, are abandoned insofar as they constituted a cause of action for a *negligent*

*misrepresentation* by the defendant in August 1984 that compensation for destocked cattle would be paid at 'Southern Region rates'.

(g) As to what was allegedly said at a meeting on 10 May 1985 between Dr Ainsworth of the defendant and the Dunbars: the allegations in sc pars 19D(a), (b), (d) and 32A, 36, 37, 38, 39, 41, 43, 44 and 44C (quaere, 43C), are abandoned insofar as they constituted a cause of action for *negligent misrepresentation* relating to rates of compensation, arising from "the May 1985 Representations".

(h) As to the pleading in sc par 20 of what was allegedly said at a meeting on 2 August 1985 between the Dunbars and officers of the defendant: the allegations in sc pars 20(a), (b), (c), (d) and 32A, 36, 37, 38, 39, 41, 43, 43C and 44, are abandoned insofar as they constituted a cause of action for *negligent misrepresentation* relating to rates of compensation, arising from "the August 1985 Representations".

(i) As to the pleading in sc par 23 of what was allegedly said at a meeting on 8 December 1987 between the Dunbars, Mr Winter (the plaintiff's solicitor), and 2 officers of the defendant, the allegations in sc pars 20(d), 23(a) and (b), 25(a), 36, 37, 38, 39, 42, 43, 43C, 45 and (apparently) 24A(b), are abandoned insofar as they constituted a cause of action for *negligent misrepresentation* relating to rates of compensation, arising from "the December 1987 Representations".

(j) As to "the Implied Representations", being the representations pleaded in sc par 35 as having been impliedly made by the defendant when making the (above) representations on 8 June 1984, 10 May 1985, 2 August 1985 and 8 December 1987: sc pars 35(a) and (b), and 36, 37, 38, 39, 40, 41, 42, 43, 43C and 44, are abandoned insofar as they constituted a cause of action for *negligent misrepresentation* arising from those "Implied Representations".

(k) Further as to "the June 1983 Representations" in (a) above: sc pars 6(a) and (c)(i), (ii), (iii), (iv) and (v), and 6B, 6C, 11(a), 11(b), 30, 30(d), 43A and 43B, are abandoned insofar as they constituted a cause of action in *estoppel* arising from those representations.

(l) Further as to "the August 1984 Representations" in (f) above: sc pars 17, 17(b), 30(a) and 52, are abandoned insofar as they constituted a cause of action in *estoppel* arising from those representations.

(m) As to the alleged contract of late August 1994 pleaded in sc par 14, whereby compensation for destocked cattle was agreed to be paid to the plaintiff at "Southern Region Rates": sc pars 16, 50 and 51 are abandoned, insofar as they constituted a cause of action for *breach of that contract*.

(n) As to the alleged breaches by the defendant of a duty of care it owed the plaintiff when determining the rates of compensation payable for destocked cattle: sc pars 33B, 33C, 33D and 43C are abandoned, insofar

as they constituted a cause of action in *negligence*, arising from those alleged breaches.

(o) As to the allegation in sc Part 10 of unconscionable conduct and duress by the defendant in its conduct of the BTEC: sc pars 43C (quaere), 46(a), (b), (c), (d) and (e), pars 47(a)(i), (ii) and (iii), par 47(b), and pars 49(a) and (b) are abandoned, insofar as they constituted a cause of action arising from the alleged obtaining by the defendant of the plaintiff's consent to the Destocking Compensation Agreement (the 'DCA'), particularly Clause 17 thereof, by *unconscionable conduct, undue influence, and duress*.

(p) As to the allegations of mistake and duress in sc pars 49B and 49C: sc pars 19D(e), 24A(b), 49A, 49B, 49C and 49D are abandoned, insofar as they constituted a cause of action based on the allegation that the defendant, in the operation of the BTEC Approved Program on Nutwood Downs in the 1984, 1985, 1986, 1987 and 1988 cattle seasons, by paying the plaintiff substantially less than Market Rates for cattle destocked in those years, had thereby obtained a financial benefit by *duress by the defendant*, or *by mistake by the plaintiff* as to its entitlements.

(q) As to the allegations of mistake and duress in sc par 49C1: sc pars 49C1(a), (b), (d), (e), (f) and (g), and 49D and 49E are abandoned, insofar as they constituted a cause of action based on the allegation that

the defendant, *mistaking its authority* so to do, between mid-1984 and 1989 had ordered the destocking of certain cattle and the destruction of certain 'unmusterable/untruckable' cattle of the plaintiff, or alternatively so ordered *without paying 'just terms*'.

[10] It can be seen from par [9] that the plaintiff thereby abandoned 17 causes of action: 4 in fraud, 6 for negligent misrepresentation, 2 for estoppel by representation, 1 for breach of contract, 1 in negligence, 1 for unconscionable conduct, and 2 for duress or mistake. The abandonment of these causes of action significantly reduced the number of causes of action upon which the plaintiff relied. In broad terms, it left alive 12 causes of action: a six-fold 'negligent misrepresentations case' (with a two-fold 'estoppel case' said to be a 'back-up' thereto), a 'three-fold breach of contract case', and a 'breach of fiduciary duty case'. I deal in turn with each of these remaining causes of action, and the evidence adduced in their support.

[11] Much of the evidence related to various alleged misrepresentations to the plaintiff by Dr Calley, Dr Ainsworth and other officers of defendant. These misrepresentations were said to give rise to breaches of various duties of care owed by the defendant to the plaintiff, and accordingly to ground the plaintiff's claims in negligence, as negligent misrepresentations made to it upon which it had relied, and acted upon to its economic loss. I turn first to the five causes of action of this type.

## The negligent misrepresentations case

### (1) *"The (pre-purchase) June 1983 Representations" – the BTEC and Nutwood Downs*

[12] As noted in par [1], about June 1983 the plaintiff in the person of Mr Bob Dunbar had commenced negotiations to purchase Nutwood Downs from Vesteys. It is common ground that in connection therewith, on or about 30 June 1983, Mr Bob Dunbar went to see Dr Calley in the latter's capacity as the officer-in-charge of the Territory BTEC. Only the two men were present.

Dr Calley in his evidence had no recollection of the June 1983 meeting or of what he said thereat; I consider that this was to be expected after the lapse of such a long period of time, no notes of the meeting or what was discussed thereat having been made, and no follow-up correspondence having resulted from it. I found Dr Calley a transparently honest witness, a careful person of complete integrity. I consider that Mr Bob Dunbar was also an honest witness, in the sense that he spoke what he now believed to be the truth; however, I consider that his memory of the detail of what he alleges was said at the June 1983 meeting was in fact very far from reliable. On the evidence, I am satisfied that Dr Calley informed Mr Bob Dunbar at that time that if the plaintiff purchased Nutwood Downs it would be asked to participate in the BTEC administered by the defendant, and that further information or advice in relation thereto could be sought from him or from the DPP.

The plaintiff however alleges that Dr Calley made 5 further representations to Mr Bob Dunbar at this meeting, to the following effect:–

(a) that the defendant, by Dr Calley, *agreed to advise* the plaintiff in relation to the operation of the BTEC program on Nutwood Downs, in the event that the plaintiff purchased the property (sc par 6(a)). The defendant denies that Dr Calley agreed to advise the plaintiff, at all. It submits that the evidence of this alleged oral agreement is not borne out by Mr Bob Dunbar's oral evidence. Further, it correctly notes that the pleading is that the alleged agreement to advise was to operate only "in the event" of the plaintiff's purchase of Nutwood Downs; that did not occur in June 1983 – the plaintiff did not sign a contract to purchase until 22 December 1983 – and so, the defendant submits, accepting what the pleading alleges the defendant was under no duty *in June 1983* to the plaintiff as an adviser. I accept that. Having considered the evidence on the point, I say immediately that I am not satisfied that the plaintiff has established that Dr Calley agreed to advise it; I deal with this in more detail from par [18].

(b) that Dr Calley told Mr Bob Dunbar that the plaintiff would need to supply the defendant with detailed financial information about itself and its plans for Nutwood Downs, to enable the defendant to work out a BTEC program for the property (sc par 6(b)(i)); and that government officers would work with the plaintiff in implementing that program (sc par 6(b)(ii)). The defendant denies the allegation

in sc par 6(b)(i), and admits that in (ii); it notes that the plaintiff admits that it never provided any such financial information to the defendant. Again, I say immediately that I am not satisfied on the evidence that the plaintiff has established its allegation in sc par 6(b)(i).

(c) that Dr Calley told Mr Bob Dunbar three things about the working of the BTEC: that its operation on Nutwood Downs "would not be a financial burden" on the plaintiff (sc par 6(c)(i)); that if it involved destocking cattle, the compensation therefor would be such as "to ensure that the plaintiff [would be] no worse off and no better off financially" (sc par 6(c)(ii)); and that the compensation paid for "breeding cows and bulls" destocked under the BTEC program would be the 'replacement value' of those animals (sc par 6(c)(iii).

I note that Dr Calley, despite his lack of memory of what he said to Mr Bob Dunbar in June 1983, denied that he would have told Mr Dunbar what he is alleged to have said in sc pars 6c(i), (ii) and (iii). In my opinion, it is quite competent for him to give evidence to that effect. He did not believe those things, and he was aware that he would not have lied about them to Mr Bob Dunbar. Clearly, they were not views which he held in 1983 about the operation of the BTEC – cf. the final paragraph of par 2.3.5, pars 2.6.12 and 3.4, the third and fifth paragraphs of par 4.1.2, the fourth paragraph of par 4.1.3, and the second, fifth and sixth paragraphs of par 4.1.5 of the

Calley plan. I am satisfied he had no reason to mislead Mr Bob Dunbar about those matters, and did not do so.

To my mind Dr Calley gave a convincing explanation at tpt pp 1565-6 as to why he considered in 1983 that it was "obviously impossible" to pay compensation for cattle destocked in the Territory in 1983, at their replacement value; and as to why, in assessing compensation at that time, a reduction factor was applied to the estimated saleyard price, initially of 25% and then of 40% in the latter part of 1983. See also on this point his evidence cited in par [6]. I note and accept his explanation that the reduction had been increased to 40% because the Territory Government found that it could no longer sustain paying the amount it had earlier been paying; this further reduction appears to have a pragmatic foundation, as opposed to the basis of the 25% reduction. Dr Calley agreed that he may have told Mr Bob Dunbar that the compensation payable for a destocked animal would be sufficient to allow a pastoralist to replace that animal with an equivalent animal "for the use to which it had been put"; he explained how it was that the words quoted resulted in the reduction factor mentioned above – see par [6] – and he adhered to that qualification in cross-examination, at tpt pp 1592-3.

On the evidence I say immediately that I consider that the probabilities are that Dr Calley's testimony accurately reflects what he had in fact told Mr Bob Dunbar at their June 1983 meeting, and

indeed what he told other pastoralists up to September 1983. I do not accept Mr Bob Dunbar's evidence, which was in accord with sc par 6(c)(iii); nor do I consider that a conclusion along the lines of sc par 6c)(iii) could reasonably have been drawn by him from what I find Dr Calley probably said. I consider that Mr Dunbar's evidence relating to this alleged representation (and all of the '5 further representations') is largely his own reconstruction, a creation probably coloured by his subsequent acrimonious dealings with the DPP. The relationship was characterised by the plaintiff at par 59 of doc 239 as "long and poisonous", with "fear and loathing on both sides". I note, for example, that he agreed in cross-examination that he had obtained from the Calley plan the information he earlier said he had from Dr Calley in June 1983, that the basis of compensation was "market value"; yet, admittedly, he did not receive that document until his later meeting with Dr Calley on 5 January 1984. Just as Dr Calley was unable to distinguish between the two meetings, so I consider Mr Bob Dunbar ran them together.

As to what is alleged in sc par 6(c)(i), (ii) and (iii), I accept Dr Calley's denial that he would have said what those pleadings allege he said.

(d) that there was 'no great quantity' of tubercular cattle on Nutwood Downs (sc par 6(c)(iv)). The evidence is that Mr Watts of Vesteys had earlier told Mr Bob Dunbar that the incidence of tuberculosis in

the Nutwood Downs herd was 0.5%, while Dr Calley's then estimate was 1.0%. I do not accept Mr Bob Dunbar's evidence that Dr Calley said what is alleged in sc par 6(c)(iv); I consider that allegation is probably a conclusion which Mr Dunbar chose to draw from what he had in fact learned from Dr Calley and others. I consider that the evidence shows that he should have been aware that there was a potential for a significant amount of destocking on Nutwood Downs, if the test for tuberculosis – the 'caudal fold' test - did not work effectively on the property (as to which, see (e) below). I consider that his evidence (Exh P32, at par 80) that he believed as a result of "what Calley told me at our meeting on 30 June 1983" that the level of destocking would be "something like the disease level" – that he expected the number to be destocked would be about 80 head, a figure which is in fact 1.0% of the 8000 head which Vesteys had guaranteed were on the property – is not supported by his other evidence in Exh P32. Further, it is not supported by the plaintiff's later lack of protest, when much larger levels of destocking were discussed when the first Approved Program for Nutwood Downs was being settled in May 1984; this militates against any such belief by Mr Dunbar as to the level of destocking he asserts, having been rationally engendered by anything he was told by Dr Calley on 30 June 1983.

(e) that the tuberculin test used in the BTEC programs – the 'caudal fold' test – "worked well" and "would identify all animals which were diseased" (sc par 6(c)(v)). I consider that this allegation is only partially true, and by what it omits is misleading. Mr Maurice submitted (tpt p 2392) that Dr Calley "virtually concedes" in his evidence that he told Mr Bob Dunbar on 30 June 1993 that the test "works well". However, that submission takes no account of Dr Calley's important qualification in his evidence: his view clearly was (as it had been in 1983) that the 'caudal fold' test worked well to detect bovine tuberculosis, *over a number of tests*. From the evidence before me, it is quite clear that it was an imperfect test in terms of sensitivity and specificity, and known to be such; and repeated testing was therefore required to detect tubercular animals. I consider as a matter of common sense that that fact must have become widely known among the cattlemen of Australia, following the introduction of the BTEC. I accept that the 'caudal fold' test was nevertheless the most reliable test available in 1983 to diagnose bovine tuberculosis.

I accept the defendant's contention that the ultimately successful outcome of the BTEC, of which a vital common component of a test-and-slaughter program – though by no means the only component – was the application of the 'caudal fold' test, shows clearly that it was an effective test to detect bovine tuberculosis, when repeatedly administered over time; and it was an

effective part of the eradication campaign, when used in conjunction with the other components of the BTEC test-and-slaughter programs as spelled out, for example, in Dr de Witte's "basic principles" in par [17]. As a result of the BTEC, the Katherine region had reached the stage of being declared 'impending free' of bovine tuberculosis in 1992; I note in passing that the Calley plan's target date in par 2.3.4 had been total eradication by 1 January 1989. The whole of Australia became a 'disease free' area as regards bovine tuberculosis in 1997.

I note that Mr Bob Dunbar conceded in cross-examination (tpt p. 1093) that Dr Calley had "possibly" told him that the 'caudal fold' test "was reliable over a number of tests". I think it probable that that was indeed the thrust of what Dr Calley had told him about the efficacy of the test. It is probable, in my opinion, that Mr Bob Dunbar was made aware by Dr Calley that a BTEC program on Nutwood Downs would involve the herd being tested several times over a number of years. 'Caudal fold' repeat testing was usually of the essence of a BTEC test-and-slaughter program, in practice. I bear in mind the caveat in pars 2.6.1 and 2.6.8 of the Calley plan, in par [6], as to the region where Nutwood Downs is located.

[13] As to the '5 further representations' in par [12], the defendant also submitted that the level of detail with which they deal was unlikely to have been addressed in June 1983, because the whole discussion was short – some 20 to 30 minutes in all. It submitted that this conception of the level of detail of that discussion is consistent with the evidence of Rod Dunbar (Exh

P3, par 53) as to what his father related to him on 1 July 1983 as the outcome of his short meetings with various persons including Dr Calley, viz:

> "Dad told me about conversations he had with Graham Calley the day before. He basically told me that there was a national program to get rid of two diseases. It was not a big deal because it was integrated into the annual mustering. The Department would work as partners in getting rid of it and funds were available for necessary capital works".

I accept the defendant's submissions as to the level of detail in the discussion of June 1983.

The defendant further submitted that the evidence showed that Mr Bob Dunbar's present recollection of the content of his discussions with other persons at about this time, mid 1993 – Messrs Watts, McGill, Hockey and Emerson - indicated that his memory as to who said what was unreliable, and his evidence of those discussions also amounted to reconstruction, and was not his actual memory of their contents. I accept this submission; it is far from surprising that it should be so.

As I indicated in par [12], I do not consider that Mr Bob Dunbar's evidence of the content of his discussions with Dr Calley in June 1983 was reliable; it was very far from that. I am not satisfied that the representations which he alleges were then made by Dr Calley, were in fact made as alleged in sc par 6(c)(i)-(v). That factual conclusion disposes of the plaintiff's cause of action for negligent misrepresentation insofar as it founds on "the (pre-purchase) June 1983 representations". It is nevertheless desirable to

consider the other matters which the plaintiff would have been required to prove to establish that cause of action, had 'the June 1983 Representations' in fact been made by Dr Calley as alleged. I turn to those matters.

The first is *reliance*. It would have been necessary for the plaintiff to prove that it relied on the representations in par [12] when subsequently purchasing Nutwood Downs, because otherwise there would be no causal relationship between the representations and the alleged economic loss; see *San Sebastian Pty Ltd v Minister administering the Environmental Planning and Assessment Act* (1986) 162 CLR 340 at 366, per Brennan J.

[14] The plaintiff pleaded in sc par 6B that it believed 6 matters of fact, as a result of the representations it alleges were made by Dr Calley to Mr Bob Dunbar on 30 June 1983, as described in par [12]: that it would receive compensation "at rates equal to market value" for all cattle destocked under the BTEC (sc par 6B(a)); that there was not a high incidence of bovine tuberculosis on Nutwood Downs; that the 'caudal fold' test for identifying tubercular cattle "worked well"; that accordingly, not much destocking was likely to be required (sc par 6B(b)); that it would be no worse off and no better off financially from any BTEC destocking on Nutwood Downs (sc par 6B(c)); and that the operation of the BTEC on the property "would not be a financial burden" upon it. I do not accept that the representations alleged were made, and I do not accept these allegations of engendered belief; I consider they were a reconstruction. However, for present purposes, the

representations are treated as having been made and on that basis I would accept that the beliefs alleged were engendered.

[15] The plaintiff's case as regards 'the June 1983 Representations', as pleaded in sc par 6C, is that in the light of the representations by Dr Calley as alleged in par [12], and Mr Bob Dunbar's resulting beliefs as set out in par [14], when it later contracted to purchase Nutwood Downs on 22 December 1983, it did so *relying* on those representations in par [12] and in accordance with its own resulting beliefs in par [14]. The evidence of Mr Bob Dunbar (Exh P32, pars 80-91, 101, 107-8) generally supports this case. Mr Maurice pointed out that much of this evidence as to reliance, had not been challenged in cross-examination by the defendant. It is nevertheless clear, to my mind, that the defendant put the matter of reliance very much in issue. As noted, reliance by the plaintiff on the representations when acting to its loss, is a matter which it was required to prove once it had established that the representations in par [12] were in fact made to Mr Bob Dunbar, and had engendered in him the beliefs set out in par [14]. I consider that it is significant and adverse to the plaintiff when considering whether it in fact relied on Dr Calley's alleged representations, , that it made no attempt to contact Dr Calley or any of his BTEC officers between the meeting on 30 June 1983, and its entering into the contract to purchase and paying the deposit on 22 December, nearly 5 months later. I also note that on the evidence only one of the three Directors of the plaintiff, Mr Bob Dunbar,

claimed that he had relied on what Dr Calley is alleged to have said in June 1993, when subsequently deciding to purchase Nutwood Downs.

[16] The defendant denies that the plaintiff purchased Nutwood Downs in reliance on what Dr Calley is alleged in par [12] to have said to Mr Bob Dunbar on 30 June 1983. It contends that the Dunbars intended to purchase Nutwood Downs 'no matter what'; that their decision to purchase the property was "made with the heart not with the head" (tpt p.2270), a decision based essentially upon the exercise of their own judgment and their inadequate inquiry, and, in particular, without relying upon anything Dr Calley said in June 1983.

As to this, it is sufficient to say that having considered the evidence, I consider it probable that Mr Bob Dunbar and Rod Dunbar, both very experienced cattlemen, obviously confident of their own abilities and judgment in that business, decided at a very early stage to buy Nutwood Downs. Their decision to do so was not affected by what Dr Calley *in fact* said to Mr Bob Dunbar in June 1993; as I noted earlier, I am not satisfied that any beliefs which Mr Bob Dunbar says he had in relation to the impact of the BTEC on Nutwood Downs, as alleged in par [14], rationally arose from what Dr Calley in fact said on that occasion. For present purposes, however, and contrary to what I have found to be fact, I assume that the "5 further representations" in par [12] were made by Dr Calley.

On that assumed basis, I accept as generally accurate in relation to the Dunbars' decision to purchase Nutwood Downs, the factors and considerations summarized by Mr Riley in his submission, doc 233 at pp 3-6. Nevertheless, had the '5 further representations' been made by Dr Calley, I consider that probably they would have rationally engendered in Mr Bob Dunbar the beliefs in par [14], and they would probably then have been, as one factor amongst others, a real inducement in persuading the Dunbars to purchase Nutwood Downs. I reject the defendant's submission that the Dunbars would have relied on their own judgment without reference to Dr Calley's '5 further representations', had those representations been made. I consider that in those circumstances the plaintiff would have established that it had relied on those representations when deciding to purchase.

[17] The plaintiff pleads in sc par 6E that 'the June 1983 Representations', upon which it says it relied, were "false and incorrect", in the ways there specified. This it would also have had to prove, had 'the June 1983 Representations' been made. To this end, it pleads in sc par 6E(g) that the 'caudal fold' test "did not work well in the circumstances existing at Nutwood Downs". In support of this contention, the plaintiff points to the BTEC veterinarian Dr de Witte's three papers (DLOD 1373, 1989 and Exh P67) and what is said in the Territory's Strategic Plan 1990-92. I note that in his first paper DLOD 1373 of 23 June 1988, Dr de Witte listed the basic principles for eradication of bovine tuberculosis as –

> "(1) 100% complete musters for testing or turnoff

(2) stock segregation and movement control to prevent the spread of infection

(3) heifer and age group segregation

(4) twice yearly testing of infected mobs

(5) age culling."

I accept these, as indicating basic matters to be carried out in effective BTEC test-and-slaughter programs. Dr de Witte considered in his 1988 paper (written some 4 plus years after the plaintiff purchased Nutwood Downs) that the then current strategy of "whole herd test-and-slaughter programs" was proving unsuccessful for the BTEC in the Katherine district because of "the continuation of severe practical problems of implementation and the reluctance of some station managements to react positively". As to the latter aspect, I noted in par [6] the emphasis in item 4.1.2 of the Calley plan on 1983 on the need for "commitment by the station management". Dr de Witte rightly considered in 1988 the future was "very bleak" for the BTEC to meet its current time frame for eradication of TB, when these factors were "combined with a standard test of doubtful sensitivity in mixed-breeder herds"; that is, the 'caudal fold' test.

In his second paper, DLOD 1989, a 1989 review, Dr de Witte reviewed the history of BTEC in the Katherine region. He said "progress began seriously in 1983-84".

In the light of the evidence relating to the efficacy of the 'caudal fold' test – which is usefully summarized by the defendant at pp 42-8 of its doc 233 – I consider that it may well have been effective to eradicate TB in Nutwood Downs, provided it had been "used in conjunction with other eradication techniques such as aged destocking and weaner segregation" as Dr Neumann put it in Exhibit D38, or in accordance with the "basic principles" for a test-and-slaughter program spelled out by Dr Sykes above, and provided there was an appropriate "commitment by the station management" in terms of the Calley plan requirement. Had Dr Calley represented to Mr Bob Dunbar that the 'caudal fold' test "worked well", as alleged in par [12](e), and had all of the "basic principles" of a BTEC program been followed at Nutwood Downs as required by its Approved Program, with the necessary "commitment by the station management" referred to in the Calley plan at par [6] – treating all these as part of "the circumstances existing at Nutwood Downs" – I doubt whether the plaintiff would have established that the 'caudal fold' test "did not work well in the circumstances existing at Nutwood Downs". There is a real problem as to what the plaintiff intends to encompass by the words "in the circumstances existing at Nutwood Downs" in sc par 6E(g).

[18] The plaintiff would also have needed to establish that when making 'the June 1983 Representations' the defendant owed the plaintiff a duty of care which extended to those matters. It was no doubt for that reason that in sc par 6H the plaintiff pleaded that in making those representations to it via

Dr Calley the defendant owed it a duty of care because, inter alia, it was *an adviser* to the plaintiff in relation to the operation on Nutwood Downs of the BTEC. In this regard the plaintiff also contended – see (a) in par [12] - that the defendant had *agreed* at the June 1983 meeting between Dr Calley and Mr Bob Dunbar to act as the plaintiff's adviser in relation to the BTEC on Nutwood Downs; see sc par 6H(a). Apart from agreement it alleges that at that time "the defendant knew or ought to have known" both that it was being relied on by the plaintiff as a "source of full and accurate information and advice" on that aspect, and being relied on in the plaintiff's consideration of whether to purchase Nutwood Downs (sc par 6H(b) and (c)). The pleading of reliance in this way in sc par 6H(b) and (c) is no doubt for the purpose of establishing a requisite proximity of relationship so as to create a duty of care breach of which attracts liability in tort for economic loss; see *San Sebastian Pty Ltd v Minister administering Environmental Planning & Assessment Act* (supra) at 355; and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 461, 466, 497-9, 509.

[19] Apart from the agreement to advise referred to in par [12](a), the plaintiff appears to have founded its contention that the defendant was its adviser on the BTEC on the following three bases: that the defendant in the circumstances had effectively held itself out as having the role of adviser; that it had affirmatively assumed the role of adviser, by responding to inquiries made by the Dunbars; and that it had assumed the role of adviser, by reason of a special interest of its own that the Dunbars purchase Nutwood

Downs. I accept that if the defendant were the plaintiff's adviser as alleged, in the circumstances it would have owed the plaintiff a duty to take reasonable care that its advice was accurate; I adopt the approach to ascertaining when a duty of care exists, outlined by Kirby J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419-420.

[20] As to the first basis in par [19], the plaintiff submitted that the DPP was not merely providing pastoralists with a reactive 'shop front service' about the BTEC. Rather, it was a government agency which was promoting the BTEC to pastoralists, and implementing it as a particular scheme to eradicate bovine tuberculosis by 1992; for that reason the defendant recognised the need that the DPP as its agency act in an advisory capacity to pastoralists. The defendant responded to the effect that the DPP was not "promoting" the BTEC in the sense advanced by the plaintiff in sc par 4B in par 7C of its submissions, doc 239; rather it was implementing in the Territory by the Calley plan the eradication of bovine tuberculosis, a goal agreed to by the cattle industry Australia-wide, in the States and Territories, and with the participation of the Commonwealth. That is, it was implementing an 'industry program'. I consider that the defendant's contention is correct and the first basis in par [19] is not established. I note in passing that it is common ground that the objective of eradicating tuberculosis was not only a Territory objective, but an Australia-wide objective, as were the various time deadlines set for that eradication.

[21] The plaintiff's case was that the BTEC would operate on Nutwood Downs once the plaintiff had purchased it, either by a program agreed to by the defendant and plaintiff (an "Approved Program") or, failing that agreement, by an uncompensated compulsory destocking of the cattle on the property (potentially involving the 'Crown Muster' –referred to in par 2.2.4 of the Calley plan). The plaintiff also submitted that it followed that the Dunbars had only until they had completed their purchase of the property to determine the implications of the BTEC for them, and in particular for their decision whether or not to proceed to purchase it.

The defendant responded that this was not so; that while tuberculosis had to be eradicated, the plaintiff like all pastoralists always had a choice whether or not to enter into a BTEC scheme by way of an Approved Program (which provided inter alia for compensation, subsidies, low rental leases and free professional assistance and testing). It contended that while to enter into an Approved Program was the only commercially sensible thing to do, the choice whether or not to do so was a matter for the plaintiff. It submitted that the 'commercially sensible' aspect accounted for why the Dunbars had in fact voluntarily entered into an Approved Program on 8 June 1984. I consider that the defendant's contention is correct. As to determining the implications of the BTEC before completing its purchase in March 1984, I consider that the plaintiff should have been aware in detail of the working and implications of the BTEC, after it received a copy of the Calley plan on 5 January 1984.

[22] As to the second basis in par [19] for the contention that the defendant was the plaintiff's adviser, I think it is clear that having chosen to respond to the Dunbars' BTEC enquiries, in the circumstances Dr Calley was under a duty not intentionally to mislead them; this duty is not related to any role as an adviser. The plaintiff contends that Mr Bob Dunbar in June 1983 made known to Dr Calley that the Dunbars were contemplating using their life savings to purchase Nutwood Downs, and that he was then seeking advice from Dr Calley about the impact (particularly the financial impact) of the BTEC on that property.

[23] As to this contention, the defendant points to the factual context in which the meeting between Mr Bob Dunbar and Dr Calley took place in June 1983, and the lack of any outcome therefrom. The factual context includes the following: during their meeting Mr Bob Dunbar told Dr Calley that he knew something of the BTEC from his own experience of its operation on his Queensland property; see pars (e) on p 11 and (d) on p 12 of doc 233, which I accept. No file note of what they discussed was kept by either man; and (of particular evidentiary relevance to the question whether there was a fiduciary relationship between the parties at this time) Mr Bob Dunbar left no forwarding address or other means by which Dr Calley could maintain any ongoing contact with him. It is sufficient to say that I accept that the effect of the evidence was as per pars (a) – (i) at pp 6-7 of the defendant's submission, doc 233. I conclude that Dr Calley did not affirmatively assume the role of adviser to Mr Bob Dunbar in June 1983, as alleged. I do not

accept the plaintiff's contention in par [22] as to what Mr Bob Dunbar made known to Dr Calley in June 1983.

[24] The third basis in par [19] –that the defendant assumed the role of adviser because it had its own special interest that the plaintiff purchase the property – appears somewhat surprising on its face; it may gain some credibility when considered in conjunction with the first basis, and what was stated in pars 2.6.1 and 2.6.8 of the Calley plan in par [6] about the sub-region. The plaintiff contends that the representations it alleges were made by Dr Calley, Dr Ainsworth and the defendant prior to the plaintiff completing the purchase of Nutwood Downs in March 1994, were all made by way of securing the defendant's general objective of eradicating tuberculosis in the Territory; that the defendant considered that this objective would be better secured by encouraging the plaintiff to purchase Nutwood Downs from Vesteys and enter into an Approved Program of the test-and-slaughter type; that the advantage to the defendant if the plaintiff became the owner rather than Vesteys, would be a reduction to the defendant in the cost of disease eradication, because that would then be attained by a co-operative endeavour between the defendant and the plaintiff. In particular, the plaintiff stressed that the Dunbars were "able and willing to undertake an Approved Program", and that this gave the defendant a "real interest" that they buy the property; see generally the reasons detailed in the plaintiff's submissions in doc 239 at par 7A which may also relate to its (withdrawn) allegation in sc par 6D that 'the June 1983 Representations'

were made to induce the plaintiff to purchase Nutwood Downs. I should say that I would reject the allegation in sc par 6D, and the third basis in par [19], as I consider that the effect of the evidence on those matters is what is stated by the defendant in pars (a) to (d) at p 16 of its submissions in doc 233.

In the result I reject the allegation in sc par 6H that the defendant was the plaintiff's adviser in relation to the BTEC's operation on Nutwood Downs. Accordingly, it owed no duty of care as an adviser.

[25] The plaintiff's case in part is that Dr Calley engaged in June 1983 in misleading and deceptive conduct, in circumstances where that conduct involved breaches of his duty of care to the plaintiff; see par 2. of its submissions, doc 239. That is to say, the plaintiff alleges that what Dr Calley said to Mr Bob Dunbar on that occasion, as specified in par [12], amounted to a misrepresentation which led the Dunbars to believe that if they purchased Nutwood Downs they would be able to operate the property as a viable pastoral enterprise notwithstanding the requirements of a suitable TB eradication program.

The plaintiff had to establish not only that the defendant had a duty of care, but also was in breach of that duty. Accordingly, as noted in par [17], in sc par 6E the plaintiff alleged that 'the June 1983 Representations' referred to in par [12] were "false and incorrect", the particulars thereof being those specified in subpars (a) – (i) of sc par 6E; and in sc par 6F the breach of the

duty of care is pleaded – that Dr Calley either knew they were false or incorrect, or made those representations recklessly, not caring whether they were true or false.

[26] It will be recalled that the defendant's principal submission on 'the June 1983 Representations' was that the alleged representations were not made; I indicated in par [13] that I accept that submission. The matters now being addressed assume for present purposes that the representations in par [12] *were* made. The defendant in its submissions doc 233 at p 17 addressed particulars (c), (da), (e), (h) and (i) of sc par 6E, by reference to the evidence. I indicate that I accept the defendant's submissions on the matters dealt with by those particulars, while noting that the advice from Dr Calley referred to at (h) and (i) on p 17 of doc 233 is his advice in January 1984, not June 1983. Those particulars of falsity and incorrectness are rejected; and the alleged breach of a duty of care in relation thereto falls with them.

[27] In sc par 6I, the plaintiff also alleges a breach of the defendant's duty of care set out in sc par 6H, arising from its alleged role as adviser to the plaintiff. This alleged breach consists in *failing to advise* the plaintiff as to the matters specified in subpars (a) – (g) of sc par 6I, and – as per subpars (h) and (i) - in failing to take reasonable care to ensure there was a proper and reasonable basis for making 'the June 1983 Representations', and failing to appreciate the lack of such a reasonable and proper basis. I note the matters particularized in subpars (a), (b), (c), (ca), (e), (f) and (g) of sc par 6I as the relevant matters about which the defendant allegedly failed to

advise the plaintiff, are the same as those set out in subpars (c), (e), (d), (da), (g), (h) and (i) respectively of sc par 6E, as the particulars of "false and incorrect" representations by Dr Calley in June 1983, 5 of which were rejected in par [26].

[28] At pp 18 and 19 of its doc 233, the defendant addresses the alleged breaches of its duty of care as specified in par [27]. I accept submissions (a) and (b) on p 18 of the defendant's submissions, doc 233; they effectively rebut the allegations in sc par 6I, subpars (a) and (b).

As to the allegations of failure to advise in terms of subpar (c) of sc par 6I, (identical with subpar (d) in sc par 6E) the defendant submits at par (c) on p 18 of its submission doc 233 that on the evidence the plaintiff was aware that compensation rates were variable – see par 57 of Exh P32 – and notes that there was a lack of evidence as at June 1983 of any intention by the defendant to vary the then current compensation rates, or of any 'pressure to decrease' them. I consider that the defendant is correct in these submissions, which effectively rebut the allegations in subpar(c) of sc par 6I.

As to the allegation of a failure to advise in terms of subpar (c)(a) of sc par 6I (similar in content to subpar (da) in sc par 6E), the defendant submits at par (ca) on p 18 of its submissions doc 233 that the plaintiff knew that the Minister could vary the compensation rates – see par 57 of Exh P32 – and further submits that the concept of "Market Value" was not relevant to those

rates. As to these matters, I accept the defendant's submissions, which effectively rebut subpar (c)(a) of sc par 6I. I note on this topic that in a memorandum of 29 August 1983 to the Secretary of the DPP (Court Book Folder 3, p 1070; DLOD 1480), Dr Calley states in pars 4 and 5 that –

> "[w]e have up till now, sought to have the [destocking compensation] rate *truly reflective* of replacement value for herd bulls and breeding cows. Now however, the replacement price of breeding cows has risen so far above their meat price that the difference can no longer be made up from compensation fund sources". (emphasis added)

In consequence, he proposed in par 7 of that memo that the rate be dropped to "something we can afford"; relevantly, in the northern region (the Calley plan in par 2.1.2 had divided the Territory into southern and northern regions, or 'eradication zones', and Nutwood Downs was in the southern region near the border, but was treated as being in the northern region for compensation purposes), the correction factor for "breeding female cattle" would become 40%, and for "herd bulls" 50%. This proposed change became effective in September 1983; the Dunbars were not informed of this change. I do not consider that the defendant if it were the plaintiff's adviser, was obliged to seek out the Dunbars to inform them, in the circumstances.

As to the allegation of a breach of duty of care as adviser in terms of subpar (e) of sc par 6I, identical with subpar (g) in sc par 6E dealt with in par [17], in terms of a failure to advise the plaintiff that the 'caudal fold' test "did not work well in the circumstances existing at Nutwood Downs", the defendant

referred to its submissions on that test at pp 42-8 of its doc 233. I consider that any alleged negligence by Dr Calley in failing to advise must be tested by reference to what he knew or ought reasonably to have known at the relevant times, in June 1983 and January 1984. I consider that it is clear from the evidence that when Dr Calley spoke with Mr Bob Dunbar in June 1983, and with both Dunbars in January 1984, he must have known that generally the 'caudal fold' test had serious limitations in its application in the northern region, and in properties such as Nutwood Downs. As early as August 1981, the defendant had recognised these limitations of that test in the north, in its submission to the Industry Assistance Commission Inquiry into financing the BTEC beyond 1984; see doc 238, and tpt pp. 2449-50. These limitations were further recognised in a variety of reports and publications in the period 1982-83; they were available at that time to Dr Calley.

By contrast, the Dunbars' only previous practical experience with the test, on their property in Queensland, had been that it worked well. There is no suggestion that Dr Calley told the Dunbars about the limitations of the test in the north. It is clear in my opinion that he told them that the test was reliable when performed over a number of tests and re-tests. It is also clear from his evidence that during 1983 and early 1984 he was telling pastoralists that the test had the capacity to work well in the Territory, given repeated testing (see tpt pp 2456-7).

The defendant appears to accept this position. It noted that in cross-examination, Mr Bob Dunbar accepted that Dr Calley "possibly" told him that the test was reliable over a number of tests (tpt p.1093); and he also thought that Dr Calley had told him that "the herd would be tested several times over a number of years" (tpt p.1091). I note, incidentally, that at tpt 1092 be referred to their meeting in June 1983 as being "for a few minutes". It is clear that Rod Dunbar appreciated that the 'caudal fold' test was not infallible.

The defendant submitted that the two allegations in sc par 6I (h) and (i) stand or fall by reference to the other matters it had addressed generally in sc par 6I(a) – (g). I accept that.

In the circumstances I consider that were Dr Calley the plaintiff's adviser as alleged in sc par 6H, and were it a fact that the test "did not work well in the circumstances existing at Nutwood Downs" Dr Calley in the circumstances was obliged to advise the Dunbars at the time of that fact. Neither of these conditions were in fact met.

[29] Amongst other information which the plaintiff contends in its submissions doc 239 at par 3 was not, but should have been, communicated by the defendant to the Dunbars, presumably pursuant to the defendant's duty of care, were the following 8 pieces of "crucial" information:

(1) that Nutwood Downs "had one of the highest tuberculosis rates in the region". I note that this was the view of Dr Ainsworth , the

District Veterinary Officer, in his report of 21 January 1985 (Court Book Folder 4, p. 1642; DLOD 1543), when he noted the need for "significant age destocking". I consider that it has not been shown that Dr Calley was in a position to take such a view of Nutwood Downs in June 1983 or January 1984.

(2) that "testing from 1976 to 1982 had shown significant anergy in Nutwood cattle". 'Anergy' is the term used where an infected animal does not, for various reasons, react to the tuberculin test. The evidence on which this assertion is based come from Regional Stock Inspector Lunn who had agreed in cross-examination (tpt p 1824) that there was clear evidence of anergy to the caudal fold test, on Nutwood Downs; Dr Ainsworth did not accept that proposition (tpt p 1834). Mr Lunn had been the Stock Inspector for Nutwood Downs from 1974 to 1984; see Exh D32, par 6. His report DLOD 2858 (Exh P64) of late 1983 recommended a total destock of the station, because cattle tested "in the last 4 years are everywhere now". See also pars 6 and 7 of his statement Exh D33 in which he refers to his "frustration" when writing the report DLOD 2858, due to the undoing of "all the hard work" of testing because Vesteys' new manager "had opened all of the gates". The defendant in its submissions in reply, doc 250 at par 8, noted Dr Calley's evidence as to anergy, and his opinion that the problem was not sufficiently serious that the 'caudal fold' test

should not be used (tpt p 1643). I accept Dr Calley's expert opinion on the significance of anergy to the 'caudal fold' test, and I note Dr Ainsworth's refusal to accede to the proposition put to him about anergy on Nutwood Downs. I note that the assertion that the Dunbars had not been told of Mr Lunn's view as to anergy on the station, was not raised with any witness. In the circumstances I do not give Mr Lunn's opinion as to the prevalence of anergy much weight, and I consider that Dr Calley was not obliged to inform the Dunbars about that opinion.

(3) that the then Stock Inspector for the station, Mr Lunn, had recommended in late 1983 a total destock of the station by the new owner. See (2) above. Understood in the context in which those views were expressed, I consider there was no obligation on Dr Calley or the defendant to communicate Mr Lunn's opinion to the plaintiff.

(4) that the BTEC had to be recommenced from scratch on Nutwood Downs because untested stock had become mixed with the tested stock. This is a further reference to Mr Lunn's report DLOD 2858 in (2) above. That the Dunbars had not been told of it, does not appear to have been raised with any witness. I see no obligation on the defendant to have communicated this fact to the plaintiff.

(5) that the infrastructure on the station was “in a terrible shape”. I note that the Dunbars, very experienced cattlemen, had both inspected the property before purchase; and that Mr Bob Dunbar had done so before he went to see Dr Calley in June 1983. There was no obligation on the defendant to communicate this opinion of Dr Ainsworth, expressed for the first time at trial (tpt p 1835), to the plaintiff.

(6) information about three programs developed by Dr Calley. These were the handwritten Program worked out for Nutwood Downs between Mr Watts of Vesteys and Dr Calley on 19 December 1983, 3 days before the plaintiff contracted to buy the station and involving substantial destocking; the program written up for Nutwood Downs by Dr Calley in January 1984; and the program worked out for the Dunbars by Dr Calley on 31 January 1984.

The plaintiff submits that it was a breach of the defendant’s duty of care to it that neither Dr Calley nor Dr Ainsworth informed the Dunbars of the first of these programs. I consider that their not doing so was understandable and proper, since the Calley/Watts agreement should have been treated as confidential; see tpt p 1841-2.

I note that Dr Calley did not on 5 January 1984 simply inform the Dunbars that a program had been agreed with Vesteys less than

3 weeks before, and invite the Dunbars to pursue the detail with Vesteys. The defendant's case on this at par 5 of its submissions in reply, doc 250, is that the proposed program of 19 December 1983 for Nutwood Downs while under Vesteys' ownership would not have been an appropriate program following the purchase of the property by the Dunbars; the caretaker structure of the Vesteys management of Nutwood Downs as at December 1983 pointed to the 'destock' approach envisaged by that program rather than the "test-and-slaughter" program considered to be appropriate under the Dunbars' very different approach to management. See generally tpt pp.2282, 2710. I accept the defendant's submissions on this point.

It is true that the defendant's failure to tell the Dunbars about the program of 19 December 1983 may be contrasted with the detailed information it provided through Dr Ainsworth on 21 February 1984 (Exh P65) to Mr Don Hoare, then a prospective purchaser from Vesteys of both Limbunya and Waterloo Stations. Programs for these properties had also been agreed between Dr Calley and Mr Watts at the same meeting of 19 December 1983, along similar destocking lines to that for Nutwood Downs; see Exh P22. However, I accept that the reasons advanced by the defendant in its doc 250 at par 7 warranted the different approach taken in the case of Mr Hoare; see also tpt pp 1839, 2710-1.

(7) that “the alternative to an immediate and almost total destocking of [Nutwood Downs] would need to be a combination of destocking all cattle over 5 years of age (50% of the herd), massive shootouts, 8 years or more of whole herd testing, probable breakdowns [in tested-free herds], paddock destocks, twice yearly tests, intensive herd segregation and movement restrictions”. The allegation in sc par 6I (f) was that there was a failure to advise the plaintiff that “very substantial destocking” was likely to be required.

I note that the defendant submitted that the plaintiff elected to pursue a total destock, a view the Dunbars had formed as early as 1986; the defendant had not sought it. Importantly, it also submitted that the only reason the “test-and-slaughter” approach in the Approved Program of 1984 did not work was because it was “never given a chance” by the plaintiff (tpt p 2283); and that it was the plaintiff’s “persistent failure” to enter into a testing program, by carrying out its obligations in its Approved Program of 1984, which led ultimately to the need to destock the herd. The evidence relating to the performance by the plaintiff of its Approved Program obligation to test is summarized by the defendant in par 10 of its submissions in reply, doc 250. I accept that submission.

The defendant submitted that some of these 7 matters were not put to any witness as having been raised (or not raised) with the Dunbars prior to settlement. I do not consider that the defendant was obliged to advise the plaintiff in 1983 and early 1984 of the 7 matters specified by the plaintiff; or that he should have said at that time that in the absence of a total destock and despite a prolonged test-and-slaughter program (carried out in accordance with the basic principles in par [17]) there would still be "a significant risk that tuberculosis would not be eradicated from the station", as the plaintiff put it in doc 239 at par 3(l).

(8) that the "BTEC activities would dominate normally commercially sensible management strategies"; and, unless the plaintiff "completely destocked the entire station for replacement value compensation, and shot out any remaining cattle, [it] would not be able to conduct a viable cattle enterprise on the station for many years to come": doc 239, pars 3(m) and (n). I see no reason why Dr Calley was obliged to express such views to the Dunbars in June 1983 or January 1984. It has not been shown that he held such views at that time.

In par 152 of his statement of 7 August 1998 (Exh P3), Rod Dunbar recounts directions given by Dr Ainsworth at their meeting on 10 May 1985, as follows:

> "Ainsworth said … that the whole of the paddocked areas had to be mustered within the next two or three months. … He told us that we were to extract as many animals as we could out of a paddock and immediately after that he would send in helicopters to shoot out everything that remained. He said only the weaners could be kept, everything else had to be destocked. He may have said young cattle as well, my memory is not clear on this".

Mr Dunbar concluded at par 155 that:

> "To have carried out Ainsworth's direction at this time would have meant we would have lost about eighty per cent of our herd, including all or nearly all our bulls. We would have had no offspring in 1986 and only a small number in the following year. We would have to shoot all the calves not ready for weaning, approximately 2,000 animals. Our cattle business would have become unprofitable and we would have been forced to sell our property at a loss".
>
> (See also the plaintiff's submission in doc 239 at par 55.)

In par 6 of his supplementary statement of 24 August 1998 (Exh P4), Rod Dunbar stated further that these economic concerns equally applied if there was a prolonged testing program:

> "Further, if Lexcray had given priority to TB eradication over building new paddocks, bringing bush cattle under control and herd segregation, the station would cease to have been viable from 1985 onwards".
>
> (See also tpt p 2418; and the plaintiff's submissions in doc 239, at pars 4(b) and (c)).

Rod Dunbar's opinion on these points was not challenged (tpt pp 2417-8, 2480). I note that the potential for the Dunbars to be ruined in meeting Dr Ainsworth's requirements of 10 May 1985 was recognised by various

pastoral inspectors (doc 239 at par 56; Court Book Folder 4, pp 1816-21; tpt pp.2482-4), and their fear of it was noted by Dr Ainsworth in a report of 28 May 1985 (Court Book Folder 4, p 1808).

I note in the context of par [43] the plaintiff's submission at par 22 of its doc 239 that Dr Calley should have advised the Dunbars in January 1984 that if they purchased Nutwood Downs and carried out an Approved Program:

> " … they faced a long period when their operating costs would significantly exceed their income from cattle turn-off and their breeding herd would be severely depleted."

I note that the defendant responds that the need for expensive infrastructure for the BTEC appears in the Calley plan; and it questions whether the evidence shows that Dr Calley had "constructive knowledge" of the matters referred to in par 22 of doc 239 which are said to lead to the requirement that he give the advice quoted. I do not consider that Dr Calley was required to do so; by then the Dunbars had the Calley plan.

[30] The defendant contends that at all times it was open to the plaintiff to seek independent expert advice in relation to the BTEC. Alternatively, in terms of the way the plaintiff pleads its case in sc par 6(a), the defendant contends that no duty to advise arose (if at all) until the purchase of the property by the plaintiff in March 1984; see par [12](a), doc 233 at p.17, and tpt p.2330. Further, the defendant contends that it owed no greater duty to the plaintiff than that it owed to any other participant in the BTEC, a duty which it

discharged through its industry communications; see doc 233 at p.18, and tpt p 2330. I accept these submissions.

### (2) *The September 1983 reduction in the compensation rates*

[31] This is the second cause of action for negligent misrepresentation, in this case involving an alleged negligent failure to advise or warn. In sc par 6J the plaintiff alleged that on or about 1 September 1983 the defendant (on the recommendation of Dr Calley) "substantially reduced the rates of compensation for cattle destocked in accordance with the BTEC campaign". This reduction included rates of compensation discounted by up to 60% in the northern region. In sc par 6K the plaintiff pleaded the detrimental effect of this reduction on the operation of Nutwood Downs. In sc par 6L it pleaded that the defendant failed to "advise or warn" the plaintiff of the reduction in rates in sc par 6J, and of its effects as set out in par 6K.

[32] In sc par 6M the plaintiff pleaded that the defendant was under a duty of care to the plaintiff in relation to the matters there specified. It contended that the defendant breached that duty of care by the failure pleaded in sc par 6L to advise or warn the plaintiff prior to 22 December 1983 when the plaintiff signed a contract to purchase Nutwood Downs and paid its deposit, or at any material time thereafter, of the substantial reduction of 1 September 1993 in compensation rates for de-stocked cattle, and the effects thereof as specified in sc par 6K.

[33] The defendant addresses these contentions in its doc 233 at p 19 and tpt p 2331, noting in particular that the plaintiff had left Dr Calley in June 1983 with no contact address or details. It notes that, in any event, after the changes in the rates on 1 September 1983, the compensation scheme changed to a "flat rate" scheme; and it was this scheme which applied when the plaintiff voluntarily entered an Approved Program in June 1984. The September 1983 rates never applied in practice to the plaintiff. The Calley plan, in the plaintiff's possession from 5 January 1984, contemplated a twice-yearly review of the rates; see par [8]. I consider the defendant's submissions are correct and there is no substance in this alleged cause of action. The defendant was under no duty of care to advise or warn the plaintiff, as alleged in sc par 6M.

**(3) *The January 1984 Representations***

[34] This is the third cause of action in tort for negligent misrepresentation, but before turning to it at par [35] I deal with a claim for breach of contract also founded on what allegedly occurred on 5 January 1984. It is also mentioned under 'the contracts case'. In sc par 7 the plaintiff pleads that on 5 January 1984 Mr Bob Dunbar and his son Rod went to see Dr Calley at the offices of the DPP in Darwin, in his capacity as officer-in charge of the Territory BTEC. That is not disputed. It alleges that in consideration of its entering into an Approved Program on Nutwood Downs should it proceed to complete the purchase of that property, Dr Calley *agreed* that "the defendant would pay the plaintiff compensation for cattle destocked on Nutwood

Downs in accordance with such program, at rates equal to the 'Market Value' [a term defined in sc par 8 as the 'on-farm value of an equivalent disease free animal valued at the use to which the slaughtered animal was put, plus freight and slaughter levy, less any residual value of the carcass'] save for unmusterable cattle for which a flat rate per head would apply". It can be seen from this definition that the plaintiff takes the "basis of compensation" set out in par 2.2.5 of the Calley plan in par [6], and terms it 'Market Value'. The words 'Market Value', in their ordinary meaning, are not an accurate description of the "basis of compensation" set out in par 2.2.5 of the Calley plan, in light of Dr Calley's explanation (which I accept) in par [6] of the qualifying effect of the words "the use to which the slaughtered animal was put". It is clear, in my opinion, that the Calley plan provided in any event for compensation to be paid according to "rates", which were reviewed twice a year; see par [6]. I do not consider, despite the language used in par 2.2.5 of the Calley plan as to the "basis for compensation", that that provision was intended to set out a formula. In any event I am satisfied on the evidence that no such contract was entered into, as alleged. It would not have been in accordance with the methodology of the Calley plan which Dr Calley handed to the Dunbars on this occasion; it is clear to my mind that Dr Calley would not have agreed to it. This was the first of the 3 claims in contract in 'the contracts case' relied on by the plaintiff; I return to the action in tort.

[35] In sc par 8 the plaintiff pleads a cause of action for misrepresentation in similar terms to the contract pleaded in sc par 7: that at the meeting on 5 January 1984 Dr Calley both orally and in writing (in that he handed the Calley plan containing par 2.2.5 to the Dunbars), represented to them that compensation would be paid to them at "rates equal to the … 'Market Value'", (defined as in par [34]) "for all cattle destocked on Nutwood Downs in accordance with the Approved Program".

In its submissions doc 233 at p 20 the defendant rightly stresses the importance of the written Calley plan having been provided by Dr Calley to the Dunbars at this meeting. Rod Dunbar agreed that Dr Calley told him to read it "carefully" (tpt p 448), and that "it would tell us all we needed to know about BTEC" (Exh P3, par 99). The plaintiff relies on Rod Dunbar's account of the meeting of 5 January 1984 in his statement (Exh P3, pars 83-106. I note also Mr Bob Dunbar's broadly similar account in his statement (Exh P32, par 92-107).

I do not accept that Dr Calley made the representation alleged. In my opinion it is not in accordance with the Calley plan, a copy of which he handed to the plaintiffs at the time. Compensation was not payable under that plan at "rates equal to the 'Market Value';" it was payable at rates laid down by the Minister, after consultation with representatives of the cattlemen, and reviewed twice a year. I do not construe "basis of compensation" in par 2.2.5 of the Calley plan, as the plaintiff construes it. I consider it is clear that anything Dr Calley told the Dunbars about payment

of compensation would have been in accordance with the written Calley plan, which he gave them. I also accept the defendant's submission in its doc 233 at p 21 that par 2.2.5 of the Calley plan did not serve as a 'representation' to the plaintiff in the 'Market Value" terms alleged in sc par 8; it constituted information as to the "basis of compensation" payable at that time; and it had to be read with the rest of the Calley plan provisions on compensation, particularly the provisions for its payment according to reviewable rates.

**(4)** ***The Further January 1984 Representations***

[36] In sc par 9 the plaintiff pleads that at the meeting of 5 January 1984 with Dr Calley, the defendant also *agreed* to advise the plaintiff in terms of sc par 9(a)(i) and to provide "free economic advice" in terms of sc par 9(a)(ii); and that the plaintiff provided certain financial information to Dr Calley in terms of sc par 9(b). It is then pleaded in sc par 9(c) that Dr Calley made the following 9 further representations to the plaintiff: carrying out the BTEC would advantage the plaintiff in 3 specified ways (sc par 9(c)(i)); the operation of the BTEC on Nutwood Downs would not be a "financial burden to the plaintiff" (sc par 9(c)(ii)); further information and advice about the BTEC and its operation on the property was already contained in the Calley plan (sc par 9(c)(iii)) (a copy of which was provided to the Dunbars at the meeting); the plaintiff "would be no worse off or any better off" after the BTEC on Nutwood Downs was completed (sc par 9(c)(iv)); the BTEC on

Nutwood Downs would "primarily involve a test-and-slaughter program" (sc par 9(c)(v)); the testing system [the 'caudal fold' test] for identifying diseased animals was "a good system" (sc par 9(c)(vi); the indications were "that there was no great quantity" of diseased cattle on Nutwood Downs, and destocking was only required "if significant amounts of disease" were discovered on test (sc par 9 (c)(vii); testing would be once per year (sc par 9(c)(viii); and testing could be carried out with "normal mustering operations" (sc par 9(c)(ix). These 9 allegations were relied on by the plaintiff as "the further January 1984 representations". The defendant submits generally that what is stated in writing in the Calley plan should be regarded as governing the content of any advice provided by Dr Calley on 5 January 1984; see doc 233 at pp. 20, 22, and tpt p. 2332.

[37] The unchallenged evidence of Mr Bob Dunbar (in his statement of 7 August 1998, Exh P32 at par 101) is that there was "nothing substantially different about what Dr Calley told us at that meeting from the first [June 1983] meeting I had with him". I note that Dr Calley said that the two meetings "merge in my mind" (tpt p 1564). The defendant pointed to similar confusion in the mind of Mr Bob Dunbar (tpt pp 2309-10; defendant's submission doc 233 at pp 7-9). I have already indicated that I do not consider Mr Bob Dunbar a reliable witness as to the June 1983 meeting, and I maintain that opinion as regards his evidence as to the January 1984 meeting.

A significant amount of material, much of it unchallenged, appears in Mr Bob Dunbar's statement (Exh P32), and in that of Rod Dunbar (Exh P3) of 7 August 1998 (tpt pp.2507-8) designed to demonstrate *reliance* by the Dunbars upon Dr Calley's alleged representations at the meetings of June 1983 and January 1984, as pleaded in sc par 11(b), in accordance with the beliefs alleged to have been engendered in them by those representations, as pleaded in sc par 11(a).

[38] In sc par 11C the plaintiff alleges that Dr Calley's 'further January 1984 representations' were "false and incorrect", and particularizes this at (i) – (xiv). The defendant noted that many of these allegations had already been addressed. Particular (xiii) for example, addressing sc par 9(c)(viii), asserts that "animals needed to be tested for tuberculosis more than once a year". As to this, the defendant notes in its submission (doc 233, p 24, par (xiii)) that the Calley plan (in the plaintiff's possession) at item 2.2.2 made it clear that "at least twice yearly" testing was the norm, though once-yearly testing might be permitted, depending on the presence of certain factors.

[39] The Dunbars had met Dr Calley by appointment on 5 January 1984 with a view to finding out the implications, particularly the financial implications, of the BTEC for Nutwood Downs, which some 2 weeks before they had signed a contract to purchase (tpt, p.2438). The plaintiff alleges that the Dunbars made Dr Calley aware that this was the purpose of their visit (doc 239, par 16); and that their purchase of the property would both "seriously stretch their financial resources" and provide them with their only source of

income. (doc 239, par 16; and see sc par 9(b)(ii) and (iii). The defendant submits that these matters could not have been brought to Dr Calley's attention as the plaintiff's financial details were not known at the time, since it had not sold its Queensland properties; further, if they had been known and costs were a problem for the plaintiff, the defendant submits that the figure of $50,000 as costs of infrastructure required to meet the costs of eradication, as indicated in the Calley plan, would have raised "an outcry" from the plaintiff at the time, doc 233 at p 21, tpt p.2334-5). I am not persuaded by the defendant's submission in this regard.

The defendant submits that there was no "agreement by Dr Calley" to advise the plaintiff in relation to the BTEC on Nutwood Downs; see sc par 9(a)(i), tpt p.2333, and doc 233 at p.21, item (a)(1); nor to provide the "free economic advice" alleged in sc par 9(a)(ii) – see tpt p.2333, doc 233 at p.21(a)(ii). I accept that submission.

The defendant initially submitted that in any event, as regards the representations in sc par 9c, no duty of care could have arisen as at 5 January 1984, in that the plaintiff had already bound itself on 22 December 1983 to purchase the property; see, however, par [41]. The plaintiff contended that no such obligation to purchase existed as at 5 January 1984. I note that in his statement of 7 August 1998, Rod Dunbar admitted that the plaintiff had paid a deposit and signed a contract for the purchase of Nutwood Downs pastoral lease, cattle and improvements from Vesteys' for $990,000 on 22 December 1983; see Exh P32, par 79, amended at tpt

p.1006. The plaintiff contended that its contract for purchase had not been exchanged until 12 January 1984; the contract is dated that day (Court Book, Vol 3, p 1213). I accept the plaintiff's submission.

I note that in any event the contract by Clause 3 was conditional upon consent to the assignment and transfer of the lease being given by the responsible Minister; Clause 5(6) provided that either party could rescind if the Minister's consent were refused. Further, under Clause 5(c) any Ministerial consent given is deemed to have been refused, if either party is unable or *unwilling* to comply with any condition attached to that Ministerial consent. It was clear from the evidence that in this case the Minister's consent would be conditional upon the Dunbars' willingness to enter into an Approved Program; see tpt p.2428. I consider that it is clear that the plaintiff was not contractually bound to complete the purchase of Nutwood Downs even as at 12 January 1984, at least until it was satisfied about the terms of the Approved Program. Against this background I do not accept the defendant's contention that the Ministerial consent was just "a mechanical exercise" (tpt p 2331-2).

[40] I accept the plaintiff's submissions on this point; it is unnecessary to examine further alternative submissions advanced by the plaintiff, such as those under the *Trade Practices Act 1974* (Cth).

[41] However, despite the defendant's approach in par [39] that the plaintiff was contractually bound to its purchase before 5 January 1984, at a later stage in

its submission it conceded that "up until March 1984, the Dunbars were at liberty to walk away from the purchase" (tpt p.2707). The defendant noted that therefore the plaintiff on its own submissions was not bound to the contract until *after* 5 January 1984, at which time the Calley plan had been provided to the Dunbars at their meeting with Dr Calley. It submitted that this meant that the plaintiff proceeded to complete the purchase 2 months after 5 January 1984 with "eyes wide open", – for the reasons set out in par 3(a) – (d) (xiii) of doc 250 and tpt pp.2707-9.

This late change in tack by the defendant, stressing that the plaintiff had the Calley plan in its possession with time to consider it before finally committing itself to the purchase, is particularly significant. The defendant's basic submission was that the plan governed the content of any representations made by Dr Calley; this is, even if representations were made in June 1983 and January 1984 they were overborne by the provision to the plaintiff of the Calley plan; see tpt p.2709 and doc 250 at par 4. I consider that the defendant's submission has considerable force. I note that par 3(d) in doc 250 sets out some 13 matters in the Calley plan of which I consider the plaintiff should be treated as having been aware, before it committed itself to a binding contract of purchase. Those matters go to the level of potential destocking, amongst other things. The Dunbars knew of these matters yet, as Mr Riley put it, "they didn't walk away" from the purchase (tpt p 2709). I consider that on the evidence the Dunbars understood through the Calley plan before purchasing Nutwood Downs, the

impact which the eradication campaign would have on that property. In the result, I do not consider that Dr Calley made the 'further January 1984 representations' as alleged, apart from that in sc par 9(c)(iii); and I consider that the plaintiff proceeded to complete its purchase knowing from the Calley plan in detail what the BTEC entailed. I consider that although Rod Dunbar was generally an impressive witness, his evidence as to the 5 January 1984 meeting was largely reconstruction, not memory, and was coloured by the subsequent disputes between the plaintiff and the DPP.

[42] This conclusion is sufficient to dispose of the 'further January 1984 representations' but I deal with some of the other matters the plaintiff would have had to establish, had those representations been established. The plaintiff contends that the representations were misleading, in that Dr Calley knew that compensation was then being paid to pastoralists under Approved Programs in the northern compensation zone at only 40% of replacement value; see doc 239 at par 18. I note that the Calley plan which had been provided to the Dunbars at their meeting with Dr Calley on 5 January 1984 (and which the defendant rightly submits, in my opinion, governs the content of any advice provided by Dr Calley on that occasion) states relevantly, at par 2.2.5, that the "basis of compensation for all categories of stock, except unmusterables, is the on farm value of an equivalent disease-free animal valued at the use to which the slaughtered animal was put, plus freight and slaughter levy, and less any residual value of the diseased carcass". The defendant draws a distinction between "on-farm value" and

“compensation value” and ”market value”: it submits that “on-farm value” does not encompass the cost “to go down the road and buy an animal to replace it” (‘compensation value’) and that there was “really no market available at this time on many animals” (‘market value’) - see tpt pp 2331-3. I consider that the distinction is validly drawn. In any event, I consider that it was not par 2.2.5 which was the determinant of compensation, but simply the rates fixed following industry consultation.

The plaintiff submitted that its contention that compensation being paid by the defendant at the time was not “on-farm value” was supported by the recommendations of the BTEC Committee at its Eighth Meeting in Sydney, 9 July 1987. The Committee recommended that the Standing Committee of Agriculture:

> “REQUEST the northern States to modify their compensation systems so as to reflect the principles endorsed by the BTEC Committee that the compensatable value of stock should be their on-farm market value as reflected by the market value of equivalent disease-free replacement stock”; see Court Book, Vol.6 at p. 2724; at tpt p 2517 and doc 239 at par 75.

Clearly enough, the defendant was not paying ‘on farm value’ as compensation, in the BTEC Committee’s sense of that expression.

The plaintiff’s further allegation of falsity in sc par 11(c)(iv) that there was a serious shortage of funds for payment of compensation in 1984, is denied

by the defendant, although it admits that the budget was overrun, and the scheme for compensation was changed to a 'flat rate' scheme in that year; see doc 233 at p. 24, item (iv); tpt p. 2341.

[43] The plaintiff also alleges that Dr Calley, as a result of his own knowledge and by reason of knowledge he constructively had through his officers, knew in January 1984 but failed to advise the Dunbars that there would be a long period during which the property would not be viable after they had purchased it; see doc 239 at par 22 and the references there to the pleadings. It alleges that to the contrary Dr Calley advised the Dunbars that the BTEC would not be a financial burden, it would actually leave them "better off", they would be "compensated for increased costs", testing would "fit in with their normal mustering operations" and, in any event, would probably be assisted by the mustering subsidy; see doc 239 at par 23. I consider that these matters were covered by the Calley plan which he gave them.

[44] The plaintiff also alleged that Dr Calley had misled the Dunbars in January 1984 as to the reliability of the 'caudal fold' test. I dealt with this topic when discussing 'the June 1983 representations'. I reject that allegation.

[45] The plaintiff also alleged a misleading by Dr Calley in January 1984 as to the levels of destocking and the number and frequency of tests. It contends that Dr Calley expected that a 'very substantial destocking' would be required and that the BTEC program for Nutwood Downs "would not primarily involve a test-and-slaughter program"; sc 11C(ix) and (x). I note

the submission of the defendant at par (h) and (i) on p 17, and par (ix) and (x) on p 24, of doc 233; I accept that submission on the point. I do not accept that the plaintiff has established its contention at par 2(b) of doc 239.

[46] The plaintiff alleges that the defendant knew that the level of infection in Nutwood Downs was in fact one of the highest in the Katherine region, and that in the circumstances pertaining on the property regular mustering for testing was so unlikely to be sufficient for a successful test-and-slaughter program that destocking would be the only way to eradicate disease, particularly given that the BTEC then required that a disease-free status be attained by 1 January 1987; see tpt pp.2445-6. I note that this status was ultimately attained on the plaintiff's property in 1990, by a complete destock.

As to this contention, I accept that when Dr Calley recorded in his file note of his conversation with Mr Watts of Vesteys on 19 December 1983, that the cattle on Nutwood Downs were "out and mixed", and that a destock should start, (Court Book Vol. 3, p 1091A) he should have been aware of the recommendation of Stock Inspector Lunn that "the best thing to do is to destock it all" (Exh P64). I also accept the plaintiff's submission (tpt pp 2397-8) that in the handwritten Approved Program completed by Dr Calley shortly thereafter he expressly contemplated the complete destocking of Nutwood Downs (subject to the possible retention of not more than 1000 heifers) by 1986. This proposed program reflects Dr Calley's file note of 19 December 1983 that a destock should start, "may keep 1000"; it must have

been within his contemplation at the time he met with the Dunbars on 5 January 1984. Dr Calley did not advise the Dunbars of this matter; see doc 239 at par 31.

The plaintiff also relied for support on a hand written note, drafted by Dr Calley on 31 January 1984, of an Approved Program for Nutwood Downs which would be acceptable to the DPP; see doc 239 at pars 33-35. The history leading to preparation of the note is at tpt p. 2461. This note also proposed a massive destocking at a time when it appears that Dr Calley had come into possession of no new information since 5 January 1984; see tpt p.2460. This note was not brought to the Dunbars' attention.

Although the plaintiff acknowledged that requirements of confidentiality may have limited the defendant's ability to disclose to it elements of the program it was proposing for Nutwood Downs when owned by Vesteys, (tpt p. 2429) it submitted that Dr Calley should at least have informed the Dunbars that he had worked out a program with Vesteys so as to put them on notice that they could inquire as to its details from Vesteys; see doc 239 at par 31. It also submitted that, in the absence of knowledge of the unreliability of testing, the Dunbars could not have anticipated the proposed levels of destocking; doc 239 at par 32.

The plaintiff submitted that the levels of destocking outlined in the Vesteys' program was not brought to the Dunbars' attention at any time by either Dr Calley or Dr Ainsworth; as to Dr Ainsworth's failure to do so, see doc

239 at pars 39-40. The plaintiff contended that the only information provided to it on this topic was in a letter of 17 February 1984 sent by the Department of Lands to its solicitors, informing them of the Minister's consent to transfer the pastoral lease to the plaintiff. This letter also stated that:

> " … the Department of Primary Production has requested me to inform the incoming lessees of their responsibilities with respect to B.T.B. eradication.
>
> Nutwood Downs has a problem with T.B. which will require *relatively severe herd reduction in 1984*." (emphasis added) (Court Book, Folder 3, p1265A).

The cautionary note in the final paragraph appears to have derived from a telex sent by Dr Ainsworth in response to a request for advice from the Department of Lands. On 24 January 1984, (see Court Book, Folder 3, p.1237B) the Department of Lands had written to Mr Tony Hooper seeking advice as to whether the DPP had any objection to the proposed transfer of the pastoral lease to the plaintiff; this was in connection with the application to the Minister for consent to the transfer. Mr Hooper, in forwarding a copy of the letter to Dr Calley, wrote on the copy, "Are you aware of any problems"; see doc 239 at par 34. It was in response to this request that Dr Calley had prepared the hand-written note on 31 January 1984 of an

Approved Program that would be acceptable to the DPP; see.doc 239 at par 35.

Dr Ainsworth had responded directly to Mr Hooper in a telex on 3 February 1984, stating:

> "No problem envisaged as long as owner is fully aware of his responsibilities re B.T.B. eradication. Nutwood has a problem with TB which will require relatively severe herd reduction in 1984." (Court Book, Folder 3, p.1237B).

It was clearly enough this response by Dr Ainsworth which was reflected in the letter of 17 February 1984 from the Department of Lands to the plaintiff's solicitors. No other information was provided to the plaintiff by either Dr Calley or Dr Ainsworth of the proposed extent of destocking; as to this fact, see generally the plaintiff's submissions in doc 239 at pars 38, 40 and 42.

The plaintiff contended in par 36 of its submissions in doc 239 that the effect of the destock proposed in Dr Calley's two programs of 19 December 1983 and 31 January 1984 would be that:

"(i) the calving capacity of the herd would be reduced by over 80%;

(ii) it would take at least 10 years to build the herd up again;

(iii) there would be no turn off for two years and then negligible turn off for some years subsequently;

(iv) for several years the operating expenses of the station would greatly exceed the income"; and

(v) interest from destocking compensation would be the only mechanism the plaintiff would have, absent an alternative source of income, to meet its costs and expenses.

The plaintiff complains that none of this information was adequately conveyed to the plaintiff by the Department of Lands' letter of 17 February 1984. The plaintiff lists in doc 239 at par 45, 7 matters which "as later events have shown", the Dunbars were supposed to deduce "from this letter"; I note that by sc par10A the plaintiff pleads that the Department of Lands' letter of 17 February 1984 was a further misrepresentation – 'the February 1984 representations' – to the effect that "to eradicate TB from Nutwood Downs would require only relatively severe herd reduction in 1984". See also tpt p 2467, and par [47].

This can be contrasted with the detailed information provided by Dr Ainsworth in a letter of 21 February 1984 (Exh P65) to Mr Don Hoare, referred to in par [29]. Some of those details are set out in doc 239 at par 46. The plaintiff contends that the TB position on Nutwood Downs was not significantly different from that of Waterloo and Limbunya, nor were the circumstances surrounding Mr Hoare's possible purchase of the properties; see doc 239 at pars 47-8.

The plaintiff concedes that until 10 May 1985 "the Dunbars' relationships with DPP officers were cordial; see par 50 of its submissions doc 239. On 10 May 1985, Dr Ainsworth and Dr de Witte visited the station. In par 152 of his statement of 7 August 1998 (Exh P3), Rod Dunbar recounts the directions given by Dr Ainsworth at this meeting:

> "Ainsworth said … that the whole of the paddocked areas had to be mustered within the next two or three months. … He told us that we were to extract as many animals as we could out of a paddock and immediately after that he would send in helicopters to shoot out everything that remained. He said only the weaners could be kept, everything else had to be destocked. He may have said young cattle as well, my memory is not clear on this".

The plaintiff's submissions on this are at pars 50-53 of doc 239.

Rod Dunbar's account is generally consistent with the evidence provided by Dr Ainsworth on this point; see tpt, pp. 2474-80. I accept the plaintiff's submission that what was now being proposed by Dr Ainsworth was consistent with the draft program of Dr Calley of 31 January 1984. I note the defendant's submission that as at the end of May 1985, no agreement had been reached as to the way forward, until the meeting of 2 August 1985; see doc 250 at par 13, which I accept. The plaintiff contended that the Approved Program of 8 June 1984, which the plaintiff entered into shortly after it acquired the property, had suggested a much more limited impact for BTEC; see doc 239 at par 49. This is disputed by the defendant; but at tpt pp. 2468-2472 and 2503-5 the plaintiff submits that this merely reflected a misunderstanding by Dr Ainsworth of what the June 1984 program entailed.

I consider that it is significant that on 13 May 1985, only three days after the meeting on 10 May 1985, the Dunbars sent letters of complaint (Court Book, Folder 4, pp 1801-02) to both the Minister and the DPP, the latter marked for the attention of Dr Ainsworth; see doc 239 at par 58. The letter to the DPP asserted that Nutwood Downs' "level of disease status is very high for this area", and this fact had not been brought to their attention by Dr Calley during the January 1984 discussion "just prior to our purchase of Nutwood Downs". They also observed that "officers of your Department" should have informed them in 1984 that they would need to "sacrifice a sizeable percentage" of their breeding herd during 1985. I note Dr Ainsworth's note to Messrs Hagan and Radeski of 28 May 1985 recounting his version of the history of the matter; see Court Book, Folder 4, pp 1808-11. I also note the defendant's submission that Dr Ainsworth was not cross-examined upon that note, although the plaintiff attempted to use it to discredit him. As to that, the defendant submits at par 21 of doc 250 it should not therefore be used for any purpose; I consider that it stands as Dr Ainsworth's account.

There can be no doubt that the meeting of 10 May 1985 marked a turning point in relations between the plaintiff and the DPP; as the plaintiff submitted (tpt p 2472) "The first 14 months of the Dunbars' relationship with the Department and its officers was good". Only the previous month, Dr Ainsworth had completed a review of the 1984 Approved Program, in which he had described the plaintiff as "keen to co-operate" (Court Book,

Vol 4, p 1355); see also the report of 29 March 1985 of Stock Inspector Barry stating that the "owners are keen to get started after being held up in '84" (Court Book, Vol 4, p 1751). From 10 May 1985 the relationship clearly deteriorated; as noted earlier, it was described by Mr Maurice after that date as "long and poisonous" (tpt p 2486).

I note the submissions about the actions of the Dunbars in the period after 1985 in complying – or not complying –with the DPP's eradication requirements under the Approved Program, and as to how sensible those requirements were; see tpt pp 2484 et seq, and 2529-36. I also note the plaintiff's submissions in doc 239 at pars 71, 71A and generally 80-101; and the defendant's submissions in reply in doc 250 at par 10,and at tpt pp.2716-8. The plaintiff's submissions, inter alia, were that through the late 1980's and into the 1990's there appeared to be a growing realisation by the defendant that its eradication Program would have been ineffective; and that what the Dunbars had done was ultimately the best way to have gone forward. The defendant, on the other hand, submits that in effect the Dunbars took the proffered compensation pursuant to the Program without fulfilling their obligations under it. The result was the need for a total destock. I should say that I accept the defendant's submission in par 10 of doc 250; I consider that it is clear that the plaintiff did not fulfil the obligations it had undertaken when entering into the approved Program and its Reviews over the years, as to regular testing.

**(5)** ***The February 1984 representations***

[47] I referred to this cause of action and the letter of 17 February 1984 which gave rise to it, in par [46]. The defendant in effect submits that on its obvious construction there could not have been a "more dire warning" than that in the Department of Land's letter of 17 February 1984; it submits that this warning reflected the Calley plan and what must have been said by Dr Calley to the Dunbars in January 1984. See doc 233 at p. 22, which I accept; see also tpt pp. 2336-7.

The defendant had earlier submitted – see par [39] – there was no reliance on the alleged 1984 representations in that the plaintiff was already contractually bound in December 1983 to complete the contract, had no realistic option but to enter into an Approved Program and was contractually bound to seek the Minister's assent; see doc 233 at p. 23, and tpt pp. 2337-8. However, at tpt p.2707, the defendant conceded late in the trial – see par [41] – that it was wrong on this point, and the plaintiff was not contractually bound at the times the alleged representations were made. Its new submission was that the plaintiff had received both the Calley plan and the Department of Land's letter of 17 February 1984 before it was committed to completing the purchase and yet did so; see doc 250, end of par 3; tpt p.2709. I accept that submission. I consider there is no substance in this cause of action.

**(6)** ***The 1988 Representations***

[48] In sc par 42B the plaintiff pleads that by letter dated 18 January 1988 the defendant by Dr Sykes, represented to the plaintiff that "cattle destocked from the plaintiff's paddocks known as Farrar, 5 mile, Lane, Dingeri and No.8 paddocks would be eligible for compensation at prevailing rates for bush stock in accordance with the Bush Destocking Policy currently being finalised"; in sc pars 42B(b) and (c), that it would pay compensation at $30 per head for breeders and herd bulls destocked from all other paddocked areas save that cattle in those areas which had now attained the age of 5 years but which had been mustered in previous years from bush areas were not eligible for any compensation; and in sc par 42B(d) that the current entitlement to compensation under the current destocking agreement was to compensation for destocking in bush areas only. The plaintiff pleaded that while making those representations, the defendant failed to refer to an intention to pay compensation for destocked paddocked cattle at rates equal to Market Value, pleaded by the plaintiff in sc par 42A. It had alleged in sc par 42A that as at 18 January the defendant intended to introduce new compensation arrangements for cattle destocked under the BTEC in 1988, by which "compensation at rates equal to Market Value would be paid to pastoralists for all cattle, save unmusterables, destocked from paddocked areas".

[49] In sc par 42C the plaintiff pleads that in those circumstances the defendant had impliedly represented to it that the only entitlement the plaintiff had to compensation for its cattle during 1988 was that set out in sc par 42B; and

that there was no other material information to show that the representations in sc par 42B "were not a full and accurate description of the plaintiff's entitlement to compensation". These implied representations were "the 1988 Representations".

[50] The plaintiff pleaded that the defendant was negligent because as adviser to the plaintiff (sc par 42H) in relation to the operation of the BTEC on Nutwood Downs it owed a duty of care in the giving of such advice, including the subject of the letter dated 18 January 1988; and, in the alternative (sc par 42I) it owed a duty of care in that at the time of making the 1988 Representations the defendant knew or ought reasonably to have know that the plaintiff was relying on it "to exercise all due care, skill and diligence" in and about the making of those representations, and was likely to act upon them, and if they were false or incorrect, would or might suffer loss or damage. The plaintiff pleads a breach of the duty of care in that the defendant failed to inform it of its intention as pleaded in sc par 42A.

In sc par 42K the plaintiff pleaded in effect that relying on the truth of the 1988 Representations, the plaintiff had agreed to the operation of the Approved Program in 1988, and to accept the rates of compensation for cattle destocked in the letter of 18 January 1988. I noted in par [42] that the BTEC Committee at its Eighth Meeting in Sydney, 9 July 1987, recommended that the Standing Committee:

> "REQUEST the northern States to modify their compensation systems so as to reflect the principles endorsed by the BTEC Committee that the compensatable value of stock should be their on-farm market value as reflected by the market value of equivalent disease-free replacement stock".
>
> (Court Book, Vol 6 p. 2724).
>
> See also the plaintiff's submissions, tpt p.2517, and in doc 239 at par 75.)

This recommendation was not brought to the Dunbars' attention by Dr Sykes; see doc 239 at par 77A, tpt p. 2520. Dr Sykes in fact introduced a "three tier" compensation scheme at the beginning of 1988 under which the only cattle eligible for replacement value compensation were those in a "controlled area". The effect of this requirement was that no cattle on Nutwood Downs were eligible for destocking compensation except, at best, on the basis they were to be treated as 'bush animals' for which replacement value compensation would not be paid; see doc 239 at pars 76 and 77, tpt pp.2517-2520.

[51] The plaintiff submits that when the Dunbars shortly after 12 April 1988 agreed to the Approved Program operating in 1988, they were unaware of the "three tier" scheme; see tpt p.2526. It was not referred to in the BTEC Program proposed for Nutwood Downs for 1988, which had been agreed to in January 1988, and a signed copy of which was provided to the Dunbars by

Dr Wilson, Regional Veterinary Officer, by letter dated 12 April 1988; see Exh P2, tpt pp. 2520-22. It contends that the scheme was brought to the Dunbar's attention no earlier than May 1988; and then in terms which did not clarify the limitations as to replacement value compensation which were inherent in the scheme, through the concept of a "controlled area". (tpt pp.2523-5)

[52] The defendant addresses these allegations in doc 233 at pp.38-9 and at tpt p.2357. It also asserts that the Dunbars were sent detailed information about the 'three tier' scheme *before* they executed, without complaint or demur, the amendment to the Destocking Compensation Agreement on 22 June 1988, effectively incorporating it; see doc 250 at par 22, tpt p.2723. The defendant further submits that there was no evidence led from the Dunbars to the effect they had a different understanding of the meaning of "controlled area" to the defendant; see doc 250 at par 22. I accept the defendant's submissions on the evidence, and reject the plaintiff's claim under "the 1988 Representations".

**The Estoppel Case**

**(1) *Estoppel arising from the January 1984 Representations***

[53] There are 2 causes of action pleaded based on alleged estoppels. The first founded on 'the January 1984 Representations' as pleaded in sc par 8, that the defendant had represented that compensation for destocked cattle was at rates equal to 'Market Value', apart from unmusterables. The second

estoppel pleaded founds on 'the further January 1984 Representations' pleaded in sc par 9(c). It is pleaded in sc par 30(d) that in the circumstances the plaintiff is entitled to received such compensation at rates equal to the Market Value. At sc par 43A the plaintiff pleads that as a result of the representations the defendant is estopped from denying that it was obliged to pay compensation at Market Value rates; and in sc par 43B it seeks an order for payment of the difference between what it should have received, based on those rates, and what it actually received.

The defendant's major response at p 34 of doc 233 is that there were no such representations as alleged, to found the estoppel pleaded. I have already indicated that I consider that that submission is correct. However I deal with the arguments put.

This claim is only relied on should the Court find that the Destocking Compensation Agreement did not contain an entitlement to on-farm market value. I have so found.

[54] I have set out in par [35] what is pleaded in sc par 8 relating to compensation rates for destocked cattle. The claim based in estoppel is founded upon the same alleged representations by Dr Calley at his meeting with the Dunbars on 5 January 1984, as the plaintiff relied on in seeking to establish its Misrepresentations Case, and upon his providing to them at that meeting the Calley plan (in particular par 2.2.5 of that plan); see tpt p. 2587. By reason of these representations, treated as estoppel by conduct, the

defendant is claimed to be estopped from denying that the plaintiff is entitled to "value to the owner's use"; see the plaintiff's submissions, doc 242, par 1. The plaintiff submits that it purchased Nutwood Downs with a consequent commitment to an Approved Program believing from the representations – see the unchallenged evidence of Rod Dunbar as to this belief at tpt p.471.5 - that it would receive replacement value compensation. I note that the defendant distinguishes that concept from the 'on-farm value' referred to in par 2.2.5 of the Calley plan, which it submitted did not encompass the cost "to go down the road and buy an animal to replace it"; see tpt pp.2331-3.

[55] I accept the submission of Mr Durack of counsel for the plaintiff that the central principle of the doctrine of estoppel is "that the law will not permit an unconscionable – more accurately unconscientious – departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of litigation … ", as it is put in *The Commonwealth of Australia v Verwayen* (1990) CLR 394 at 444, per Deane J. I also accept the propositions of law at pars 4-8 and 8 of doc 242.

I also accept that the remedy is the minimum to do justice by preventing detriment from being suffered by reliance on the assumption; see doc 242 par 7.

### (2) *Further January 1984 Representations*

[56] At his meeting with the Dunbars on 5 January 1984, the plaintiff alleges that Dr Calley made the further representations to them which are set out in par [36]. The plaintiffs has a claim in estoppel upon these representations, and upon the handing to the Dunbars of par 2.2.5 of the Calley plan, similar to its claim for estoppel arising out of 'the January 1984' representations. The defendant raises the same arguments as before; see doc 250, at par 27. In particular, it submits there was no reliance on any representations because the plaintiff acted on its own judgement (doc 250 at par 28) and par 2.2.5 of the Calley plan does not embody "replacement value" or "market value" compensation. I indicate that I accept the last-mentioned proposition. There was no foundation for any belief in the plaintiff that it would receive 'Market Value'. I reject this claim in estoppel.

## The Contract Case

### *(1) The alleged Agreement to pay Market Value except for unmusterables*

[57] In sc par 7 the plaintiff pleads that at the meeting between Dr Calley and the Dunbars on 5 January 1984, it was agreed that in consideration of the plaintiff entering into an Approved Program for Nutwood Downs, if it proceeded to complete the purchase of the property, the defendant would pay the plaintiff compensation for cattle destocked under the Program at rates equal to the 'Market Value', a term defined in sc par 8 in terms which follow the basis for compensation set out in par 2.2.5 of the Calley plan.

[58] It can be seen from the particulars pleaded in sc par 7 that the alleged agreement was made orally or, alternatively, partly orally and partly in writing, the writing being the wording of par 2.2.5 of the Calley plan, handed to the Dunbars by Dr Calley. It is alleged in sc par 29 that the defendant breached this agreement, by failure to pay compensation for cattle destocked under the Approved Program at rates equal to the 'Market Value'. I dealt with the cause of action at par [34] and rejected it.

### *(2) The alleged Agreement of August 1984 to pay Market Value to be determined by the Minister*

[59] In sc par 13A the plaintiff pleads that in late August 1984 the parties agreed that in consideration of the plaintiff conducting the Approved Program the defendant would pay it compensation for all cattle destocked on Nutwood Downs under that Program, "at rates equal to the Market Value, which value would be determined by the Minister". The agreement was said to be partly in writing, and partly oral. As to the writing, it is said to be based on par 2.2.5 of the Calley plan, the Commonwealth/Northern Territory BTEC agreement, the Approved Program, and the Destocking Compensation Agreement which took effect from 8 June 1984 and contained provisions set out in (1)-(4) of sc par 18(a)(ii). The oral part is said to be the oral representation by Dr Calley at the meeting on 5 January 1984 as pleaded in sc par 8. The plaintiff claims that it performed its obligations under the alleged agreement, but that in breach thereof, the defendant failed to pay the plaintiff compensation for the cattle destocked on Nutwood Downs "at rates

equal to the Market Value" (sc par 29). I deal with this claim in conjunction with the third and alternative contract claim, below.

***(3) The alleged agreement of August 1984 to pay a reasonable amount***

[60] This contact is pleaded in sc par 13B, in the alternative to that pleaded in sc par 13A It is alleged there that the parties agreed in or about late August 1984 that in consideration of the plaintiff undertaking to conduct and comply with the Approved Program the defendant would pay the plaintiff compensation for all cattle destocked on Nutwood Downs pursuant to the Approved Program, that the compensation was payable at rates which the defendant, by the Minister, acting fairly to the plaintiff, considered it would be reasonable to pay the plaintiff, having regard , inter alia , to the extent of destocking proposed on Nutwood Downs, the financial ramifications thereof to the plaintiff, the aims and objectives of the BTEC, and the terms of compensation required by the Commonwealth/Territory BTEC Agreement (sc par 13B(c). Alternatively, the amount of compensation was to be a fair and reasonable amount, equal to the Market Value of each mustered animal destocked, plus a flat rate as determined by the Minister in respect of each unmusterable animal; see (13B(a))

[61] The contract claim is essentially an issue of construction of the Destocking Compensation Agreement (the 'DCA') – see Exh P1 at pp 1424-34. This was entered into by the parties on 8 June 1984. See the defendant's submissions, doc 233 at p.25; the plaintiff's submissions doc 240; and tpt p 2549. The DCA contains the whole of the parties' agreement; see clause

31. It is therefore clear, for example, that conversations between the Dunbars and Messrs Barry and Chubb on 8 June 1984 were not part of the DCA. It is clear that both parties were aware of the existence of the 'flat rate scheme'.

The plaintiff alleges that the DCA obliged the defendant to pay replacement value compensation for cattle destocked up to 1989, when it is common ground that the DCA was superseded by a new agreement dated 3 November 1989. The DCA encompasses cattle destocked in 1984 and 1985, up to and including destocking pursuant to two orders to destock issued by Dr Ainsworth on 8 August 1985, as well as cattle destocked under two orders issued by Dr de Witte on 6 March 1987.

[62] That identified cattle were destocked is not in dispute. However, the defendant contends that under the DCA it was not required to pay on-farm value compensation for the cattle; rather, it contends that the amount of compensation payable was in the discretion of the Minister, controlled only by a duty to act honestly and reasonably. Although the defendant submitted that the rates set by the Minister under this duty were the result of consultation and agreement with the cattle industry, it appears that evidence is lacking to support that contention; see doc 240 at par 6.

[63] Mr Maurice submitted that the recitals to that DCA set out the factual matrix against which the agreement was entered into, and is to be construed; they were critical to the plaintiff's construction that compensation was to be on-

farm value. The defendant contends that recitals cannot control clear words in the operative part of an instrument; see doc 250 at par 18 and tpt p.2722.

[64] I note that Recital "A" to the DCA states:

> "The Territory has established a fund ('the Fund') *in pursuance of the* Commonwealth Brucellosis and Tuberculosis Eradication Campaign ('the Campaign') to provide compensation to owners of stock who carry out destocking programs for the purpose of eradicating Brucellosis and Tuberculosis amongst stock in the Northern Territory." (emphasis added)

The plaintiff contended that this suggested that the Territory fund had been established to give effect to the Commonwealth Campaign, not merely some variant of it. It submitted that this construction was further supported by Recital "C", which states that:

> "The Owner and the Territory desire that certain stock depastured at the date when this agreement is deemed to commence on the land set out in Item 3A of the Schedule, shall be Destocked or otherwise dealt with *in pursuance of the Campaign* in accordance with this Agreement." (emphasis added)

[65] I accept the plaintiff's submission that "the Campaign" referred to in these Recitals is that identified in the Territory's "Strategic Plan for BTEC in the Northern Territory 1990-1992", as the agreement signed by the Commonwealth and the Territory and dated 1 May 1984 relating to the eradication of brucellosis and tuberculosis in cattle and certain buffalo for the period 1984-1992. Clause 2(1) of that agreement provided:

> "The Territory will, by using the financial assistance provided by the Commonwealth in accordance with this agreement, the payments referred to in sub-clause 13(3) and its own resources, establish and operate a scheme to eradicate brucellosis and tuberculosis in cattle in the Territory which scheme will include financial assistance to persons engaged in the cattle industry." (See Exh P1 at 1371, doc 240 at par 15, tpt p.2555.)

Clause 2(2) provided that the Scheme … "shall be operated in conformity and in accordance with the general principles and the provisions set out in the schedule". Part II of the Schedule sets out the "forms of assistance". Part B of Part II originally provided for "financial assistance to compensate producers for cattle slaughtered on a compulsory basis where such cattle are brucellosis or tuberculosis reactors, or are ordered to be slaughtered at an abattoir for eradication purposes where such slaughter may be more economical or give better disease control procedure than individual testing". The words "at an abattoir" were omitted by mutual agreement between the parties on 29 October 1984. This made it clear that the "financial assistance" referred to was to extend to animals ordered to be slaughtered for eradication purposes, whether they were to be slaughtered in an abattoir or on the property.

[66] Having stated the purpose of the "financial assistance", Part B proceeds to outline the nature of the assistance to be provided:

> "The compensation payable shall be a net amount determined by the Authority *after taking into account*, in respect of each animal slaughtered, the on-farm value of an equivalent disease free animal valued at the use to which the slaughtered animal was put immediately before it was slaughtered …". (emphasis added)

It is relevant that this provision does not distinguish between musterables and unmusterables. However, contrary to the plaintiff's submission in doc 240 at par 17, I note that the provision does not state that the "compensation payable shall be the on-farm value of an equivalent disease free animal", but merely that that factor is to be taken into account. The defendant submits that even if it were possible to look outside the written terms of the DCA, regard could not be had to the history of Commonwealth/Territory relations, which were not known to the plaintiff.

[67] Even accepting the plaintiff's submission that the matters referred to may be taken into account when construing the DCA, I do not consider that they demonstrate that the defendant in terms of Clause 2(2) is acting "in conformity" only if when destocking it paid on-farm value of an equivalent disease free animal by way of compensation (cf. tpt p. 2557).

[68] The plaintiff sought further support for its claim from Recital "E" in the DCA, which states that the parties "have agreed on the basis on which any compensation will be payable". The plaintiff submitted that this must involve agreement not merely as to the machinery for fixing the amount of compensation, but also the formula for doing so. On this approach, the submission is that discretion of the Minister could not have been intended by the parties to have been the 'agreed basis' on which compensation is payable; that basis must involve some additional formula to be applied, when fixing compensation. However, it is not apparent to me on the face of

Recital "E", that the discretion of the Minister could not have been an 'agreed basis' for this purpose, particularly given the defendant's submission that the Minister's discretion was not uncontrolled. Indeed, clause 17 of the DCA states that the amount of compensation payable "shall be in accordance with the rates determined from time to time by the Minister …".

[69] The plaintiff also seeks support for its construction from the use of the word "compensation" in Recitals "D" and "E" and clauses 14-21 and 25 of the DCA. It submits that as the DCA contains no definition of 'compensation', its well understood meaning should apply; that is, "the full money equivalent of the thing of which he has been deprived" - *Nelungaloo v The Commonwealth* (1947) 75 CLR 495 at 571, per Dixon J. However, it is not the case that "compensation" is not defined in the DCA. Part III, comprising clauses 14-21, deals with "Payment of Compensation". Clause 14 specifically states that

> "[f]or the purposes of this Part "compensation" means money paid by the Territory to the Owner for cattle in respect of which an Order for Movement has been issued or for which a Certificate of Destruction has been issued".

Thus for the purposes of that Part "compensation" is merely the "money paid"; the amount of that is determined in accordance with Clause 17. I consider that the parties have clearly gone to some lengths to give the term "compensation" a specific meaning in the DCA.

[70] The defendant further submitted that the agreement identified above as constituting the "Commonwealth Campaign" was "varied from time to time and these variations included terms as to the applicable rates of compensation". However, that does not appear to be very relevant. In the result, I consider that the causes of action pleaded in sc pars 13A and 13B have not been established.

***The 'breach of fiduciary duties' case***

[71] The plaintiff's primary position is that the common law provides it with adequate protection, without the need to resort to equitable doctrines. The allegations of breaches of fiduciary duty are in two parts:

(i) a breach of a fiduciary relationship between the parties prior to the plaintiff's purchase of Nutwood Downs; and

(ii) breaches occurring after its purchase of Nutwood Downs, in and about the operation of the BTEC on the property.

I deal with these in turn.

***(i) Fiduciary relationship prior to purchase of Nutwood Downs***

[72] The plaintiff contends that a fiduciary duty in the defendant arose prior to the plaintiff's purchase of Nutwood Downs, from the special and unusual relationship between the parties in relation to the proposed BTEC program

on the property (tpt p.2571). In particular, it arose from the following 4 facts:-

(i) the promotion of the BTEC and an Approved Program to the Dunbars was part of advancing the interests of the defendant in achieving the objective of eradicating tuberculosis from the Territory;

(ii) if they purchased the property, the Dunbars would have no effective choice but to submit to the implementation of the BTEC on the property with a potential for great harm in a situation where they were very vulnerable; (tpt p.2572)

(iii) the defendant was the sole repository of necessary information sought by the Dunbars about the scheme; and

(iv) the plaintiff and defendant were prospective parties to what was presented by the defendant as a formal, cooperative relationship (ultimately encapsulated in the DCA), in which trust and confidence would be reposed in officers of the DPP.

[73] In his evidence, Dr Calley had described the relationship between the DPP and the pastoralists as one of trust (tpt pp. 2573, 1603), one in which both sides were to be open and frank (tpt pp. 2574, 1604).

[74] The defendant points to the context of the meeting in June 1983; and in particular submits that the fact that Mr Bob Dunbar provided no forwarding address or contact for Dr Calley, militated against any ongoing relationship.

[75] I note the authorities relied on by the plaintiff including *Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41;*and *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1. I note that the defendant's submissions on law appear in doc 234 at pp. 1-11.

### *(ii) The operation of the BTEC Campaign*

[76] The plaintiffs put its submissions in relation to (i) above, with equal force with regard to the post-purchase position. It submits that under the co-operative arrangement:

(i) substantial control and influence over Nutwood Downs was vested in the defendant;

(ii) this control and influence occurred against the background of the trust and confidence originally placed by the plaintiff in the defendant;

(iii) the successful operation of the Approved Program depended on trust between the parties; and

(iv) it was the legitimate expectation of both parties that each would be open and frank with the other (see evidence of Dr Calley at tpt pp 1603-4; and see pp 2573-4)).

[77] In consequence, the plaintiff contended that the defendant owed to it a fiduciary duty in and about the operation of the BTEC campaign on Nutwood Downs whereby the defendant would:

- Disclose to the Plaintiff any circumstances leading to a conflict of interest between the Plaintiff in connection with its operation of Nutwood Downs and the Defendant in the conduct of the BTEC campaign on Nutwood Downs including assessment by the Defendant of compensation (sc par 31(a))

- Provide the Plaintiff with all financial and other material information of which it was aware in respect of the BTEC campaign on Nutwood Downs insofar as such information affected the Plaintiff's financial operation of

Nutwood Downs and its financial capacity to carry out such operations advantageously to the Plaintiff (sc par 31(b))

- Not take advantage of circumstances and information of the said nature and description which the Defendant knew or ought to have known was not within the perception or possession of the Plaintiff (sc par 31(c))

- Act in good faith towards the Plaintiff (sc par 31(d))

- Act with reasonable care and with due regard to the interests of the Plaintiff (sc par 31(e)) and

- Account to the Plaintiff for benefits obtained in circumstances where there was a conflict or significant possibility of conflict between its fiduciary duties to the plaintiff and the interests of the Defendant (see par 31(f)).

[78] The plaintiff contended that the defendant was under a duty to deal fairly and in good faith with the plaintiff in relation to the conduct of the BTEC campaign on Nutwood Downs and the effect thereon upon the financial operation of the plaintiff at Nutwood Downs (sc par 32).

[79] In sc par 33 the plaintiff alleges various breaches of this alleged fiduciary duty in that the defendant at no time during the implementation of the eradication program on Nutwood Downs informed the plaintiff of the provisions in its BTEC agreement with the Commonwealth for payment of on-farm value compensation. The defendant submits there was no such duty and, in any event, the Calley plan contained precisely the same information on the agreement in question, as to compensation: see doc 250 at par 25.

[80] The plaintiff also contends that Dr Sykes failed to inform the plaintiff prior to the entry into the 1988 Approved Program, of the Commonwealth resolution that the Northern Territory amend its compensation scheme to reflect the principle of on-farm value. The plaintiff alleges many breaches of fiduciary duties encapsulated in items (i)-(xxiv) at pp 13-16 of the 'Key to pleadings'.

[81] As to remedies for the alleged breaches, the plaintiff seeks that the defendant account for the advantage it obtained by not paying on-farm value

[82] The defendant denies that the fiduciary duties alleged in sc pars 31 and 32 were owed to the plaintiff; see doc 233 at p.35. It submits the suggestion that a government acquires a fiduciary duty where a government employee provides advice about a government scheme to assist industry is "extraordinary"; see doc 233 at p.35, tpt pp.2354-6 and see doc 250 at par 24. It addresses the claims in sc pars 33-33D.

[83] The defendant did not admit that the plaintiff contributed to the funds of the BTEC campaign, or that it was a primary source of advice and assistance for pastoralists. It contended that the plaintiff could at all times seek independent expert advice on the BTEC campaign in relation to the matters pleaded. The defendant denied it had the function of minimising the financial effects of the BTEC campaign, admits that cooperation was required, and denies that it required pastoralists and the plaintiff to adopt measures capable of having a significant detrimental financial effect. It

contends that it provided compensation, including tax incentives. It denied that it required pastoralists to contribute resources to the BTEC campaign.

[84] The defendant agreed that it devised the BTEC by what became known as 'the Calley plan'. It denied that it was the 'promoter' of the plan.

[85] Mr Riley asked the Court in assessing the Dunbars' evidence (in particular about their relationship with the defendant and its officers) to bear in mind: (i) their allegations of fraud against various Departmental officers withdrawn without apology part way through the trial (see tpt pp.2291-93; and doc 233 at p.1); and (ii), their aggressively defensive reactions to perceived threats from Departmental officers in stark contrast to their polite and co-operative demeanours in the witness box (see tpt pp.2288-91; and doc 233 at pp. 1-2. I accept the submissions of the defendant at pars 23-26 of doc 250. I do not consider that the defendant owed the plaintiff any fiduciary duties. I consider that the causes of action for breaches of fiduciary duties have not been established.

**CONCLUSIONS**

[86] I consider that the plaintiff has established none of the outstanding 12 causes of action in par [10]. It has failed to establish that the defendant is liable to it on any ground. In this litigation the verdict must be for the defendant.

[87] I received a very considerable body of evidence as to the damages which should be awarded, had the plaintiff succeeded in establishing the defendant's liability; this aspect was also the subject of extensive submissions. The damages sought fell into two categories; the 'reliance area' flowing from 'the misrepresentations case'; and the 'replacement value' or 'expectation loss' case, relating to the monies received for cattle destocked from Nutwood Downs between 1984 and 1988. It is unnecessary that I pursue that complex issue further, since the plaintiff has not succeeded. Equally, there is no need to express an opinion on the Limitations issue. There will be verdict for the defendant. I will hear the parties on the question of costs.

———————————————