Wiebe v. Gunderson, [2004] B.C.J. No. 1844

British Columbia and Yukon Judgments

British Columbia Court of Appeal
Vancouver, British Columbia
Southin, Newbury and Hall JJ.A.
Heard: May 25 and 26, 2004.
Judgment: September 9, 2004.
Vancouver Registry No. CA031213

[2004] B.C.J. No. 1844 | 2004 BCCA 456 | 243 D.L.R. (4th) 1 | [2004] 11 W.W.R. 283 | 204 B.C.A.C. 64 | 32 B.C.L.R. (4th) 230 | 27 C.C.L.T. (3d) 159 | 23 R.P.R. (4th) 1 | 133 A.C.W.S. (3d) 650

Between Linton Keith Wiebe and Linda Yvonne Wiebe, respondents (plaintiffs), and Donald Charles Gunderson and Arlene Faith Gunderson, appellants (defendants)

(159 paras.)

[Editor's note: Supplementary reasons for judgment were delivered by the Court December 2, 2004. See [2004] B.C.J. No. 2495.]

Case Summary

Sale of land — Remedies of purchaser — Damages — Breach of warranty or false representation — Measure of.

Appeal by the appellant Gundersons from an award of $1,030,000 granted to the respondent Wiebes for their losses flowing from the purchase of a ranch under the inducements fraudulently made by the Gundersons. In 1994, the Wiebes paid $950,000 for the ranch, of which $750,000 was allocated to real property. They continued to own the ranch at the time of trial. They had not sought rescission of the purchase agreement. The Gundersons did not contest their liability for fraud but challenged the assessment of damages. The trial judge found the true value of the ranch at the date of purchase was $310,000 by deducting remediation costs from the price paid by the Wiebes. Deducting that amount from the $750,000 paid by the Wiebes for the real property, the court awarded $440,000 as a measure of the Wiebes' capital loss. The trial judge awarded a further $500,000 for loss of profits to 1999 and $90,000 for out-of-pocket expenses. The Wiebes had installed two irrigation systems and had switched crops because of problems with the original irrigation system. The trial judge favoured the evidence of the Wiebes' expert over that of the Gundersons' expert.

HELD: Appeal allowed in part.

The diminution in value, or the capital loss, and the consequential losses flowing from the Gundersons' fraudulent statements were appropriate considerations in assessing the Wiebes' damages. The trial judge erred in awarding the cost of placing the land in the physical condition in which it ought to have been in had the representations been true. The discounted value of the ranch was $400,000. The Wiebes' damages for the diminution in value of the real property were reduced to $350,000. The award for out-of-pocket expenses was affirmed. The Wiebes were entitled to damages to compensate for lost profits to the extent they were proven to have resulted directly from the Gundersons' fraud. The trial judge erred in failing to impose an obligation to mitigate by 1997, when the Wiebes knew they had water and soil problems. The award for lost profits was

reduced to $250,000. Dissenting reasons were provided.

Statutes, Regulations and Rules Cited

Court Order Interest Act, R.S.B.C. 1996, c. 79, s. 1(2).

Counsel

D.R. Clark and M. Isaak: Counsel for the Appellants

G.S. McAlister: Counsel for the Respondents

[Editor's note: A corrigendum was released by the Court September 21, 2004. The corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for judgment were delivered by Newbury J.A. Additional concurring reasons were delivered by Hall J.A. (para. 56). Dissenting reasons were delivered by Southin J.A. (para. 60).

NEWBURY J.A.

1 In 1996, in Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd. [1996] 4 All E.R. 769, [1996] H.L.J. No. 38, Lord Steyn made the following observation:

> There is in truth only one legal measure of assessing damages in an action for deceit: the <u>plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants</u>. The analogy of the assessment of damages in a contractual claim on the basis of cost of cure or difference in value springs to mind. In Ruxley Electronics and Construction Ltd. v. Forsyth [1996] A.C. 344, 360G, Lord Mustill said: "There are not two alternative measures of damages, as opposite poles, but only one; namely, the loss truly suffered by the promisee." In an action for deceit <u>the price paid less the valuation at the transaction date is simply a method of measuring loss which will satisfactorily solve many cases</u>. It is not a substitute for the single legal measure: it is an application of it. [para. 67; emphasis added.]

The question posed by this appeal is whether an award of $1,030,000 (including $500,000 for loss of profits) correctly compensated the plaintiffs for their loss flowing directly from the alteration of their position - the purchase of the "Rocky Point Ranch" in the Cariboo region of British Columbia - under the inducement of misrepresentations fraudulently made by the defendants. This award exceeded the amount the plaintiffs paid for the ranch ($950,000, of which $750,000 was allocated to the real property) - a fact that may suggest the award should

be scrutinized with considerable care. The plaintiffs continued to own the ranch at the time of trial, and did not seek rescission of the transaction.

2 The defendants do not contest their liability for fraud on appeal, but challenge the assessment of damages made by the court below. They take issue with the Court's calculation of the "true" value of the ranch property at $310,000 as of the date of the plaintiffs' purchase. Deducting that amount from the $750,000 paid by the plaintiffs for the real property, the Court awarded $440,000 - an approach the defendants say essentially used the "cost of repair" as a measure of the plaintiffs' capital loss and effectively assigned a "negative value" to parts of the property. In respect of the award for lost profits, the defendants do not object in principle, but submit that the award was based on an expert report that was speculative and that made questionable assumptions regarding causation and mitigation of damages. Last, the defendants question the award of $90,000 made by the trial judge in respect of what he described as "out-of-pocket expenses in the category of 'other contingencies'" identified by the plaintiffs' expert.

The Defendants' Misrepresentations

3 Since the facts of this case are complex and likely to be of interest only to the parties, I do not intend to recount them in detail here, nor to recount the trial judge's very lengthy Reasons, given after a trial of many days. The Reasons are reported at 13 R.P.R. (4th) 78, 2003 BCSC 1282 and were concerned for the most part with the question of liability. Ultimately, the Court concluded that the defendants had deceived Mr. and Mrs. Wiebe into purchasing the ranch and that all the elements of the tort of deceit were "overwhelmingly" proven.

4 The full extent of the defendants' misrepresentations only became apparent to the plaintiffs over many months. Their first inkling came just after closing (February 1994), when a stranger told them in casual conversation that it was generally known the irrigation well at the ranch was "salty". In April 1994, Mr. Wiebe used the "pivots" on the property for the first time and found that the pump was sucking air. When he obtained a copy of a hydrology report commissioned by the defendants in 1986, he learned that the maximum steady flow of the well was 1,200 gallons per minute, rather than the 5,000-gallon figure represented by Mr. Gunderson. As well, the defendants had known that (contrary to what they told the plaintiffs) the larger irrigation well was not producing water of satisfactory quality and that the water had a high sodium reading and high sodium absorption ratio ("SAR"). Their hydrology report had warned that these conditions presented "an appreciable sodium hazard in fine-textured soils having high cation-exchange capacity, especially under low-leaching conditions unless gypsum is present in the soil." (para. 32.)

5 In 1995, high sodium and SAR rates became apparent in alfalfa crops Mr. Wiebe attempted to grow, and he sought expert advice. In August 1995, he capped the irrigation well and began to pump water from the Fraser River for irrigation purposes. However, the water supply was inadequate at certain times of the year, and the Wiebes continued to experience high sodium and SAR rates in the soil. In 1996, they switched crops from alfalfa to barley, and in 1997 they installed a second river irrigation intake system. As the trial judge noted, it was "plagued with difficulties, most notably the problem of silting and fluctuations of river level which limit the time when the system can be used." He continued:

> Through 1998 the Wiebes continued to have difficulty with their crops despite the planting of 80 acres of sorghum. They had better results in 1999 with a crop yield of some 1950 round bales or approximately 900 tons.

> In 2000 Wiebe planted triticale because it is a tough crop with a high tolerance to sodium. The crop did not fare well yielding only some 900 bales and approximately 450 tons.
>
> By 2001 the Wiebes had concluded that the water problems made the putting in of a crop problematic and he left the fields in pasture. [paras. 132-34]

6 The plaintiffs began their action in February 1995, claiming that the defendants had misrepresented the capacity of the well which was being used when they purchased the ranch. In December 1995, they amended their Statement of Claim to add as a further particular that "... [T]he water in the said irrigation well contained such concentrations of sodium and other chemicals as to make the water unfit for irrigation, resulting in the Plaintiffs having to abandon said well and incur expense in its replacement." In 2001, they amended their Statement of Claim further to make the following allegations:

> 11. Before the Sale, the Gundersons, through the agency of Alexandre, made the following representations of fact to the Wiebes:
>   a) 320 acres of the Ranch's 585 acres were irrigated by two irrigation pivots.
>   b) The acres under pivot produced between 1600 and 1650 tons of hay per year in two crops and in some years there were three crops.
>   c) The revenues generated in 1992 included:
>   i. $97,200 from the sale of 150 calves whose average weight was 600 lbs. at $1.08 per lb.
>   ii) $72,000 from the sale of 16,000 bales of hay at a price of $4.50 per bale.
>   d) The revenues generated in 1993 included revenue from the sale of calves whose average weight was 590-600 lbs.
>   e) The Ranch's irrigation well was "deep well tested" for 5,000 gallons per minute and the system then in place used only 2,100 gallons per minute.
>   f) The only problem with the irrigation well was that it cavitated when all irrigation systems were in use, but that problem would be solved by dropping the pump 40 feet lower in the well.
>   g) There were 3000 cubic meters of saleable timber on a bench next to the Fraser River (the "Bench") and 5,000 cubic meters of saleable timber on the Ranch as a whole, the logging of which would generate additional revenue for a purchaser of the Ranch, (hereinafter referred to as the "Representations").
> 12. The Plaintiffs say that the cumulative effect of the Representations was a representation that the Ranch:
>   a) Was a productive property suitable for growing hay.
>   b) Had an irrigation well that provided a more than adequate supply of good quality irrigation water.
>   c) Had generated substantial revenues from the sale of hay and calves.
>   d) Would generate revenue from the logging of the timber on the Bench.
> 13. The representations were false in that:
>   a) There were 260 acres not 320 acres under pivot.

b) The Ranch had never produced 1,600 tons of hay in any year.

c) Revenues generated in 1992 amounted to:

   i. $77,805 from the sale of calves, not $97,200.

   ii) $7,690.96 from the sale of hay, not $72,000.

d) The calves sold in 1993 weighed an average of 553 lbs., not 590-600 lbs.

e) The irrigation well actually produced between 1,000 and 2,000, not 5,000, gallons per minute.

f) There were approximately 2,100, not 3,000, cubic meters of timber on the Bench and approximately 2,350, not 5,000 cubic meters of timber on the Ranch as a whole.

g) The irrigation well did not provide a source of good quality irrigation water. Rather, to the knowledge of the Gundersons, the water could only safely be used on course textured or organic soils with good permeability, which the soil on the Ranch was not. It presented an appreciable hazard if used on other types of soil, including the soil on the Ranch.

7 The trial judge noted at para. 26 of his Reasons that during his examination for discovery, Mr. Gunderson made the following admissions:

a) As for the two pivots covering about 320 acres, Mr. Gunderson admitted that was not true.

b) As for those 320 acres producing about 5 tons per acre with two crops, Mr. Gunderson admitted that this was not true.

c) As for the acreage under pivot being able to put up 1,650 tones of hay, Mr. Gunderson admitted that this was not true.

d) As for 150 calves being sold with an average weight of 600 lbs. at $1.08 per lb. for a yield of $97,200.00 in 1992, Mr. Gunderson admitted that there were only 147 sold, that the average weight was not true and that the revenue stated was " . . . definitely false."

e) As for 16,000 bales of hay being sold at $4.50 per bale for a yield in 1992 of $72,000.00, Mr. Gunderson admitted that both the number of bales and the stated revenue were false.

f) As for the suggestion he had sold his calves in 1993 for $1.30 per lb. and that they had an average weight of 590 lbs. to 600 lbs., he admitted that the stated weight was false.

g) The remaining representations relied upon by the plaintiffs were that the irrigation well had been "tested for 5,000 gal. per minute" and that the "system uses 2,100 G.P.M.". It is abundantly clear on the whole of the evidence that neither of these allegations was true.

Further evidence supporting the plaintiffs' allegations was provided when Ms. Gunderson produced her diaries during her discovery in 2001.

8 The trial judge made very clear findings of credibility against the defendants and in favour of

the plaintiffs. With respect to the experts called by the respective parties, he clearly preferred the evidence of Mr. Keyes, a professional agrologist called by the plaintiffs, who had produced four reports concerning the degradation of the soil on the ranch due to poor quality irrigation water. (Para. 144.) Mr. Keyes' evidence was hotly contested by the defendants' expert, Dr. Chapman, whose opinions the trial judge summarized in a passage at para. 160 of his Reasons. The trial judge found that the factual underpinnings of Dr. Chapman's opinions were "absent, incorrect, or so suspect as to render the opinions themselves of little weight."

DAMAGES

9 After finding liability for the tort of deceit, the trial judge turned at para. 227 of his Reasons to what he called the most difficult aspect of the case, the assessment of damages. He noted that in cases of deceit, the proper measure of damages is the tortious one - the measure "which places the plaintiff in the position he would have occupied if the statement had not been made rather than in that he would have occupied if the statement was true." (My emphasis.) In this regard, he cited McConnel v. Wright [1903] 1 Ch. 546 (C.A.), which he noted had been applied in several Canadian cases, including Zorzi v. Barker (1957) 8 D.L.R. (2d) 164, a decision of this court. He correctly stated the general rule that damages for fraudulent misrepresentation are assessed as at the date of the breach, citing the locus classicus of Peek v. Derry (1887) 37 Ch. D. 541 (C.A.), reversed (on the basis that no fraud was shown) sub nom. Derry v. Peek (1889) 14 App. Cas. 337 (H.L.).

10 Together, Derry v. Peek and McConnel v. Wright typify the traditional approach, which was to focus solely on the "capital expended, less capital received" as the measure of damages in cases of fraud. Thus in McConnel, Collins M.R. said:

> It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort - it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. [at 554-55; emphasis added.]

Similarly, Cotton L.J. articulated the principle as follows in the lower court decision in Derry v. Peek:

> The damage to be recovered by the Plaintiff is the loss which he sustained by acting on the representations of the Defendants. That action was taking the shares. Before he was induced to buy the shares, he had the [pounds]4000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over the [pounds]4000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the Defendants was having the shares, instead of having in his pocket the [pounds]4000. The loss, therefore, must be the difference between the [pounds]4000 and the then value of the shares. [at 591; emphasis added.]

11 In more recent years, however, this formula has been criticized as "too rigid" (see, e.g., Clark v. Urquhart [1930] A.C. 28 (H.L.) at 68, per Lord Atkin). In Doyle v. Olby (Ironmongers) Ltd. [1969] 2 Q.B. 158 (C.A.), Lord Denning began his analysis by addressing McConnel v.

Wright, and said this:

> I think that Lord Collins did express himself in too rigid terms. He seems to have overlooked consequential damages. On principle the distinction seems to be this: in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
>
> > "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages."
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do. [at 167; emphasis added.]

In the result, the plaintiff in Doyle v. Olby was awarded not only his loss of capital in buying the defendant's business, but also the amount of additional expenses and liabilities he had incurred in attempting to run the business. (Various salary and rental benefits received by the plaintiff were offset against these "consequential losses.") Doyle v. Olby has been adopted by this court in K.R.M. Construction Ltd. v. British Columbia Railway Company (1982) 40 B.C.L.R. 1, Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd. (1990) 49 B.L.R. 237, and C.R.F. Holdings Ltd. v. Fundy Chemical International Limited (1981) 33 B.C.L.R. 291, discussed below.

Diminution in Value

12 Accepting, then, that the diminution in value (or what I will call the "capital loss") and the "consequential losses" flowing from the defendants' fraudulent statements were appropriate considerations in assessing the plaintiffs' damages, the trial judge in the case at bar reviewed the expert evidence and submissions from counsel. On the question of diminution in value, he noted an appraisal provided by the plaintiffs' expert, Mr. Holmes, who had been asked to estimate the market value of the (real) property for sale purposes in February 1994 in two "categories", namely:

> 1) Normal Value - the price that would have been paid by a purchaser anticipating normal productivity and acting upon information provided by sources to be reliable.

1) Discounted Value - the price that would probably have been paid by a purchaser having full knowledge of the abnormally high levels of sodium on the site.

Mr. Holmes reasoned that a prospective purchaser who was aware of the true condition of the soil and water supply would either walk away from the purchase because of the risks posed by those conditions; proceed with the purchase but at a discounted price "to cover the costs of the major contingencies"; or complete the purchase, shut down the irrigation well and operate the ranch as a dry-land site. Considering the second of these alternatives, Mr. Holmes factored in the cost of a replacement irrigation water supply (at $209,000) and the cost of gypsum or fertilizer treatment of the 260 acres (at three tonnes per acre) under irrigation, costed at $189,670. He calculated the "total costs to remedy" as some $398,000. In his words:

> This calculation of estimated costs to rectify the abnormal sodium level in the existing deep well would have been recognized as an up-front cost by any purchaser in possession of all relevant facts in February 1994. The price that was actually agreed upon was paid by the Wiebes in anticipation of normal productivity, with forage crops irrigated by a system delivering uncontaminated water in the quantities and at intervals typically required in the local area.

He also allowed for "other contingencies" at five per cent of the market price in order to recognize the expenses of experimenting with alternative crops, setting up and administering test-plots, and obtaining additional reports on soil samples to monitor progress. In the result, he calculated the "discounted market value" of the ranch in the context of the 'second option' as $310,000, calculated as follows:

Normal Market Value	=	$750,000	
Less Discount to Remedy (Option 2) =			($398,670)
Discounted Market Value	=	$351,330	
Allowance for Other Contingencies @ 5% of Market Price =			($ 37,500)
Net Discounted Value	=	$313,830	
Rounded	=	$310,000	

13 At para. 265, the trial judge provided another calculation which adjusted the $398,670 figure to $489,000 to reflect an increased amount (five tonnes per acre) of gypsum or fertilizer to be applied to the 260 acres. This produced a cost of $280,000, increasing the total cost of remediation to $489,000. On this basis, the discounted market value of the ranch in 1994 was shown as $222,700. (Para. 265.)

14 Under Mr. Holmes' 'third option' - considering the purchase "in the context of a different highest and best use - i.e., a small cattle ranch with no intended emphasis on hay sales as a supplementary enterprise", he concluded a fair market value of $300,000. This assumed that productivity of 1.5 tonnes of hay per acre would not be attainable for 10 years (as the plaintiffs had estimated). His report stated:

> As indicated, if the subject [property] is not capable of [plus/minus]1.5 tons per acre hay production in perpetuity, this option is economically impractical, since there may be other ongoing and unknown problems in the absence of irrigation. <u>However, it serves to indicate that the site is probably never worth less than [plus/minus]$300,000</u>. [Emphasis added.]

15 For their part, the defendants tendered a report by Mr. Hadland, a consulting agrologist and appraiser who had estimated the value of the property on three different scenarios, none of which was entirely reflective of the facts. As the trial judge noted:

> Mr. Hadland was asked to provide an estimate of the market value of the property as of February 14, 1994 based on three separate scenarios.
>
> 1. The quality of the well water was acceptable but the capacity of the irrigation well was such that it would not provide enough water for an expansion of the irrigated area of the ranch.
> 2. The irrigation well water was unsuitable for irrigation for purposes because of the high sodium levels.
> 3. The quality of the irrigation well water was poor or marginal and its long term impact and the quality was insufficient to allow for expansion of the irrigated area.
>
> The key difference between these two reports is the question addressed by Mr. Holmes of high levels of sodium on the site while in the case of Mr. Hadland he was asked to make certain assumptions about the quality of the water. [paras. 256-57]

On the first scenario, Mr. Hadland opined that the market value of the property was $760,000, and on the second that it was the same amount, less costs of "developing another water source". This approach does not seem very different from that taken by Mr. Holmes, but no final figure was suggested by Mr. Hadland. (He was also unable to reach any opinion on the third scenario.)

16 Apparently finding Mr. Hadland's report unhelpful, the trial judge returned to Mr. Holmes' report. He noted three "difficulties" emerging from the plaintiffs' approach to the calculation of damages, namely:

1) The discounted value calculated by Mr. Holmes is based on a purchase price reduced by the amount required to provide both a new water supply and to treat the land with gypsum. To allow for these costs in addition to the discounted value would be to allow double recovery.

1) The allowance for other contingencies as described by Mr. Holmes is calculated to cover a great many of the specific costs the plaintiffs are seeking to recover as actual out-of-pocket expenses, namely, experimenting with alternative crops, setting up and administering test plots and obtaining additional lab reports. Costs related to these items are found within Exhibit 42 [the list of special damages agreed upon by counsel].

1) Mr. Holmes also concluded that despite the discounting of the price because of knowledge of the sodium problem the property was never likely to be valued at less than $300,000. [para. 267]

In response to these difficulties, the trial judge simply said:

> I am painfully aware that, to some extent, a remedy must be fashioned in this case which does justice between the parties while remaining within the principles of damages touched on earlier. To some extent, in this case that requires gazing into the crystal ball.
>
> This, however, is not a case where a business was purchased and subsequently collapsed. This is a case where, having purchased the property the plaintiffs struggled to operate it, incurring costs and expenses. The present task is to fashion a remedy within the applicable principles that best reflects that loss, while recognizing the uncertainties of that process, and the fact the plaintiffs still retain the property.
>
> In my view, Mr. Holmes' report provides that means. I accept the approach taken by him as best estimating the loss at the time of the "breach" February 14, 1994. <u>I calculate the immediate loss as being the difference between Mr. Holmes' Normal Market Value and his rounded Net Discounted Value [$310,000] and award the plaintiffs $440,000.</u>
>
> Theoretically this estimate compensates the plaintiffs for the difference in value of the property while compensating them for the costs of providing an alternate water supply and the funds to treat the soils with gypsum. In addition it includes Mr. Holmes' allowance for "other contingencies" of $37,500. [paras. 268-71; emphasis added.]

17 On appeal, the defendants say the Court essentially awarded the plaintiffs the costs of remedying the water and soil problems - an approach to damage assessment expressly disapproved in C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd. Like this case, C.R.F. Holdings involved a fraudulently-induced purchase - in that instance, of real property that included a pile of radioactive slag which the vendor told the purchaser would make "excellent fill". The purchaser used it for that purpose before becoming aware of its true condition. In assessing damages (see (1980) 21 B.C.L.R. 345), the trial judge (Taylor J., as he then was) said that "[w]hile the court must, I think, assess damages with a view to making the plaintiffs whole in the sense of being in the *financial* position they would have been in had the land been free from contamination ... that can in this case be done only by awarding the cost of placing the land in the *physical* condition which it ought to have been in had the representation been true." (At 362.) In addition, he reasoned that the traditional position stated by this court in Sorensen v. Kaye Holdings Ltd. [1979] 6 W.W.R. 193, 14 B.C.L.R. 204 (lve. to app. refused [1980] 1 S.C.R. xii) could not be followed because, unlike the plaintiff in Sorensen, the plaintiff in C.R.F.

Holdings could be made "financially whole only by being put in a position to remedy the problem which was concealed by the fraud." In respect of the so-called "Anvil Way" property, he reached a damage award of $400,000 by adding together the anticipated clean-up cost of $315,000 and a "contingency" amount of $85,000 to reflect the possibility that applicable regulations might make it impossible to clean up the site. In Taylor J.'s analysis:

> While the loss to be made good must be that existing at the date of discovery of the fraud, the question remains whether the damages are to be assessed on the basis of cost of repair at that date or at the date of trial .... The fact is that the problem could not have been remedied prior to the date of judgment because no disposal site has existed. From a practical point of view, it is only fair that the damages should be adequate in fact at date of trial. I conclude that the proper measure of damages is the cost of decontaminating the property today together with some compensation for the contingency that clean-up may be impossible because of continued governmental opposition or inaction ....
>
> I assess the damages of the plaintiff C.R.F. Holdings Ltd., as owner of the Anvil Way property, at $400,000, inclusive of some compensation for the contingency that governmental action may prevent any clean-up .... [at 362-63; emphasis added.]

18 The Court of Appeal ((1981) 33 B.C.L.R. 291, lve. to app. refused, [1982] 1 S.C.R. vii) ruled that Taylor J. had erred and that he should instead have attempted to place the plaintiff "in the financial position in which he would have been had the representation not been made." (At 300, per Craig J.A.) His Lordship went on to observe:

> I think that the judge, initially, should have attempted to ascertain the normal measure of damages, that is, the difference between the price paid and the actual value of the property. This would involve a consideration of to what extent the slag had reduced the value of the property. ... Following this, the trial judge should have considered whether there was consequential loss and whether an award should be made for such loss. As I understand his reasons for judgment, he treated the cost of removal of the slag, namely $315,000 as consequential loss. I think that he erred in including this whole amount as part of the consequential award because this in effect would be awarding damages to the plaintiff on the basis of the value of the property had the representation been true. Whether any portion of this amount should be treated as consequential loss for the purpose of the damage award or whether, indeed, there is any consequential loss should be the subject of argument and, if necessary, evidence. [at 300-1; emphasis added.]

19 Macdonald J.A. agreed that Taylor J. had erred. He stated at 302 that "the damages are the difference between the price paid and the actual value of the property purchased", citing Zorzi v. Barker, supra, Hepting v. Schaaf [1964] S.C.R. 100 and Sorensen v. Kaye Holdings Ltd., supra. Unfortunately, no evidence had been adduced of the "actual value" of the property at the time of purchase (December 1974) so the matter had to be remitted to the trial court. Macdonald J.A. also went on to deal with "consequential loss" as follows:

> When that calculation is completed, one goes on to consider consequential loss. The right to recover for such loss did not have to be decided in the cases in which the established rule for the measure of damages in deceit was applied. The learned trial judge was of the opinion, in taking as authority the judgment of the English Court of Appeal in Doyle v. Olby Ltd. ... that damages for consequential loss could be awarded. I agree with that opinion. Now a claim for such damages has to be considered here with

> respect to the $318,400.00 spent on improvements to the contaminated property in 1975 before the plaintiffs were aware of the deception. It is an assessment which this court is not in a position to make. The plaintiffs carry the onus of proof. The mere expenditure of the money is not proof of loss. And it is clear that there has not been loss to the total of the amount spent. The expenditure created facilities which have been used to facilitate the business of the plaintiff Comor Supplies Ltd. for some five years up to date of trial. A number of factors have to be weighed in the assessment of the loss, if any. It is undesirable to discuss the matter further before the assessment takes place. [at 303; emphasis added.]

20 The matter was remitted back to the trial judge, whose second judgment ((1982) 39 B.C.L.R. 43) points up the difficulty of applying the traditional measure where rescission is not sought. Taylor J. noted:

> The statement that it made "excellent fill" was calculated to put further concern on the part of the plaintiff to rest, and had that result. I am to ask: "What would have been the plaintiff's financial position had this representation not been made?" If the question had not been asked, or, being asked, had received no answer, how would the plaintiffs have stood? I have found difficulty in applying this test in the context of concealment of a "defect" by half truth, and counsel have been unable to help.
>
> After protracted consideration, I have concluded that I should take the direction of the learned judge on the point to mean this. The cost of remedying the problem hidden by the misrepresentation is not to be a governing consideration in assessing damages. The principal measure is instead to be that derived by deducting, from the amount in fact paid, the amount which would have been realized on the market *had the plaintiff's question been truthfully*. Abstention from misrepresentation could not, in itself, have resulted in the disclosure of the truth. I am forced to the conclusion that the expression "had the representation not been made" must, in the present context, mean "had the truth about the waste been told".
>
> The references of all three judges to the need to determine the difference between price paid and "actual value" confirms this view. [at 47; emphasis added.]

Taylor J. also noted that although the Court of Appeal had found that the cost of repairs provided an inappropriate measure of the damage suffered, it was clear that "such costs were the most important factor involved in arriving at the sort of valuation on which I am instead to assess the principal damages." (At 51.) He held that he "must be entitled to take the costs of remediation into consideration in the valuation context". He then described the appraisal evidence before him, which had variously placed the "true value" of the property between $80,000 and $220,000. Taking all this evidence into account, as well as the costs of repair, he concluded:

> The appraisal evidence demonstrates that the science of valuation, while directed to numerical conclusions, involves much more than mathematical skill. Having completed the arithmetics, a prospective purchaser in such a case as this will inevitably then vary his resulting figures by a purely judgmental process, in order to arrive at the price he is prepared to pay. A prospective purchaser faced with the present problem, would no doubt have done both of the calculations which have been advanced in evidence. For the reasons stated above, I think he would have regarded the 16 per cent "discount" suggested by Mr. Burgess as altogether too low on a consideration of all the dangers and

uncertainties involved. I think he would, perhaps, have thought the 70 per cent discount suggested by Mr. Nesbitt, on the other hand, as somewhat high, having in mind that Mr. Smerchanski had in fact been able to use the property in conjunction with this waste, that he had even let his licence lapse without getting into difficulties with the authorities, that there was a chance the waste might go un-noticed, and that if it had to be removed it could possibly be disposed of somewhere closer than Chalk River.

I think it reasonable that a prudent prospective purchaser in December 1974, having full knowledge of the problem presented by the presence of the radioactive slag, might have offered as much as $100,000 for the property. I do not think an informed person would have offered more. I therefore assess the damages suffered by the plaintiff C.R.F. Holdings Ltd., as a consequence of being induced by the defendants to purchase the property for $260,000, in the amount of $160,000. To this I am to add prejudgment interest, from 6th December 1974, which I would allow at the rates awarded on default judgments from time to time from that date until today. [at 52-53]

21 On the second appeal, [1983] B.C.J. No. 2076, Seaton J.A. for this court rejected the defendants' contention that Taylor J. had "simply [taken] the cost of removing the radioactive slag and that that was a wrong approach." In his words, "I do not think that the judge made that error. He took into account, as any prospective purchaser would, the cost of removing the slag as a factor for which one would have regard in calculating the true value of the property." (Para. 4; my emphasis.)

22 The defendants in the case at bar say the trial judge committed exactly the same error made in the first trial judgment in C.R.F. Holdings - i.e., that he simply deducted the costs of remediation from the price paid by the plaintiffs. In response, the plaintiffs contend that the trial judge proceeded in exactly the same way as Taylor J. did in his second C.R.F. Holdings judgment, which they describe as starting with "evidence of the value of the ranch without the water problems at the date of sale, and then [deducting] the cost of remediation." I do not read the Court of Appeal's first or second judgment as giving its blessing to the approach thus stated by the plaintiffs; as has been seen, this court expressly disapproved the simple deduction of the cost of remediation from the original purchase price as determinative of the plaintiff's loss. In the second appeal, the trial judge was said not to have made the "error" for which the plaintiffs here contend.

23 The defendants say further that the diminution in value of the asset due to a defendant's fraud (the basic measure of damages for deceit) can "never exceed the price paid", suggesting that no purchaser would pay $310,000 for property on which he or she would then have to spend $440,000 to improve to the condition for which one would pay a price of $750,000. Moreover, if one accepts (as Mr. Holmes did in his report) that the buildings and timber on the ranch were worth $100,000 and $200,000 respectively, the defendants object that the effect of his calculation is to give the irrigated hay land on the plaintiffs' ranch a negative value. This is illustrated by the following table in the defendants' factum:

DESCRIPTION	NORMAL VALUE	DEDUCTIONS	DEPRECIATED VALUE
Irrigated hay land (260 acres	$338,000.00	$440,000.00	($102,000.00)

@ $1,300.00)			
Potential irrigated land (40 acres @ $800.00)	$32,000.00	---	$32,000.00
Improvable pasture (80 acres @ $500.00)	$40,000.00	---	$40,000.00
Non-arable (205 acres @ $200.00)	$41,000.00		$41,000.00
Buildings	$100,000.00	---	$100,000.00
Timber	$200,000.00	---	$200,000.00
TOTALS	$751,000.00		$311,000.00

24 Although I do not agree with the defendants that the diminution in value of an asset due to fraud can "never" exceed the purchase price, I am persuaded that the trial judge here made the same error as was made in the first C.R.F. Holdings judgment - "awarding the cost of placing the land in the physical condition in which it ought to have been in had the representation been true" ((1981) 33 B.C.L.R. 291, at 302). This cost was one factor to be considered, but focuses too closely on the plaintiff and his or her particular plans for the property and experience with it. Other purchasers might have different plans and place different values on other aspects of the many assets that constituted the ranch enterprise. The question was not what a buyer who wanted to do exactly what the Wiebes tried to do, would have paid, but what a hypothetical, willing but not anxious buyer, informed of the true picture, would have paid a willing but not anxious seller for the 'package' of assets in a competitive market at the time.

25 In the first C.R.F. Holdings appeal, the evidence necessary to make such a determination was not available to this court and the matter had to be remitted to the trial court. A similar order might be made in this case if time and money were no object. But the parties here can ill afford more expert reports, legal fees and court proceedings. The defendants' fraud was perpetrated on them ten years ago, and they waited over 18 months after trial for the trial judge's Reasons. They have borrowed on the security of the ranch assets and no doubt wish to have the fruits of their litigation. In all the circumstances, I think it best that we determine a "true" value that is somewhat higher than the $310,000 arrived at below, and which recognizes that the ranch would be sold as a package of several assets, including timber, buildings, irrigated and non-

irrigated land, and pasture. I would fix the discounted value at $400,000, with the result that the plaintiffs' damages for the diminution in value of the real property would be reduced to $350,000.

Out-Of-Pocket Expenses

26 In addition to the diminution in the value of the real property resulting from the fraud, the trial judge also awarded $90,000 for out-of-pocket expenses. In this regard, he noted that he did not find helpful the report prepared for the plaintiffs by Ms. Dendy, a chartered accountant, and questioned in particular the appropriateness of "including within the damage assessment calculated to represent the difference in value as at February 14, 1994, the actual expenses incurred after that date." (Para. 272.) The trial judge continued:

> In my view, the most appropriate approach is to remain within the framework of the approach taken by Mr. Holmes to attempt to quantify those costs as at February 14, 1994. In doing so I recognize that the actual out-of-pocket expenses exceeded those contemplated in Mr. Holmes' model, in part, because of the way in which disclosures of the problem occurred over time.
>
> Taking the adjusted numbers set out above and recognizing that because of the defendants' conduct additional costs and efforts were required of the plaintiffs I add to the award an additional $90,000 as compensation for additional out-of-pocket expenses in the category of "other contingencies" identified by Mr. Holmes. I specifically decline to include within this award the amount of finance charges claimed which, in my view, are not recoverable. [paras. 273-74; emphasis added.]

27 As was seen earlier, the "other contingencies" identified by Mr. Holmes were considered in his calculation of the "true" value of the property with five per cent of his assessment of the market price, or $37,500. In this regard, Mr. Holmes had stated:

> Once the high sodium levels became known, and procedures and costs estimates to remedy became available, most producers would prudently allow an extra margin for risk associated with additional items of expense, such as experimenting with alternative crops, setting up and administering test-plots, and obtaining additional lab reports on soil samples to monitor progress. There are also time-lags with depressed yields involved since the problem was unlikely to be rectified in one year.

The defendants therefore argue that the award constitutes "double counting" in that expenses of this kind were already taken into account in the assessment of the discounted value of the property. Since I would set aside the trial judge's award for "diminution in value", including the allowance for "other contingencies", I need not address this issue. The plaintiffs point out, however, that counsel agreed at trial that the plaintiffs had expended $98,586.40 on "special damages" - irrigation equipment and services, welding, etc. - in their efforts to fix the water supply and soil conditions. Deciding, I gather, that the $90,000 awarded was 'close enough' to $98,586.40, the plaintiffs did not cross-appeal the trial judge's failure to award the latter sum.

28 Subject to my comments below regarding the duty of the plaintiffs to mitigate after the fall of 1997 - say, October 31 of that year - I see no reason why the expenses listed in Exhibit 42 should not have been awarded. The fact they were incurred after the plaintiffs' purchase of the ranch is clearly no bar: Doyle v. Olby, supra. I would request counsel to delete from the list

those expenses incurred from and after November 1, 1997, and I would award the remaining items as consequential or special damages, up to a maximum of $90,000.

Loss Of Profit

29 I turn next to the most difficult aspect of the trial judge's award - the $500,000 for what he called "loss of profit". As mentioned earlier, the defendants do not take issue with the idea that loss of profit represents a type of "consequential loss" for which compensation may be given in a case of fraudulent misrepresentation. They focus instead on mitigation and other more specific arguments. However, since I am not aware of an appellate decision in Canada in which an award of this kind has been made in a case of deceit not involving rescission, the underlying principles warrant some discussion.

30 As I understand it, the trial judge arrived at the figure of $500,000 after "rounding down" what he called a "theoretical loss" of $639,689 calculated by Ms. Dendy in her report. The trial judge described her general approach as follows:

> In the present case the Dendy report approached the calculation of loss of profits in different ways. She first created a theoretical model of the Rocky Point Ranch without the water problems and compared that model to the Wiebes' actual experience.
>
> The method used was to first prepare year end accounts, then to adjust those accounts to remove incremental expenses. Ms. Dendy then compared the net equity from the adjusted year end reports to two different theoretical scenarios:
>
> a) in the first ("Normal" model) she assumed that further arable land would have been brought under irrigated production; and
>
> b) in the second ("Basic" model) she assumed that no further expansion of production would have occurred.
>
> Ms. Dendy's report projects the difference in equity in the "Normal" model as at the end of 1999 as $675,236 (adjusted). In the "Basic" model the difference projected is $577,810.
>
> Ms. Dendy then calculated what she identifies as the opportunity cost to the Wiebes of their purchase of the Rocky Point Ranch. In this scenario she assumed that the Wiebes would have had $420,000 available from the sale of their dairy operation and that Linton Wiebe would have found work as a truck driver earning $40,000 to $50,000 per year. By investing the $420,000 in Canada Savings Bonds and projecting those earnings after taxes she calculated that they would have had savings of $520,589 at the end of 1999 compared to a negative equity of $119,000, a theoretical loss of $639,689.
>
> I accept these calculations as useful indicators showing the magnitude of the Wiebes' loss. Assessing damages under this head "in the round" I award the plaintiffs $500,000 as loss of profits arising from the defendants' deceit. [paras. 280-84; emphasis added.]

Although it may be that the two calculations are "useful indicators", I must say that the calculation of net equity based on the "Normal" and "Basic" models seems irrelevant once the plaintiffs' capital loss or diminution in value has been determined. Moreover, a comparison of the two models in order to "demonstrate the results that would have occurred under normal production conditions as compared to the actual results" seems indistinguishable from a contract-based inquiry into what profits would have been realized if the representations made by the defendants had been true and the plaintiffs had obtained what they bargained for. As will

already be clear, that is not the measure of damages traditionally applied in tort: thus Duff J. (as he then was) stated in Gosse-Millerd Limited v. Devine [1928] S.C.R. 101:

> Assuming the charge of fraud established, the respondents would be entitled to recover compensation for the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter?" McConnell v. Wright [supra]; Johnston v. Braham [[1917] 1 K.B. 586 (C.A.)]. [at 104; emphasis added.]

31 Ms. Dendy's calculation of the "opportunity cost" to the plaintiffs of their purchase of the ranch (by projecting what Mr. Wiebe would have earned as a truck driver in British Columbia if the Wiebes had not purchased Rocky Point or any other ranch, and by calculating what Mr. Wiebe would have earned by investing his available cash in 1994 rather than buying the ranch) also runs counter to the traditional approach, which is directed to the position the plaintiffs would have been in 'but for' the deceit, rather than to what the plaintiffs would have earned if they had been warned off the purchase and decided to invest their money elsewhere. The two approaches do not in my view sit comfortably together: having already determined the plaintiffs' capital loss on the basis that they would have paid less for the ranch had the representations not been made, it seems strange then to assume that they did not proceed with the purchase and to compensate them accordingly. Moreover, since the profitability (or lack thereof) of the property is obviously reflected in the determination of market value and of the "true" value at the time of the fraud, it would seem there is at least an aspect of double counting in making an award for lost profits as well as one for diminution of value.

32 It may be because of conceptual difficulties such as these that Canadian courts have not as yet awarded damages for lost opportunity costs or lost profits in a case such as this. On the other hand, courts in England and Australia have moved to include loss of profits as an aspect of damages in such cases. Doyle v. Olby, referred to above, opened the door for "consequential" damages such as extra expenses and liabilities incurred by a plaintiff, but the English Court of Appeal took one step further in East v. Maurer [1991] 2 All E.R. 733. It involved the fraudulently-induced purchase of a hair salon. Some [pounds]30,000 was awarded at trial for the (capital) loss incurred by the plaintiffs on selling the business, and an additional [pounds]15,000 for profits foregone in the three-year period during which they attempted to run the business before selling it. Evidently (see Lord Mustill's judgment at 739), the trial judge found that if the plaintiffs had not purchased the defendants' business, they would have bought another one in the area and that it would have been profitable.

33 Beldam L.J. gave judgment for the majority. He began by quoting the well-known passage from Lord Denning's judgment in Doyle v. Olby, supra, the material portions of which I have set out above at para. 11. These comments were, Beldam L.J. noted, supported by an earlier judgment of Dixon J. for the High Court of Australia in Toteff v. Antonas (1952) 87 C.L.R. 647. There, Dixon J. said:

> In an action of deceit a plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered in consequence of his altering his position

> under the inducement of the fraudulent misrepresentations made by the defendant. When what he has been induced to do is to make a purchase from the defendant and part with his money to him in payment of the price, then, if the transaction stands and is not disaffirmed or rescinded, what is recoverable is "the difference between the real value of the property, and the sum which the plaintiff was induced to give for it" per Abbott L.C.J. Pearson v. Wheeler [(1825) Ry. & Mood. 303 at 304, 171 E.R. 1028 at 1029]. As Sir James Hannen P. in Peek v. Derry ... pointed out, the question is how much worse off is the plaintiff than if he had not entered into the transaction. If he had not done so he would have had the purchase money in his pocket. To ascertain his loss you must deduct from the amount he paid the real value of the thing he got. [at 650; emphasis added.]

The potential expansion to a "full compensation" measure was more evident in Williams J.'s judgment in Toteff:

> The measure of damages is the difference between what the plaintiff paid, the sum he was out of pocket, and the real market value of the assets he acquired ... In Holmes v. Jones [(1907) 4 C.L.R. 1692 at 1709] O'Conner J. said "where the complaint is that the contract has been induced by a fraudulent misrepresentation, the remedy for that wrong is to put the party, who has been induced to make the contract, as far as possible in the position he would have been in if he had not entered into the contract. To put him into that position he must be recompensed for the damage he has sustained by entering into the contract. In order to ascertain the extent of that damage the full contract must be looked at". [at 654; emphasis added.]

34 Returning, however, to East v. Maurer, the defendants in that case pointed out that neither Doyle v. Olby nor Toteff referred to loss of profit as a recoverable "head" of damage. Nevertheless, Beldam L.J. could see no basis for saying that "loss of profits incurred whilst waiting for an opportunity to realize to his best advantage a business which has been purchased are irrecoverable". He continued:

> It is conceded that losses made in the course of running the business of a company are recoverable. If in fact the plaintiffs lost the profit which they could reasonably have expected from running a business in the area of a kind similar to the business in this case I can see no reason why those do not fall within the words of Lord Atkin in Clark v. Urquhart ... "... actual damage directly flowing from the fraudulent inducement."
>
> So I consider that on the facts found by the learned judge in the present case, the plaintiffs did establish that they had suffered a loss due to the defendants' misrepresentation which arose from their inability to earn the profits in the business which they hoped to buy in the Bournemouth area. [at 738; emphasis added.]

In the result, the majority upheld the award for lost profits, but reduced the amount from [pounds]15,000 to [pounds]10,000. For his part, Lord Mustill would have affirmed the trial judgment, reasoning that:

> It is objected that the loss of profits is not properly recoverable because it is appropriate not to a claim in fraud but to a claim based on a contractual warranty of profits, for in such a case the loss of profits does not stem from the making of the contract but from the fact that the profit made was not what was anticipated.

> I should have thought this argument sound if the judge had included an item for loss of the Exeter Road profits; but he has not done so. The loss of profits awarded relates to the hypothetical profitable business in which the plaintiffs would have engaged but for buying the Exeter Road business, and the profits of the latter are treated by the judge solely as some evidence of what the profits of the other business might have been. In my judgment there is no error of principle here. [at 740]

35 Another case of note is the Australian High Court's decision in Gates v. The City Mutual Life Assurance Society Ltd. (1986) 160 C.L.R. 1. There, the plaintiff was illegally induced to enter into an insurance contract under which he received a benefit which, unlike that in Toteff, was worth what he paid. He sued for damages for breach of contract and for the contravention of trade practices legislation then in force. The trial judge ruled that because there was no evidence that the coverage provided was not worth what he had paid, he was not entitled to damages. On appeal, the Federal Court upheld that result, although it ruled that the insurance given by the insurer's agent to the plaintiff had not been contractual in character. In the High Court, the majority (Mason, Wilson and Dawson JJ.) found it unnecessary to make a definitive choice between a contractual and a tortious measure of damages, although they expressed the view (at 14) that there was much to be said for the latter. In the course of their Reasons, however, the majority described the measure of damages for deceit as follows:

> In deceit the measure of damages is the difference at the time of purchase between the real value of the goods, and the price paid .... But this has been treated as a prima facie measure only, the true measure being reflected in the proposition stated by Dixon J. in Toteff v. Antonas in these terms:
>
> > "In an action of deceit a plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered in consequence of his altering his position under the inducement of the fraudulent misrepresentations made by the defendant."
>
> As his Honour then pointed out, it is a question of determining how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been had the transaction not taken place. This entitles the plaintiff to all the consequential loss directly flowing from his reliance on the misrepresentation (Potts v. Miller [(1940) 64 C.L.R. 282 at 297-98]; Doyle v. Olby (Ironmongers) Ltd. [supra]) at least if the loss is foreseeable: see Gould v. Vaggelas [(1984) 157 C.L.R. 215 at 223-24].
>
> In the United States there was strong authority for the proposition that in deceit, as distinct from negligent misstatement, the plaintiff is entitled to recover expectation loss when he is induced by a fraudulent misrepresentation to enter into a contract .... This approach seems to reflect the view that because the defendant's fraudulent conduct exposes the plaintiff to loss he is entitled to compensation on the basis that is most favourable to him. The approach, which is by no means consistent with the object of awarding damages in tort, has not been adopted in Australia or the United Kingdom and the recent affirmation by this court in Gould v. Vaggelas of the application of the measure of damages in tort to actions in deceit is quite inconsistent with it. And, even if the American rule were to be adopted, it would not necessarily avail the appellant here in the absence of a finding of fraud.
>
> Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the

> plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation. This may well be so if the plaintiff can establish that he could and would have entered into the different contract and that it would have yielded the benefit claimed: cf. Esso Petroleum Co. Ltd. v. Mardon [[1976] Q.B. 801 at 820-21, 828-29]; Doyle v. Olby (Ironmongers) Ltd .... The lost benefit is referable to opportunities foregone by reason of reliance on the misrepresentation. In this respect the measure of damages in tort begins to resemble the expectation element in the measure of damages in contract save that it is for the plaintiff to establish that he could and would have entered into the different contract.
>
> So in the present case if the appellant were able to establish that, but for his reliance on [the defendant's] representation, he could and would have entered into policies of insurance containing a disability clause of the kind represented by [the defendant], he might then succeed in obtaining an award of damages equal to the benefits which would have been payable under such policies less the premiums paid or payable in respect of them. [at 12-13; emphasis added.]

36 In the U.K., both Doyle v. Olby and East v. Maurer were approved by the House of Lords in Smith New Court Securities, supra. Indeed, Lord Steyn (with Lord Keith of Kinkel and Lord Slynn agreeing) noted that East v. Maurer "shows that an award based on the hypothetical profitable business in which the plaintiff would have engaged but for deceit is permissible: it is classic consequential loss." (Para. 65.)

37 Turning to Canada, this court in K.R.M. Construction v. British Columbia Railway, supra, accepted in principle that profits foregone on contracts which the plaintiff alleged it would have entered had it not entered into the construction contract with the defendant, were recoverable, if and to the extent they flowed directly from the fraudulent inducement. (At 32.) However, the Court set aside the award for the loss of profits on the ground that the evidence was "based upon some unwarranted assumptions making the damages too speculative" and as "tantamount to underwriting profits for the respondents, in a high-risk industry, for a number of years." (At 34.) (To similar effect, see 1874000 Nova Scotia Ltd. v. Adams (1987) 146 D.L.R. (4th) 466 (N.S.C.A.).)

38 The issue has not been dealt with by the Supreme Court of Canada post-Doyle; however, in V.K. Mason Construction Ltd. v. Bank of Nova Scotia [1985] 1 S.C.R. 271, a case of negligent misrepresentation which had induced the plaintiff construction company to take on a contract for which it was not paid, the plaintiff was held entitled to recover both its actual expenditures on the project in reliance on the misrepresentation, as well as anticipated profits. Wilson J. said for the Court:

> I believe that in principle one is entitled to assume that Mason would have found a profitable means of employing itself had it not been induced to work on the Courtot project by the Bank's misrepresentation. This in my view is a reasonably foreseeable head of damage .... In equating Mason's lost profit with the profit estimated on the Courtot project we are simply saying that this is a reasonable estimate of what Mason would have been likely to have made if it had decided to abandon the Courtot project and find other

> work. That is to say, the lost profit on *this* contract represents the lost opportunity for profit on *any* contract. [at 285-6; emphasis added.]

The Court also rejected an argument by counsel for the plaintiff that damages in contract and tort are "the same". Wilson J. commented:

> While I tend to the view that there is a conceptual difference between damages in contract and in tort, I believe that in many instances the same quantum will be arrived at, albeit by somewhat different routes. [at 285; emphasis added.]

At 288, she concluded that although damages for negligent representation "would normally be assessed in terms of actual loss, including lost opportunity, rather than loss of anticipated profit", the commercial context of the case required that the plaintiff's loss should be calculated "in the same way in tort as it would be in contract".

39 In summary, the law in England and Australia supports the proposition that in assessing damages for a fraudulently-induced purchase of a (theoretically) profit-producing property, both the plaintiff's capital loss and loss of profits are recoverable, the latter as a type of consequential loss. In Canada, the Supreme Court has approved the recovery of profits foregone in a case of negligence, and it seems to me highly unlikely the Court would award less in a case of fraud. As has been seen, the Supreme Court has even suggested that although there are conceptual differences in the measure of damages between contract and tort, the outcome may be expected to be the same in many instances.

40 Thus despite my misgivings about the co-existence, in conceptual terms, of the right to recover 'hypothetical' lost profits and the traditional formulation of the measure of damages in tort, it would seem that the trend in Canada and elsewhere is to de-emphasize one particular "measure" or another and to strive for an award that in broad and practical terms compensates the plaintiff for all aspects of his or her loss flowing from the fraud, without being overly restricted by the nature of the cause of action. I will therefore proceed on the basis that the plaintiffs here may claim, and the court may award, damages to compensate for lost profits to the extent they are proven to have resulted directly from the defendants' fraud, and subject to the usual rules of mitigation. The overarching question is what amount of money represents the financial loss suffered by the plaintiff as a direct result of the alteration of his or her position under the inducement of the defendant's fraudulent representations. (See Smith New Court, supra, at para. 67, quoted above.)

Mitigation

41 I return, then, to the defendants' primary complaint regarding the trial judge's award of $500,000 for loss of profits - that the plaintiffs were obligated to mitigate their losses, either by selling the ranch or taking steps to remedy the defects in the property, prior to December 31, 1999, the date selected by the trial judge as the "end date" for the award under this head. They take particular objection to the trial judge's reasoning at his paras. 247-49, where he stated:

> The Wiebes were faced with a situation after their purchase of the Rocky Point Ranch which was the furthest thing from a sudden discovery that everything they had been told was false. Instead they suffered through a process more akin to a form of "water torture" while they discovered step by step more and more difficulties. The letter of August 29, 1994 was sent after they had obtained the Pacific Hydrology report and discovered that

> the maximum steady flow was 1,200 G.P.M. not 5,000 G.P.M. It was not until the summer of 1995 when Fofinoff and Awmack [Ministry of Agriculture experts] became involved that they began to realize that there was a water quality problem and not until they reviewed Rob Kline's letter of May 16, 1997 that they learned for the first time that there had been well tests done by the Gundersons days after they purchased the property in 1986.
>
> Only in 2000 were the Gundersons' ledgers disclosed and only at that time did the Wiebes discover the reality of the misrepresentation as to calf weights and hay production.
>
> The concept of mitigation is not one to be used to strip recovery away from plaintiffs who have taken the best advice they had available to them and struggled on in the face of gradually emerging facts, in an attempt to mitigate their losses by making the ranch productive.

42 In the defendants' submission, the question was not at what point the plaintiffs discovered that "everything they had been told" was false, but by what point they knew they had been "dealt with dishonestly". They say there is no basis for concluding that the fraud continued to operate on the plaintiffs' minds after December 1995 at the latest. Further, the defendants contest the trial judge's statement that the plaintiffs followed "the best advice they had available to them". To the contrary, the defendants emphasize that in the summer of 1995, the plaintiffs had been advised to apply gypsum to the soil as a corrective measure and knew they needed an alternative, reliable water source.

43 The plaintiffs respond that it was not until examinations for discovery in the year 2001 (when Ms. Gunderson's diaries were produced) that they became aware that the defendants had known about all the problems they were encountering in running the ranch. At the least, they say, the trial judge's findings at paras. 247-49 (quoted above) have not been shown to be clearly and palpably wrong and should therefore not be interfered with by this court.

44 I agree with the defendants that care must be taken to differentiate between the date on which the plaintiffs became aware of the full extent of the defendants' perfidy, and the date on which they became aware they faced serious difficulties in terms of water capacity and quality (giving rise to soil quality problems). In my view, the Wiebes did not need to be aware of the misrepresentations made to them with respect to calf weights and hay production before they became obliged to mitigate their losses in respect of the water and soil conditions. In 1996, they had switched crops from alfalfa to barley (which required less water) and experienced a mediocre barley crop. Also in that year they had received a written report from Mr. Keyes alerting them to the unsuitability of the well water and the degradation of their soil. In early 1998 they obtained a loan to install a new water system, but it did not provide enough water at the critical time of the year and the barley crops continued to be disappointing. By that time, they had amended their pleadings to allege misrepresentations with respect to the water and soil problems.

45 It seems to me that by the fall of 1997, the plaintiffs were aware they faced serious difficulties regarding water and soil and that the defendants had seriously misrepresented both. In this regard, I note the following passage from Smith New Court Securities, supra, cited by the defendants in their factum:

> But once the fraud has been discovered, if the plaintiff is not locked into the asset and the fraud has ceased to operate on his mind, a failure to take reasonable steps to sell the

> property may constitute a failure to mitigate his loss requiring him to bring the value of the property into account as at the date when he discovered the fraud or shortly thereafter. [para. 22]

In this case, there was no evidence to indicate that the plaintiffs were "locked into the asset".

46 In all the circumstances, I am of the view that the plaintiffs were aware of the basic difficulties facing them by the fall of 1997 at the latest, and that accordingly, a duty to mitigate arose at that time. The trial judge characterized Mr. Wiebe as a person who "attempts to carry on" and sees the good in people and trusts them. As admirable as these traits may be, and as sympathetic as a court might be to the victims of a clear fraud, the law imposes a more objective standard and required reasonable steps to be taken shortly after the fraud had been discovered.

47 Another objection raised by the defendants is that Ms. Dendy's report was not the most reliable of documents. They note that Ms. Dendy herself emphasized that the plaintiffs had prepared no financial statements and that their accounts for tax purposes were reported on a cash basis. She therefore had to make various adjustments and assumptions and relied in part on discussions with the plaintiffs, their banker, and Mr. Holmes, or made her own assumptions and estimates. She warned in connection with her models:

> Financial models and projections require reliance on available knowledge and data, and assumptions and estimates that appear reasonable at the time. The reader should note that the models in this report have been prepared only as a hypothetical tool to indicate the outcome of specifically defined scenarios and are not intended for any other use. Further, errors in assumptions or changes in economic or other conditions could result in a significant variation between the indicated outcome and the actual result. Based on discussions and data reviewed at the time of preparing the projections, the writer believes that the following assumptions that were applied in the projections are reasonable and appropriate for the purpose.

48 The defendants note further that Ms. Dendy used "actual expense" figures for the first two years of the plaintiffs' farming operation, but in subsequent years used a slightly lower figure even though the area under cultivation increased, thus (one would think) increasing expenses as well. Moreover, the "net cash income" projected in the "Normal" and "Basic" models do, as the defendants contend, seem speculative in the absence of information concerning the average profitability rates of farms in the Cariboo. Unfortunately, as the plaintiffs note, Ms. Dendy was not cross-examined on these points.

49 The defendants also quaere Ms. Dendy's calculation of what normal stock market investments would have yielded the plaintiffs had they invested $420,000 in Canada Savings Bonds between February 1994 and December 31, 1999. They note there is no evidence the plaintiffs would have invested their funds in that manner if the misrepresentations had not been made, and that indeed the trial judge found (at para. 223) that Mr. and Mrs. Wiebe had decided to purchase a ranch in the Cariboo area. Thus if they had not bought the Rocky Point Ranch, they likely would have bought another ranch. Again, it is noteworthy Ms. Dendy did not have any average profitability statistics that would assist in estimating what the plaintiffs would have earned working another ranch, assuming such enterprise would have been profitable.

50 Given these and other difficulties, the defendants stated on appeal they would be content to have this aspect of the damages calculated with reference to two years of lost revenues rather

than six years of lost profits. In this regard, counsel provided us with a calculation of what he describes as the "revenue overstatement" on the "Basic" model, which assumed 300 acres under cultivation and a sale price for hay of $120 per tonne throughout the period. He calculated the lost revenues between 1994 to the end of 1997 as coming to a total of approximately $70,000, and for the years 1994 and 1995 as coming to some $63,000.

51 As an appellate court, it is not our role to evaluate detailed calculations made by experts at trial and redone by counsel on appeal, or to try to reconcile profit and revenue figures. Counsel's arguments do illustrate, however, the inadequacy of the accounting records and expert evidence that were adduced in this case, as well as the "pitfalls of double counting, omissions and impermissible awards of both a capital and an income element in respect of the same loss." (Per Lord Mustill in East v. Maurer, supra, at 739.) Nevertheless, I believe it would be rash and unfair to dismiss the claim for loss of profits altogether, as occurred in K.R.M. Construction, supra. Ms. Dendy's report represents a concerted effort to assess the plaintiffs' "financial loss", and although it may be criticized, the defendants failed to present an overall report at trial that reached a different figure on which a court could rely. Ms. Dendy's final calculation of the plaintiffs' (negative) equity position and what the position would have been under the Normal and Basic models produced figures of $675,236 and $577,810 respectively, while her alternate calculation of "income foregone" until the end of 1999 (by not investing in bonds) produced a "theoretical" loss of $639,689 to the end of 1999. The trial judge discounted these figures to reach his award of $500,000. I believe he erred in failing to impose an obligation to mitigate by the fall of 1997, and that the award must be reduced. Doing the best I can with the evidence there is, I would reduce this aspect of the damages to $250,000.

DISPOSITION

52 In the result, I would allow the appeal to the extent of setting aside the trial judge's award of damages and substituting therefor the following:

Diminution in value of real property -	$350,000
Loss of Profits -	$250,000
Total:	$600,000

plus those expenses listed in Exhibit 42 which were incurred prior to November 1, 1997, up to a maximum of $90,000.

53 For clarity, I would also affirm that as stated by Craig and Anderson JJ.A. respectively in the first C.R.F. Holdings appeal (see (1981) 33 B.C.L.R. 291 at 301 and 335), pre-judgment interest accrues on the damages for diminution in value from the date the plaintiffs' cause of action arose - here, the date of their purchase of the ranch. In respect of the other (special) damages, interest accrues in accordance with s. 1(2) of the Court Order Interest Act, R.S.B.C. 1996, c. 79.

54 I would also order that the defendants continue to be enjoined from disposing of or encumbering their assets or property for a period of 35 days following the entry of this court's order. In respect of the funds being held in the trust account of the plaintiffs' counsel pursuant to the order of Mr. Justice Low dated October 9, 2003, I would order that to the extent of the aggregate award (including interest) made herein, such funds are for the benefit of and may be released to the plaintiffs and such other persons, if any, entitled thereto who claim by or through them, and that (again to the extent of the award made herein) such funds are free and clear of any claims of the defendants or persons claiming by or through them.

55 Last, I would order that counsel may make submissions in writing concerning costs, failing which the plaintiffs should have their costs of their appeal and in the court below.

NEWBURY J.A.

The following is the judgment of

HALL J.A.

56 I am in agreement with the disposition of this case proposed by Newbury J.A. In my opinion, the damages she would award for monies expended to address water and soil problems at the ranch and for loss of profit are properly awarded as foreseeable damages suffered by the plaintiffs consequential upon the fraudulent conduct of the defendants. An individual who is cast into a sea of troubles because of fraudulent misrepresentations made by another party to a transaction (the case here) ought to be afforded a decent interval to address and escape from those troubles. I agree with the temporal period fixed by my colleague as a reasonable interval in this case. This temporal limitation is a reflection of the principle that an individual harmed by tortious activity cannot impose preventable losses on a tortfeasor. An example in the personal injury area is the well-known case of Janiak v. Ippolito, [1985] 1 S.C.R. 146, wherein it was held that an injured party could not successfully claim for those damages arising from injuries that could have been ameliorated by recommended surgical treatment that the plaintiff unreasonably refused to take. In this case at bar there came a time when continuing losses could not properly be charged to the defendants. The factual circumstances of the individual case will govern the determination of when such a point in time is reached.

57 I do not consider the awards here ordered by my colleague under distinct headings of damages constitute impermissible double counting or double recovery. It seems to me that on the facts of this case they constitute proper awards to address the very real losses suffered by these plaintiffs who had been fraudulently induced to purchase a ranch property that was very different in condition and capacity from what had been represented by the defendants. This was what I would describe as a working ranch. It took the plaintiffs some period of time to ascertain the problems, to evaluate matters and to explore possible remedial solutions. This is a very different situation from, for instance, the case of someone who buys a piece of jewellery that is much inferior in value to what had been represented by a vendor. In the factual circumstances here, I consider that the heads and amounts of damages proposed by my colleague represent a just award to compensate the plaintiffs for the losses they suffered as a result of buying this ranch, the qualities of which were gravely misrepresented by the defendants.

58 I would allow the appeal in the terms proposed by Newbury J.A.

HALL J.A.

The following is the judgment of

SOUTHIN J.A.

59 I have had the privilege of reading in draft the reasons for judgment of my colleagues.

60 As I have come to a conclusion somewhat different from theirs by what I see as a somewhat different process of reasoning, I consider it right to set out the whole matter in my own words.

61 In doing so, I set out much detail which to some may appear unnecessary but this is a case in which, in my opinion, the devil is in the details.

62 The appeal is from this judgment drawn up and entered on 9th September, 2003, after a trial which took place in July and August, 2001, followed by submissions (in late 2001):

> The Plaintiffs recover Judgment against the Defendants Donald Charles Gunderson and Arlene Faith Gunderson in the amount of $1,030,000.00, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 in the amount of $308,486.49, for a total of $1,338,486.49.

Subsequently, the respondents obtained against the appellants, who had been found to have induced the transaction by fraud, an order for special costs. That order is not under appeal.

63 The learned judge, in his reasons for judgment, had arrived at the amount of $1,030,000 thus:

Damages calculated on the basis of the difference of the amount paid and the discounted net value of the property at February 14, 1994	$440,000
Additional damages for out-of-pocket expenses	$90,000
Loss of Profits	$500,000
TOTAL AWARD:	$1,030,000

64 The reader will note that the order did not have attached to it a calculation of interest.

65 The interest was calculated on the item of $440,000 from 15th February, 1994 to the time of trial in the amount of $179,755.06; on the claim of $90,000 from the same date in the amount of $36,768.08; and on the item of $500,000 calculated as it would be calculated if the sum of $500,000 was a sum payable in semi-annual instalments of $27,777.77 each, the first of such instalments being due on the 15th August, 1994, and the last on the 15th February, 2003.

66 We were not informed of the learned judge's reasons, if any, for adopting this calculation.

67 Presently I shall also address the difficulty caused throughout this appeal by the use of the phrase "loss of profits".

68 That the interest on the item of $90,000 was calculated from the date the cause of action arose shows that it was not an award of special damages, for interest on awards of special damages is calculated essentially from the time of expenditure. (See Court Order Interest Act, s. 1(2).) Indeed, on the learned judge's reasoning, the item for "difference of the amount paid" etc. should be $530,000.

69 Here, the appellants attack each of the constituent parts of the award.

The Subject Matter of the Transaction

70 In January, 1994, the respondents, then in their early 30's, who had carried on a dairy farm business in Saskatchewan and recently sold their farm, purchased from the appellants the Rocky Point Ranch for $950,000. The price included land, buildings, grazing permits, water permit, cattle, equipment and some hay which had been harvested and stored on the property. The agreed allocation was $750,000 to land, buildings and fences, $135,000 to cattle, and $65,000 to machinery.

71 The ranch, of some 550 acres, is on the Fraser River in the Cariboo. In his evidence, the male respondent, to whom I shall hereafter refer as Mr. Wiebe, said that he had told his wife when he first saw the ranch that it was beautiful and he agreed with the suggestion made to him by counsel that its setting is spectacular. The many photographs put into evidence do not belie the description "spectacular". On the property, there were two ranch houses and various outbuildings.

72 Mr. Wiebe intended not only to raise cattle but also to put much of the land into hay production and to sell hay which was surplus to the needs of his own cattle.

73 Also on the property was a substantial amount of merchantable timber which Mr. Wiebe intended to log in order to bring more land into cultivation. Before the purchase was made, Mr. Wiebe inquired of an official of Weldwood of Canada Ltd. as to the amount of that timber. The official told him 5,000 cubic metres. If there had been 5,000 cubic metres, it might have yielded, when logged, over $300,000.

74 The appellants had purchased the ranch (lands, including standing timber and, I infer, buildings and fences but neither cattle nor machinery) in 1986 for $200,000 and operated it as a hay farm/cattle ranch. Mr. Gunderson testified that at the time of purchase, the buildings and fences were in poor condition and the fields were not being cultivated. The learned judge made no finding on that point. Indeed, it is a pity that Mr. Gunderson was not asked straight out why,

when he apparently first listed the ranch in 1991 for $780,000, he considered it was worth so much more than he had paid for it. He was asked about improvements he had made during his tenure but no monetary value was put on them. One of those "improvements" was an irrigation system which, according to the evidence, did more harm than good.

75 There is no evidence as to what the timber, whatever its amount, was worth in 1986. It may be that it had increased in value. It may also be that Mr. Gunderson got a very good deal in 1986.

76 I mention these matters because if the fair value of the ranch in 1986 was $200,000, it is difficult to comprehend how a fair value for it in 1994 was $750,000 unless extensive and productive improvements had been made to it.

77 Before the purchase of the ranch, the net assets of the respondents were calculated by one of the witnesses at the trial, Ms. Dendy, as follows

Net Assets of Linda and Linton Wiebe Schedule 9
Prior to Purchase of Rocky Point

Net Assets		Net Worth Prior to Purchase	Adjustments		Net Funds Available
Cash on hand, January 1, 1994	(a)	36,411			36,411
Net proceeds on sale and wind up of Saskatchewan dairy farm operations	(a)	353,432			353,432
Value of machinery and equipment on hand (retained for Rocky Point)	(b)	111,280	44,500	(1)	66,780
Dairy Producers' Co-op Equity	(b)	88,550	86,416	(5)	2,134
Horses	(b)	2,500	1,494	(2)	1,006
Shop tools, tack (retained for RP)	(b)	8,500	6,500	(3)	2,000
Household goods (retained)	(b)	15,000	15,000	(4)	-
		615,673	153,190		461,763

78 To finance the purchase of the ranch and the purchase of herd, stock and equipment, the respondents applied to the Bank of Montreal. They received credit of $580,000, which, added to their own funds, was sufficient for the purchase, secured as to $300,000 by a mortgage on the lands at an interest rate of 6.25%. The balance of the Bank's credit was farm improvement loans of $166,000 and $84,000, both at prime plus 1%, and a loan mysteriously called "D/L N/R" of $30,000 at prime plus 2% to buy equipment. I infer the farm improvement loans were used, as to $200,000, to pay for the cattle and machinery. Payments were subsequently made and, by March 1996, the respondents' indebtedness to the Bank had been reduced to $438,000. I infer that the source of the funds to reduce the indebtedness was essentially the logging of timber.

79 By the summer of 1996, however, the respondents were indebted to the Bank for the sum of $585,000.

80 There was evidence at the trial to indicate that by the time of trial the respondents were indebted one way and another in the sum of $1,000,000. I have not discovered in the reasons for judgment any express consideration of the reason or reasons for this increase in

indebtedness from $438,000 to $1,000,000 and, thus, I am unable to say whether there is any causal connection to the fraud of the indebtedness over and above $438,000.

81 If the award of $1,338,000 is well founded, then the respondents will recover sufficient to discharge all their indebtedness, whether attributable in law to the acts of the appellants or not, and will own the ranch, its buildings and whatever machinery has been acquired since the purchase, and whatever their present herd consists of, free and clear, and have a substantial sum left over.

82 At first blush, that may seem only right. The respondents, after all, were fraudsters.

83 But, for reasons hereafter appearing, I do not consider it is right.

The Findings of Material Fact on Damages

a) in paragraphs 1-226 of the reasons for judgment

84 Liability is not in issue in this Court. In the court below, it was very much in issue. Thus, the learned trial judge necessarily directed the first part of his judgment - paragraphs 1-226 - to the issues thus arising. In this Court, we are concerned only with damages.

85 In addressing the issue of damages, the learned trial judge did not set out which of the findings of primary fact made in the liability part of his judgment he was taking into account as relevant to the issue of damages, nor did he address the issue by reference to the plea of damages in the statement of claim.

86 In consequence, I have found it necessary to consider whether some of his findings of fact in paragraphs 1-226 are by necessary implication imported into the remainder of the judgment.

87 As it stood at the time of trial, these were the substantive paragraphs of the statement of claim:

> 11. Before the Sale, the Gundersons, through the agency of Alexandre, made the following representations of fact to the Wiebes:
>
>   a) 320 acres of the Ranch's 585 acres were irrigated by two irrigation pivots.
>
>   b) The acres under pivot produced between 1600 and 1650 tons of hay per year in two crops and in some years there were three crops.
>
>   c) The revenues generated in 1992 included:
>
>   i. $97,200 from the sale of 150 calves whose average weight was 600 lbs. at $1.08 per lb.
>
>   ii) $72,000 from the sale of 16,000 bales of hay at a price of $4.50 per bale.
>
>   d) The revenues generated in 1993 included revenue from the sale of calves whose average weight was 590-600 lbs.
>
>   e) The Ranch's irrigation well was "deep well tested" for 5,000 gallons per minute and the system then in place used only 2,100 gallons per minute.

f) The only problem with the irrigation well was that it cavitated when all irrigation systems were in use, but that problem would be solved by dropping the pump 40 feet lower in the well.

g) There were 3000 cubic meters of saleable timber on a bench next to the Fraser River (the "Bench") and 5,000 cubic meters of saleable timber on the Ranch as a whole, the logging of which would generate additional revenue for a purchaser of the Ranch, (hereinafter referred to as the "Representations").

12. The Plaintiffs say that the cumulative effect of the Representations was a representation that the Ranch:

a) Was a productive property suitable for growing hay.

b) Had an irrigation well that provided a more than adequate supply of good quality irrigation water.

c) Had generated substantial revenues from the sale of hay and calves.

d) Would generate revenue from the logging of the timber on the Bench.

13. The representations were false in that:

a) There were 260 acres not 320 acres under pivot.

b) The Ranch had never produced 1,600 tons of hay in any year.

c) Revenues generated in 1992 amounted to:

i. $77,805 from the sale of calves, not $97,200.

ii) $7,690.96 from the sale of hay, not $72,000.

d) The calves sold in 1993 weighed an average of 553 lbs., not 590-600 lbs.

e) The irrigation well actually produced between 1,000 and 2,000, not 5,000, gallons per minute.

f) There were approximately 2,100, not 3,000, cubic meters of timber on the Bench and approximately 2,350, not 5,000 cubic meters of timber on the Ranch as a whole.

g) The irrigation well did not provide a source of good quality irrigation water. Rather, to the knowledge of the Gundersons, the water could only safely be used on course textured or organic soils with good permeability, which the soil on the Ranch was not. It presented an appreciable hazard if used on other types of soil, including the soil on the Ranch.

14. The Wiebes relied on the Representations and were induced by them to purchase the Ranch.

15. The Gundersons made the Representations knowing them to be false. Alternatively, they made them recklessly, without caring whether they were true or false.

16. Alexandre, and through him Countrywide, made the Representations negligently.

17. As a result of the Representations, the Plaintiffs have suffered damages including:

a) Damages reflecting the difference [between] the actual value of the Ranch at the time of the Sale, and the Price.

b) The cost of remediating soil that has suffered degradation as a result of the application of poor quality irrigation water.

c) The cost of installing an alternative irrigation system sourced from the Fraser River.

d) Loss of profits resulting from reduced crop production caused by the contamination of the soil on the Ranch because of the application of poor quality irrigation water.

e) Damages resulting from there being 2,100 rather than 3,000 cubic meters of timber to log on the Bench, and 2,350 rather than 5,000 cubic meters of timber on the Ranch as a whole.

f) Damages resulting from not having an irrigation well with a capacity of 5,000 gallons per minute.

g) Bank financing costs.

h) Credit account and other financing costs.

88 As I understand the reasons of the learned trial judge, who set out much of this statement of claim at paragraph 140, he found the representations set out in paragraphs 11(a)-(e) to have been made and to be false to the knowledge of the appellants and adopted the assertions of paragraphs 12(a)-(c). The most important of these is the finding that the well did not provide a source of good quality irrigation water. The water was not sweet but, in layman's language, salty, and salty water is not a good thing. Indeed, as the evidence showed, the problem caused by water that is "salty" can only be remedied by substantial applications of gypsum at a very high cost.

89 I have been unable to find any explicit finding on the assertion in para. 11(g). Mr. Wiebe did suggest in his evidence that the Weldwood official's estimate of the amount of standing timber was not an honest mistake of that official; it was somehow induced by Mr. Gunderson, with whom that official was on social terms. This allegation was not pursued before us and I proceed on the footing that in the matter of the amount of timber, Mr. Wiebe relied not on Mr. Gunderson either directly or indirectly but on the Weldwood official.

90 It is convenient at this point to address the question of the timber of which a great deal was made in the course of the hearing before us but is essentially ignored by the learned trial judge. A convenient place to follow the logging is in the lending transaction summaries of the Bank of Montreal:

DATE: Oct 3-94

LENDING TRANSACTION SUMMARY

BORROWER: Wiebe: Linton & Linda

BACKGROUND, FINANCIAL CONCLUSIONS, RISK IDENTI-
FICATION, MITIGATION AND RECOMMENDATION RATIONALE:

* * *

FINANCIAL

* orig. logging revenue proj. in 01/94 LTS = $24m (300 cu. mtrs at $80) however Linton has indicated to me today Weldwood is paying him $90 cu. mtr. hence he will log @3000 cu. mtrs over the winter (brother assists full time).
* total logging revenue = @$240m. Major expenses are labour and trucking which Linton will keep to a nominal amount by employing brother full time (lives in 2nd house on property) and using truck purchase to haul logs. Trucking costs about $8 cu. mtr. hence $24m in savings will be used to pay for P/P of truck & operating expenses.
* client is aware the majority of funds are to be used for debt reduction which he firmly acknowledges.
* truck will be used to haul hay for buyers when not hauling logs.
* calves are currently being rounded up for sale (a buyer is visiting ranch today to make an offer).
* Linton estimates there exists 28,000 bales of hay stacked on his property (he's impressed with hay crop this year). He estimates he can sell hay for $4 per bale.

...

91 In the spring of 1994, Weldwood agreed to purchase from the respondents 2,000 cubic metres of timber at $86.00 per cubic metre. It appears to be common ground that, in the end, the respondents netted about $150,000 from that timber. Had there been 5,000 cubic metres, presumably the respondents would have cleared a great deal more than that sum although, for some reason, throughout the proceedings it seems to have been accepted that the timber actually on the ranch, as opposed to the timber the respondents thought was on the ranch, had a total value of about $200,000.

92 I return now to the question of what findings of fact in paragraphs 1-226 are by necessary implication imported into that part of the judgment on damages.

93 I have concluded that his findings in that part of his judgment headed "Expert Evidence", paragraphs 137-192, meet that test.

94 Having set out paragraphs 11, 12, 13 and 17 of the statement of claim, in part, the learned judge said:

> [141] In light of these pleadings the initial questions to be addressed are those posed by the plaintiffs in their written argument.
>
> (1) Is the irrigation well water unsuitable for irrigation having regard to the soils on the Rocky Point Ranch?
>
> (2) Has the soil on the Rocky Point Ranch suffered degradation because of the application of water from the Irrigation Well?

95 He accepted the evidence of D. O. Keyes, a witness for the respondents, and rejected the evidence of Dr. Chapman, a witness for the appellants.

96 Mr. Keyes, in his report of 1st May, 2001, had testified:

> Conclusions
>
> Soils of the South Pivot, N.E. Pivot and N.W. Pivot fields on the Wiebe farm are generally of very poor quality due to high SAR values, high pH and carbonate content, low organic matter, lack of fertility and variable texture. Although sodicity has decreased in the top foot of soil, deeper in the soil it remains undesirably high and has not improved. Fertility is inherently low and elevated pH levels likely caused by the application of sodic irrigation water have reduced the availability of nutrients. In most places the surface soil is medium textured with low permeability due to the presence of sodium. In some areas the soil is course textured and therefore has low AWHC.
>
> These fields could not be successfully irrigated, even with good quality water, due to the low permeability caused by the high SAR of the surface soil. These soils would only be suitable for crop production if they were first treated with a calcium amendment throughout. Water from the irrigation well should not be used to irrigate any part of them.

97 I take this passage of Mr. Keyes' evidence to mean that, as of the date of the sale, the soils in their then state were unsuitable for irrigation but that unsuitability was capable of correction. As I shall show, this finding underpins the assessment of damages made by the learned judge under paragraph 17(a) of the claim, "the difference between the actual value of the Ranch at the time of the Sale, and the Price". Also meeting the test as I have set it out, is the learned judge's implicit finding that the respondents irrigating their fields with well water in 1994-1995, and therefore doing some additional harm to the fields, was a direct consequence of the fraud.

98 As to paragraph 17(c) of the claim, the learned trial judge found, in paragraphs 119-134, that, in the summer of 1995, the respondents had installed such an alternative irrigation system and made changes to it subsequently. He made no finding as to whether the expenditures were reasonable. That the expenditures were the consequence of the fraud is clear but unanswered is the question of whether the respondents unreasonably failed to obtain expert advice as to the construction of a workable river system. If a man's leg is broken because of the tortious act, whether intentional or unintentional, of the defendant, he cannot recover, in my opinion, the cost of consulting other than a qualified medical man to set it.

99 Relevant to paragraph 17(d) of the claim, although the learned trial judge did not so express it, is this passage:

> [131] At the end of 1997 the Wiebes put in a modified river irrigation intake, constructing a holding pond and a berm utilizing some 60 feet of culvert. The system continues to be plagued with difficulties, most notably the problem of silting and fluctuations of river level which limit the time when the system can be used.
>
> [132] Through 1998 the Wiebes continued to have difficulty with their crops despite the planting of 80 acres of sorghum. They had better results in 1999 with a crop yield of some 1950 round bales or approximately 900 tons.

> [133] In 2000 Wiebe planted triticale because it is a tough crop with a high tolerance to sodium. The crop did not fare well yielding only some 900 bales and approximately 450 tons.
>
> [134] By 2001 the Wiebes had concluded that the water problems made the putting in of a crop problematic and he left the fields in pasture.

100 The learned trial judge made no findings of any kind on paragraph 17(e) (amount of timber).

101 As to paragraph 17(f), I think it fair to say that the learned judge, by necessary inference, found that the well did not have that capacity, but, as the well was useless for irrigation, its capacity was of no moment.

b) in paragraphs 227-284 of the reasons for judgment

102 The learned judge considered two expert reports adduced by the respondents: that of L.A. Holmes, which addressed the value of the property at the time of purchase, and that of Christine Dendy, which addressed what she called consequential and other financial losses incurred by the respondents.

103 As to the evidence of Mr. Holmes, the learned judge said:

> [255] In the appraisal of L.A. Holmes (Exhibit 7) the instructions given were that the appraiser was to estimate the market value of the property for sale purposes in February 1994 in two categories. Those categories are:
>
> 1) Normal Value - defined as the price that would have been paid by a purchaser anticipating normal productivity and acting upon information provided by sources to be reliable.
>
> 1) Discounted Value - defined as the price that would probably have been paid by a purchaser having full knowledge of the abnormally high levels of sodium on the site.
>
> [256] In contrast the defendants tendered a report (Exhibit 64) by Arthur Hadland, a consulting agrologist and a member of the Appraisal Institute of Canada. Mr. Hadland was asked to provide an estimate of the market value of the property as of February 14, 1994 based on three separate scenarios.
>
> 1. The quality of the well water was acceptable but the capacity of the irrigation well was such that it would not provide enough water for an expansion of the irrigated area of the ranch.
> 2. The irrigation well water was unsuitable for irrigation for purposes because of the high sodium levels.
> 3. The quality of the irrigation well water was poor or marginal and its long term impact and the quality was insufficient to allow for expansion of the irrigated area.
>
> [257] The key difference between these two reports is the question addressed by Mr. Holmes of high levels of sodium on the site while in the case of Mr. Hadland he was asked to make certain assumptions about the quality of the water.

> [258] In my view, the best estimate of the value of property as at February 14, 1994 is that provided by Mr. Holmes, the plaintiffs are entitled to recover the difference between $750,000 and the discounted value of $310,000 or $440,000.

104 The appellants complain that the learned trial judge, in approaching the matter that way, committed an error of omission, namely not analyzing the constituent parts of Mr. Holmes' appraisal.

105 I, however, infer that the learned judge, in his conclusion, was accepting this portion of the evidence of Mr. Holmes (exhibit 7):

> Option (2)
>
> Proceed with the purchase, but apply a discount to the price of the real estate sufficient to cover contingencies once ownership had been assumed. The primary contingencies identified included replacement of the irrigation water supply; chemical treatment of the irrigated land; and consideration of alternative cropping procedures. Subsequent inquiries and research indicated the probability of high capital outlays associated with those items, and it would have been reasonable for a prospective purchaser to deduct such anticipated costs from the purchase price of the real estate, which would have resulted in a price that more closely reflected the value of the property in its present condition. The minimum costs were:
>
> (a) The cost of a replacement irrigation water supply. Highlands Irrigation Limited provided two alternatives for consideration; the first was for placement of two 12" wells alongside the Fraser River at an estimated cost of $179,000; and the second was for a system to facilitate pumping out of the Fraser River at an estimated cost of $222,000. Both alternatives required additional 12" main lines estimated to cost an additional $30,000. Highlands recommended the new wells adjacent to the river as the best option. Estimates of cost for irrigation systems do not vary by large amounts and it would be reasonable to assume [plus/minus]$200,000 as a rounded estimate.
>
> (b) Application of gypsum to the hay fields as a standard remedy to high salt conditions. A letter from 153 Mile Fertilizer recommends treatment with gypsum and compound fertilizer at a total cost of $729.50/acre. The time frame for a remedy was still unknown, but that was recommended as an initial treatment. Estimates from alternative sources would likely have been the same - with differences reflecting trucking costs.
>
> (c) Revisions to crop production estimates and planting and management strategies, including allowances for costs related to reseeding to salt-tolerant crops. Some experimentation in test-plots could be anticipated that could further compromise profitability because they are time-consuming and labour-intensive.
>
> Estimate of Total Discount under Option 2:
>
> (a) Replacement Irrigation Water Supply (the Recommended Option being New Wells Near the River) =$179,000

	Plus Main Lines		=$30,000
(b)	Gypsum/Fertilizer Treatment		
	260 Acres x $729.50	=$189,670	
	Total Costs to Remedy		=$398,670

This calculation of estimated costs to rectify the abnormal sodium level in the existing deep well would have been recognized as an up-front cost by any purchaser in possession of all relevant facts in February 1994. The price that was actually agreed upon was paid by the Wiebes in anticipation of normal productivity, with forage crops irrigated by a system delivering uncontaminated water in the quantities and at intervals typically required in the local area.

Normal Market Value	=	$750,000	
Less Discount to Remedy (Option 2) =			$398,670
Discounted Market Value	=	$351,330	
Allowance for Other Contingencies @ 5% of Market Price * =			$37,500
Net Discounted Value	=	$313,830	
Rounded	=	$310,000	

*Once the high sodium levels became known, and procedures and cost estimates to remedy became available, most producers would prudently allow an extra margin for risk associated with additional items of expense, such as experimenting with alternative crops, setting up and administering test-plots, and obtaining additional lab reports on soil samples to monitor progress. There are also time-lags with depressed yields involved since the problem was unlikely to be rectified in one year.

106 It is convenient to note now that the foundation of the award of $90,000 was the paragraph in Mr. Holmes' opinion which is noted with an asterisk. I derive that from this passage in the learned trial judge's reasons:

> [274] Taking the adjusted numbers set out above and recognizing that because of the defendants' conduct additional costs and efforts were required of the plaintiffs I add to the award an additional $90,000 as compensation for additional out-of-pocket expenses in the category of "other contingencies" identified by Mr. Holmes. I specifically decline to include within this award the amount of finance charges claimed which, in my view, are not recoverable.

107 I infer from the learned judge's acceptance of Mr. Holmes' evidence that he was satisfied that statements which Mr. Holmes made, for instance as to the costs of the gypsum for remediation and of a new irrigation system, were accurate. In this Court, counsel for the appellants did not contest them.

108 But Mr. Holmes made other assertions of fact, particularly on page 8 of his report, including, among other matters, "normal" hay production of "a property such as this" upon which the learned judge made no express finding.

109 As to the Dendy report, what the learned judge said was this:

> [280] In the present case the Dendy report approached the calculation of loss of profits in different ways. She first created a theoretical model of the Rocky Point Ranch without the water problems and compared that model to the Wiebes' actual experience.
>
> [281] The method used was to first prepare year end accounts, then to adjust those accounts to remove incremental expenses. Ms. Dendy then compared the net equity from the adjusted year end reports to two different theoretical scenarios:
>
> a) in the first ("Normal" model) she assumed that further arable land would have been brought under irrigated production; and
>
> b) in the second ("Basic" model) she assumed that no further expansion of production would have occurred.
>
> [282] Ms. Dendy's report projects the difference in equity in the "Normal" model as at the end of 1999 as $675,236 (adjusted). In the "Basic" model the difference projected is $577,810.
>
> [283] Ms. Dendy then calculated what she identifies as the opportunity cost to the Wiebes of their purchase of the Rocky Point Ranch. In this scenario she assumed that the Wiebes would have had $420,000 available from the sale of their dairy operation and that Linton Wiebe would have found work as a truck driver earning $40,000 to $50,000 per year. By investing the $420,000 in Canada Savings Bonds and projecting those earnings after taxes she calculated that they would have had savings of $520,589 at the end of 1999 compared to a negative equity of $119,000, a theoretical loss of $639,689.
>
> [284] I accept these calculations as useful indicators showing the magnitude of the Wiebes' loss. Assessing damages under this head "in the round" I award the plaintiffs $500,000 as loss of profits arising from the defendants' deceit.

110 But what the learned judge did not do at any time was address the correctness of the assumptions which Ms. Dendy made in her two models. Calculations are only "useful indicators" if the underlying facts are true.

111 To understand her calculation of "opportunity cost" (para. 283 of the judge's reasons), one must go to the report in order to derive the meaning of "negative equity"

[Editor's note: In the following quoted text, square brackets indicate where text has been struck through.]:

> 3. Opportunity Cost
>
> Alternatively the losses can be assessed in terms of the opportunity cost of investing in Rocky Point Ranch. In addition to the loss of the capital that the Wiebes invested in Rocky Point, they have forgone potential profits that would otherwise have been earned on their capital.
>
> Had the Wiebes not purchased Rocky Point, nor any other ranch, it is understood from discussions with Mr. Wiebe that the family would still have left Saskatchewan and Mr. Wiebe would have found employment in B.C., probably driving a truck, and Mrs. Wiebe would probably not have sought employment. It is therefore assumed that Mr. Wiebe would have found employment with an income of $40,000 to $50,000 per year, adequate to pay for all family living expenses, and the net proceeds of selling the dairy operation and any other related investments would have been available to earn income through other investment.
>
> The Wiebe's financial position after sale of the Saskatchewan dairy farm, quota, and liquidation of related residual assets, was prepared in a statement of Assets and Liabilities for the Bank of Montreal in application for a loan for Rocky Point. After making adjustments for assets that Mr. Wiebe says he would have retained for personal use, or were not liquidated, the net cash position would have been about $460,000, as summarized in the Appendices in Schedule 9, Net Assets Prior to Purchase. Conservatively allowing for relocation and living expenses until re-established in B.C., it is assumed that about $420,000 would have been available for investment as of February 1994.
>
> A conservative estimate of potential return on alternative investments the Wiebe's may have made would be to assume the capital was invested in safe financial instruments such as government bonds, Canada Savings Bonds, or term deposits during the intervening period of February 1994 to date in May, 2000, and interest re-invested. At the time, average interest rates ranged from 4.13% for 6-month Treasury Bills through 4.63% for Chartered Bank 5-year Term Deposits, 5.19% for 5-year Gov. of Canada Guaranteed Investment Certificates and 5.81% for Government of Canada 3 to 5-year Bond yields. November 94 Canada Savings Bonds were issued at 6.38%. Based on these rates, the net return on $420,000 (adjusted to May 1, 2000) would have been between [$134,877] 91,046 and [$165,645] 110,040, as shown in the Schedule 10 amended, Investment Earnings, in the Appendices. Of these, had an investor selected 5-year GICs as one of the better rates available at the time, the investment would have earned [$149,679] 100,689 over the period, with a cumulative investment balance of [$569,679] 520,689 as of May 1, 2000. [Handwritten notation in margin omitted.]
>
> As of December 31, 1999 the Wiebes had a negative equity of approximately $119,000 in the Rocky Point enterprise. In other words, assuming all their assets could be sold at

book value (and with no further financial losses incurred in the process of liquidation) a residual debt to creditors of $119,000 would remain. Comparing this to the financial position they might otherwise have had of [$569,679] 520,689 in savings, at minimum, their loss has been [$688,679] 639,689.

112 But the learned trial judge made no finding whether or not the liabilities which the respondents had at the time of trial were liabilities arising in direct consequence of the fraud of the appellants.

113 That they incurred liabilities of $580,000 to purchase the Rocky Creek Ranch is undoubtedly so. That those liabilities were reduced to $438,000 by the spring of 1996 is also true, but I do not see how this Court can be expected, in the absence of a finding by the learned trial judge, to hold that subsequent borrowings can be laid at the feet of the appellants simply because the money was borrowed, as opposed to borrowings which can be identified as lying at the feet of the appellants.

The Pleading as to Damages

114 I have already mentioned that the learned trial judge, in addressing damages, did not direct himself expressly to paragraph 17 of the amended statement of claim.

115 In my opinion, paragraph 17 does not support any award founded on the Dendy report. It claims, "Loss of profits resulting from reduced crop production caused by the contamination of the soil on the Ranch because of the application of poor quality irrigation water."

116 That is as plain a claim as can be for damages to make good the representation.

117 A claim for the money I would have had in my pocket if your representation had been true, is not the same as a claim for the money I would have had in my pocket if I had never entered into this transaction with you but had invested my time and money in some other venture. On the importance of proper pleading of particulars of damage, see Perestrello E Companhia Limitada v. United Paint Co., Ltd. [1969] 1 W.L.R. 570, [1969] 3 All E.R. 479 (Eng. C.A.).

118 When the learned trial judge speaks of "loss of profits", it appears to me he is not addressing paragraph 17(d) but a claim that was never pleaded. It is not easy to come to grips in this Court with a claim that is not pleaded and which the learned trial judge did not recognize was not pleaded.

119 I have to say, however, that counsel below for the appellants (not Mr. Clark) does not appear to have objected to the admissibility of the Dendy report on the ground that much of it was not relevant to the plea.

The Measure of Damages

120 It is convenient now to address authorities which bear on the point which I have just made concerning the pleading.

121 In Gosse-Millerd Ltd. v. Devine, [1928] S.C.R. 101 at 104, Duff J. said:

> As already mentioned, the respondents alleged, by their statement of claim, that they had been induced to enter into the lease and the contemporary contracts, by the appellant company's fraudulent misrepresentations touching the Clayton Company's contract. Assuming the charge of fraud established, the respondents would be entitled to recover compensation for the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter?"

See, also, McConnel v. Wright, [1903] 1 Ch. D. 546 at 554 (C.A.); Hepting v. Schaaf, [1964] S.C.R. 100; and Saunders v. Edwards, [1987] 2 All E.R. 651 at 655 (C.A.).

122 Thus, the plea in subparagraph 17(d) was bound to fail as a matter of law.

123 So what losses are directly ascribable to this transaction?

124 The classic measure of loss on a transaction of purchase and sale is the difference between the purchase price and the true value of the thing purchased.

125 There are, however, other ways of measuring the loss "... directly ascribable to the transactions ...." as is shown by Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 (Eng. C.A.), and East v. Maurer (1990), [1991] 2 All E.R. 733 (Eng. C.A.).

126 It is, however, wrong, in my opinion, to take passages out of these cases and interpret them without reference to the facts of each case.

127 In Doyle (at p. 160), the plaintiff alleged:

> ... that the second defendant, Mr. Cecil Olby, as express or implied or ostensible agent for the vendor company, made false and fraudulent statements to the effect that all sales of the business being offered were over the counter and that the wages bill was [pounds]42 a week whereas in fact it was [pounds]57 5s., the wages of the manager and of himself as a part-time traveller being omitted. Secondly, in regard to conspiracy he claimed that all the defendants were engaged to injure his interest by cheating him of his bargain, the plot alleged being ostensibly to sell the whole business as a profitable concern whereas (a) it was declining and unprofitable and its unprofitability was masked by the deceit alleged and other ancillary abuses; and (b) the real intention was to abstract the trade, or wholesale part of the business, both by concealing that the fourth defendants, A. Olby & Son Ltd., were operating and would continue to operate in competition in the area and also by deflecting customers to that company and away from the plaintiff both before and after the sale.

128 The trial judge (at p. 161):

> ... found that the plaintiff and his wife were "thoroughly honest and decent people" now completely convinced that they had been "tricked into buying a pup" and *deliberately robbed of part of what they had bought*.
>
> [Emphasis mine.]

That I take to be a reference to the respondents, directly or indirectly, continuing to operate in competition in the area, thus effectively taking to themselves the goodwill which Mr. Doyle had purchased.

129 In determining the damages, Winn L.J. said, at 169-170:

> The starting point is a simple one: [pounds]4,500 was paid away out of his pocket by the plaintiff to acquire this business; and a further [pounds]5,000, in round figures, to take over stock at valuation. That was [pounds]9,500. When he came ultimately to leave the business, I say quite confidently that he is not revealed by the evidence now before this court, nor do I think it could have been shown by any evidence, having regard to the general circumstances of the case, to have hung on too long or to have behaved otherwise than as a sensible business man or to have brought misfortune upon himself. When he gave up the business after three years, he got out of it at that time [pounds]3,500 from the purchaser to whom he sold it, and he had, at a knock-down price, which I think was forced upon him, [pounds]800 for the sale of such stock as he then had. *During the time that he was running or trying to run and revive this moribund if not dead, business, he drew [pounds]10 a week to live on out of the till, if one may use that expression, and he lived with his wife in part of the premises, for the totality of which he was paying a rental of [pounds]800 a year, plus, of course, rates. I think he should be debited with the [pounds]10 a week for the period and debited with [pounds]300 a year, making [pounds]900, for such living accommodation benefit as he and his wife then received from these premises.* I would take those two items at a round figure together of [pounds]2,500. Adding up the benefits which I have mentioned, I arrive at a figure of [pounds]6,700 and call it [pounds]7,000. At that point, comparing outgoings with such benefits as ought to be set off, there is a gap or balance of losses of [pounds]2,500. Then one considers other consequences in terms of finance, because no damages are being awarded, at any rate, in this case today, by the court for worry, strain, anxiety and unhappiness; it may be that in some cases such considerations might well be appropriate. He lost during the time he was trying to run this business additionally [pounds]700 that he borrowed from his mother and another relative. He incurred an overdraft of [pounds]1,400 with his bankers. At the time when he came out of occupation he was owing [pounds]480 odd for rates. He also owed some items, the items which he could actually recall in court, totalling about [pounds]100, for goods supplied. He had been paying [pounds]22 odd a month interest on the loan of [pounds]4,000 which he had to raise in order to enable him to meet the purchase price of the business and the stock, which I have already mentioned. I do not propose to say more about details. If it were appropriate to go into those item by item, then I would think that three or four days would be set aside before some tribunal to investigate with more complete discovery; I venture to hope the result would not differ very much from that which I, as a common juror, have arrived at. As I say, one brings in those items. I have taken them at [pounds]6,800, which I have called [pounds]7,000 for the benefits, a gap of [pounds]2,500; and, having regard

> to the plaintiff's evidence - when I say "evidence" I mean evidence before the trial judge - and his answers to questions in this court which I accept from him as an honest man, I think that a further round figure of [pounds]3,000 (for an estimated [pounds]3,380) should be added, and that his total loss should be [pounds]2,500 plus [pounds]3,000- [pounds]5,500, as an award of damages. That means that this appeal should be allowed, in my view, to that extent.
>
> [Emphasis mine.]

130 In the case at bar, the learned trial judge nowhere debited the appellants for the value of the ranch as a residence nor for such income as they had taken from the operation of the ranch for living expenses.

131 The facts in East v. Maurer have about them an essentially similar aspect of a fraudulent representor by subsequent acts effectively taking to himself the goodwill which he had sold. The head note sets the facts out thus:

> The first defendant owned and managed two successful hair salons in the same town and built up a considerable local reputation as a hair stylist. In 1979 the plaintiffs bought one of the salon businesses for [pounds]20,000, being induced to do so in part by a representation made by the first defendant that he had no intention of working in the other sale except in emergencies and that he intended to open a salon abroad. In fact the first defendant continued to work full-time at the other salon with such an adverse effect on the plaintiffs' business that it was never profitable and they were forced to sell it in 1989 for [pounds]7,500.

132 The representation which was false when made was surely made much worse by the acts in contravention of the representation.

133 These cases are not this case: goodwill was not part of this transaction.

134 Although that be so, I see in principle no objection to applying the method of Doyle v. Olby (Ironmongers) Ltd. to a case in which the fraud is as to the quality of the land when that land is to be used for future agricultural operations. But the method requires first calculating one side of the ledger, what might be called the "debits", which are the actual expenditures, so long as they are not too remote.

135 But for that method to be adopted, the court must first make findings as to what the purchaser has expended and next it must make findings as to the value of the benefits he has received. Included in those benefits must be the value of the lands as of the date of trial. Here, for instance, there is no finding by the learned judge as to the value of the ranch at the date of trial, nor is there any finding by him as to the benefits received from residential occupation.

136 If such a method is adopted, it necessarily excludes as part of an award the difference between the purchase price and the true value of the land at the time of the transaction.

137 To award that difference and then to superimpose a Doyle v. Olby computation is to run the risk of double counting.

138 If, because of the course of the trial, it was open to the learned trial judge, despite the absence of a plea to support what I will call the Doyle v. Olby approach, to adopt in whole or in part the Dendy report, he could not also make an award for the difference between the purchase price and the actual value.

139 To put all this another way, it was Dendy or Holmes, not both.

140 I am also, however, of the opinion that if the method adopted is the difference between the purchase price and the actual value, it was open to the learned judge to award further actual expenditures directly attributable to the fraud.

141 For myself, I consider the classic method is the better choice in this case.

142 As to Mr. Holmes' valuation, the appellants say:

> 62. The effect of using the cost of repair as the measure of damages is that the irrigated hay land is assigned a negative value. In a case of deceit, the successful Plaintiff is entitled to be compensated for the diminution in value of the asset. However, the measure of damages can never be more than the price paid.
>
> 63. The result can be analyzed in different ways, but the effect is the same. The amount of the award for capital loss is simply too high. For example, in both the cost approach to normal valuation and the alternative approach, timber was a constant and was valued at $200,000.00. The value of the land and buildings, net of timber, in both approaches was approximately $550,000.00. An award of $440,000.00 for capital loss reduces the effective price of the land and buildings to $110,000.00. The value of the buildings alone was $100,000.00. If you valued all of the land on the basis that it was non-arable ($200.00 per acre) the value of the land would be $117,000.00. The salvage value of the fixed irrigation equipment was estimated by Mr. Holmes at $70,000.00. In effect, if the ranch property had no agricultural value whatsoever, it would still be worth $287,000.00, plus the value of the timber. If you assume that, the effect of the use of the unsuitable irrigation water was to make the land entirely unfit for agricultural purposes, the net reduction in the value of the land would be $750,000.00 minus $487,000.00 equals $263,000.00 not $440,000.00 as found by the Trial Judge ($750,000.00-$487,000.00).

143 With respect, however, I do not consider the learned judge to have accepted the cost of repair as the measure of damages. He was accepting the cost of remediation as determining the price the mythical reasonable purchaser, knowing the truth, would pay for the land.

144 Thus, in Watts v. Morrow, [1991] 4 All E.R. 937 at 950 (C.A.), Ralph Gibson L.J. said in a case of a negligent surveyor's report:

> The cost of doing repairs to put right defects negligently not reported may be relevant to the proof of the market price of the house in its true condition: see Steward v. Rapley [1989] 1 E.G.L.R. 159; and the cost of doing repairs and the diminution in value may be shown to be the same. If, however, the cost of repairs would exceed the diminution in value, then the ruling in Philips v. Ward [[1956] 1 All E.R. 874 (C.A.)], where it is applicable, prohibits recovery of the excess because it would give to the plaintiff more

> than his loss. It would put the plaintiff in the position of recovering damages for breach of a warranty that the condition of the house was correctly described by the surveyor and, in the ordinary case, as here, no such warranty has been given.

145 In my opinion, to take into account, as the appellants suggest, a salvage value for the irrigation equipment, is speculative. But it is not speculative to say that the true value at the time of the transaction was: land, $100,000; buildings and fences, $100,000; and timber, $200,000; for a total sum of $400,000. On this head, therefore, the respondents are entitled to $350,000 ($750,000 - 400,000).

146 The next question is expenditures made after the purchase. Here, the difficulty is that the learned judge made no award for such expenditures as the new irrigation system, water testing and so forth, and the respondents did not cross appeal.

147 As it is put in their factum:

> 96. The respondents do not agree with the premise on which the trial judge awarded damages for out of pocket expenses, since he could have and should have awarded the special damages in the amount of $98,586.40 notwithstanding that they represented expenses incurred after the date of the breach. However, the respondents do not quarrel with the amount of the award of $90,000.00, which is why they did not cross-appeal on this issue.

148 In my opinion, the respondents should have cross appealed because this was not a matter of sustaining a judgment on a different footing from that of the learned judge. This was a matter of seeking an item of damage different in kind from that which sustained the learned judge's award of $90,000.

149 However, in the unfortunate circumstances of this case, including the delays in the court below, I would give leave to the respondents to cross appeal out of time and I would award them $98,586.40.

150 There is, to my mind, one further proper component of damages in this case. On all the evidence, Mr. Wiebe, confronted with this sodicity problem, actually expended much time and effort in attempting to solve it. His time is worth money, even though no witness put a value on his time.

151 I consider such an expenditure of time as an expenditure in mitigation and it is worth something.

152 I appreciate the respondents did not ask for such an award. In other circumstances I might say that the question of "how much" should go back to the learned judge. But to follow such a course in light of the delays in this case would not be right. Sometimes a little rough justice is the right thing to administer and I would award under this head to the respondents the sum of $30,000 for each of the years 1995, 1996 and 1997, for a total sum of $90,000.

153 The final question is that of interest.

154 By the Court Order Interest Act, R.S.B.C. 1996, c. 79:

1 (1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

(2) Despite subsection (1), if the order consists in whole or part of special damages, the interest on those damages must be calculated from the end of each 6 month period in which the special damages were incurred to the date of the order on the total of the special damages incurred

(a) in the 6 month period immediately following the date on which the cause of action arose, and

(b) in any subsequent 6 month period.

(3) For the purpose of calculating interest under subsection (2), and despite subsection (2), if the date of the order occurs

(a) before a date 6 months after the date on which the cause of action arose, or

(b) after the end of a 6 month period but before the end of the subsequent 6 month period,

interest must be calculated from the date on which the special damages were incurred to the date of the order.

155 The learned judge fixed the interest rates at the registrar's rates. He was not asked to do otherwise nor were we.

156 But if the respondents wish to seek, on the award of $350,000, a higher rate, for instance the same rate as they were obliged to pay the Bank of Montreal on the money they borrowed secured by the mortgage on the lands and on the money they borrowed for the irrigation system, I am of the opinion the Court should entertain it.

157 As, however, I am in the minority on the question of the quantum of the damages, I see no purpose in saying anything further on interest.

158 To sum up, I would allow the appeal, set aside the judgment below, and fix the damages at the total sum of $538,596.40.

159 As to the question of costs, the usual order in this Court is that costs follow the event, but I would, if I were not in the minority, be prepared to entertain submissions that this case deserves a different order.

SOUTHIN J.A.

* * * * *

CORRIGENDUM

Released: September 21, 2004.

[1] At p. 92, para. 145 of my judgment, the following sentence should be added:

> On this head, therefore, the respondents are entitled to $350,000 ($750,000 - 400,000).

[2] At p. 93, para. 149, the end of the sentence should read: "... I would award them $98,586.40."

[3] At p. 95, para. 156, line 2, the amount should be "$350,000" rather than $400,000.

[4] At para. 158, the amount should read "$538,596.40" rather than $598,596.40.

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