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(Winnipeg Centre)

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## **COURT OF QUEEN'S BENCH OF MANITOBA**

### **B E T W E E N:**

ALBIONEX (OVERSEAS) LIMITED and	)	<u>Counsel:</u>
PAGNAN S.p.A.,	)	
	)	<u>MARK NEWMAN,</u>
plaintiffs,	)	<u>DAVID J. KROFT,</u>
- and -	)	<u>DAVID A. SIMPSON,</u> and
	)	<u>DEAN G. GILES</u>
CONAGRA LIMITED and	)	for the plaintiffs
THE CANADIAN WHEAT BOARD,	)	
	)	<u>GEORGE J. ORLE, Q.C.</u> and
defendants.	)	<u>DARYL A. CHICOINE</u>
	)	for the defendant,
	)	Conagra Limited
	)	
	)	<u>COLIN R. MacARTHUR, Q.C.</u>
	)	and <u>CURTIS M. UNFRIED</u>
	)	for the defendant,
	)	The Canadian Wheat Board
	)	
	)	JUDGMENT DELIVERED:
	)	JULY 17, 2009

### **DUVAL J.**

[1] By amended statement of claim filed April 2, 2007, the plaintiff Albionex (Overseas) Limited claims \$2,981,433.48 U.S. plus interest, and general damages and costs, and the plaintiff Pagnan S.p.A. claims \$1,447,099.76 U.S.

plus interest, and general damages and costs against the defendants in respect of the purchase and sale in 1983 of a shipment of frost-damaged Red Spring Wheat described by the Canadian Wheat Board (hereinafter "CWB") as "Wheat – Ex. Special Bin". Both plaintiffs claim as general damages, loss of profit of \$1,447,099.76.

## **ISSUES**

[2] As against the CWB, the plaintiffs' claims are based on negligent misrepresentation and breach of collateral contract. As against Conagra Limited (hereinafter "Conagra"), the plaintiffs' claims are based on:

- (a) breach of contract;
- (b) breach of *The Sale of Goods Act*, R.S.M. 1970, c. S10 (now C.C.S.M. c. S10); and
- (c) breach of duty of care by negligent misrepresentation.

Conagra claims against the CWB in respect of any damages that might be attributed to it and relies upon *The Tortfeasors and Contributory Negligence Act*, C.C.S.M. c. T90.

## **BACKGROUND**

[3] On August of 1982, a portion of the Red Spring Wheat crops in Western Canada suffered widespread frost-damage, resulting in a record volume of the grain being degraded. At the time, four grades of this type of wheat existed, pursuant to the *Canada Grain Act*, R.S., 1985, c. G-10:

- (i) No. 1 Canada Western Red Spring Wheat;
- (ii) No. 2 Canada Western Red Spring Wheat;
- (iii) No. 3 Canada Western Red Spring Wheat;
- (iv) Canada Feed Wheat.

Canada Feed Wheat is a "catchall" grade for lower quality wheat which does not meet the standards established for No. 1, 2 or 3.

[4] The CWB is an organization created pursuant to the **Canadian Wheat Board Act**, R.S., c. C-24, with headquarters in Winnipeg, Manitoba. Since 1935, it has been mandated to market, within Canada and for export, certain grains grown in Canada. Part of its role is to maximize for the benefit of farmers, the price paid for the grain. In 1982, it was the exclusive marketer of Canada Red Spring Wheat.

[5] The **Canada Grain Act**, s. 3, creates the Canadian Grain Commission (hereinafter, the "Commission"), consisting of three commissioners appointed by the Governor in Council. Section 12 (now. s. 14) of the **Canada Grain Act** delineates the powers (now functions) of the Commission which include:

- (a) recommend and establish grain grades and standards for those grades and implement a system of grading and inspection for Canadian grain to reflect adequately the quality of that grain and meet the need for efficient marketing in and outside Canada;
- (b) establish and apply standards and procedures regulating the handling, transportation and storage of grain and the facilities used therefor;
- . . . . .
- (e) undertake, sponsor and promote research in relation to grain and grain products and, in so doing,

- (i) wherever appropriate, utilize technical, economic and statistical information and advice from any department or agency of the Government of Canada, and
- (ii) maintain an efficient and adequately equipped **laboratory**; [Emphasis supplied]

The Commission's laboratory is the Grain Research Laboratory (hereinafter the "Laboratory").

[6] Section 11 (now s. 13) of the *Canada Grain Act* specifies that in the interests of grain producers, the objects of the Commission shall be to establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets.

[7] Section 18 (now s. 23) of the *Canada Grain Act* states that in each crop year the Commission shall cause to be collected representative samples of the crops of western and eastern grain and, from those samples and from such other samples of the stocks of grain from any previous crop year as the Commission considers to be representative of the existing stock of any grain, cause to be prepared representative samples of:

- (a) each grade of grain set out in Schedule I (now "established by regulation that the Western Standards Committee or the Eastern Standards Committee considers advisable");
- (b) any other grade of western grain or eastern grain for which, in the opinion of the Commission, it would be appropriate to designate

either or both **primary standard samples** and **export standard samples**; and

- (c) any **grain** in respect of which the Commission wishes to obtain a recommendation pursuant to paragraphs (b) and (c) of s. 19(2) (now s. 24(2)(b) and (c)).

[8] The Commission conducts an annual crop survey after the harvest is completed. As crops are delivered by farmers to local elevators, samples are remitted from these rural elevators to the Inspection Division of the Commission. These samples are analyzed to determine the quality of the crop. The data resulting from the Commission's analysis is provided to the CWB to assist it in marketing these crops. In December of 1982, the Commission published a crop bulletin entitled, "Canadian Red Spring Wheat 1982 Crop", which provided data and conclusions based on tests completed in the fall of 1982. These included alveograph, farinograph, and extensograph test results with respect to grades 1, 2 and 3 of Canada Western Red Spring Wheat.

[9] The primary standard sample of a crop of Western Canada grain is set by the Western Standards Committee. It meets in late October or early November of each year after the harvest has been completed. The Committee approves samples to be used by grain inspectors to grade wheat. Two samples are created: the primary standard sample and the export standard sample. The primary standard sample reflects the minimum quality which must be met at rural elevators for any wheat to qualify for a particular grade. The export

standard sample reflects the **average quality** for the established grade which must be met for export from Canadian terminal elevators. The standards for the top three grades of Canada Western Red Spring Wheat were established by the Western Standards Committee for the 1982 crops. Canada Feed Wheat has no minimum or export standard and is used to designate any wheat which is inferior to the established grades.

[10] On learning of the extent of the August 1982 frost-damage to the Canada Red Spring Wheat crop, the CWB determined that it would need to develop a marketing plan for this frost-damaged wheat, which represented 20% of the total crop, and which appeared to be higher in milling and baking quality than Canada Feed Wheat.

## **FACTS**

[11] The facts as I have found them are as follows.

### **Parties**

[12] At the relevant time, the Agro Company of Canada Limited, which became Conagra Ltd. in 1986, was a grain trading company with headquarters in Montreal, Quebec, Canada. It was registered to carry on business in the Province of Manitoba and had an office in Winnipeg, operated by its agent, Malchy Grain Co. Hereinafter, the company will be referred to as "Conagra", although in 1982-83 the company's documents and correspondence referred to it as "Agro". By 1982, it had been an accredited exporter of the CWB for approximately 35 years. The use of accredited exporters formed part of the

CWB's overall marketing structure. Accreditation with the CWB entitled Conagra to purchase grain from the CWB for resale. It exported Canadian and U.S. grain to Europe and Asia, to Middle Eastern countries, and to Africa. Conagra had not sold Canada "Feed Wheat" to the Common Market between 1969 and 1982. Mr. Arnold Ceretti, since deceased, was a Senior Trader in its Export Department. Mr. Seymour Cramer was a Director and Senior Financial Officer of Conagra, which had established a long trading history with the plaintiff Pagnan S.p.A. (hereinafter "Pagnan").

[13] Pagnan is a company incorporated pursuant to the laws of Italy. It is a family-owned company carrying on the business of trading in grain. Its offices are located in Padova, Italy. The business began its operations in approximately 1918, at the end of World War I. The principal owners of the business were the brothers, Romano Pagnan (hereinafter "Romano") and Pietro Pagnan (hereinafter "Pietro"). Later, Giovanni Pagnan (hereinafter "Gianni") and Paolo Pagnan (hereinafter "Paolo"), nephews, also worked in the business. At trial, Paolo was the principal witness for Pagnan as Romano was deceased and Pietro was suffering from Alzheimer's disease. In 1982-83, Paolo was responsible for Pagnan's internal marketing and had been working within the business since 1973.

[14] Albionex (Overseas) Limited (hereinafter "Albionex") is a company incorporated in the Channel Islands. Its head office is located at St. Peter's Port, Guernsey. No witnesses were called on behalf of Albionex, except for a Director,

Mr. Leonard Kitzmuller, who was employed by the Lavoro Bank AG, in Zurich, Switzerland. He had accepted a directorship at the behest of his employer. Mr. Kitzmuller did not attend any directors' or shareholders' meetings of Albionex, nor was he able to locate any minutes of a meeting relating to the agreement for the purchase and sale of Wheat Special Bin. Albionex relies on the documentary evidence filed in these proceedings and the testamentary evidence advanced by Pagnan.

[15] In 1982-83, due to taxes/tariffs imposed by the European Common Market on all imported wheat, regardless of its quality, it was not financially lucrative for Italian grain traders to import lesser quality grades of wheat which were available in Europe. However, prior to 1982, Pagnan had imported higher quality wheat which was not then readily available in Europe.

[16] Conagra had used the services of a broker, Giulio Guetta (hereinafter "Guetta") and his Swiss firm, Mugra/Multigrain, for many of its transactions with Italian traders, including Pagnan. Conagra paid a commission to Guetta for his services on a sale. Pagnan also used Guetta as its broker. The role of such a broker in Italy was to act as a middleman, transmitting all relevant information from the potential seller to the potential buyer and vice versa, and to remain independent of each.

### Marketing of Wheat Special Bin

[17] Mr. William Spafford was the Assistant General Director of the Sales and Market Development Division of the CWB in 1982. He was responsible for

developing a marketing program for this frost-damaged wheat. In October of 1982, Mr. Spafford advised Mr. Gordon Machej, the Executive Director of the CWB's Marketing Directorate, that the supply of this wheat would be in the range of 1 to 1.5 million tons. Mr. Spafford recognized that if this wheat, which would ordinarily be graded "Feed Wheat", was going to be sold to other countries as food, it would need to be based on its better specifications and on the basis that it was a millable product.

[18] As part of its marketing approach, the CWB distributed "type samples" to prospective buyers, including accredited exporters. The Commission would send a "bulk sample" to the CWB which then distributed "type samples" to individual customers. This "bulk sample" was kept in a climate controlled sample storage facility located at the CWB's premises.

[19] By November 10, 1982, the CWB had received preliminary indications suggesting that 3.5 to 4 million tons of frost-damaged wheat were available for marketing. The CWB had received information from the Laboratory that some of this wheat was of millable quality. The preliminary data did not include the results of any baking tests, which took longer to complete.

[20] The CWB did not wish to market this wheat as "Feed Wheat", as this suggested that it was of lesser quality and useful for livestock feeding purposes only. To avoid the negative connotation for this wheat which was suitable for milling, it decided to market it as "Wheat Special Bin", based on established specifications.

[21] On cross-examination at trial, Mr. Spafford agreed that the term "Feed Wheat" had a negative connotation if someone was seeking to use wheat for human food products, as that designation was associated with wheat of the lowest quality. The CWB decided to set up a system to segregate from the "Feed Wheat" catchall grade, a portion of the wheat which was considered of millable quality by the CWB and the Commission. Because the primary focus was to market wheat with higher specifications, fit for milling, a change of name from that of "Feed Wheat" was important. Mr. Spafford confirmed that no new grade was ever created under the *Canada Grain Act* for "Wheat Special Bin".

[22] Dr. Keith Tipples was employed by the Commission as Director of the Laboratory in 1982-83. The Commission was consulted by the CWB in respect of the latter's marketing plan. Dr. Tipples stated that neither a primary standard sample nor an export standard sample were established for Wheat Special Bin. If one applied the **statutory grade**, Wheat Special Bin would be considered Canada Feed Wheat. Ultimately, **specifications** were set for Wheat Special Bin with respect to its test weight, the total permitted amount of foreign material (i.e., other cereals, seeds or other types of wheat), and in respect of heat damaged kernels. However, a new grade of wheat was not established.

[23] The CWB decided to distribute an information letter to its prospective buyers, i.e., both accredited exporters and those dealing directly with the CWB. Over time, three different types of information letters were prepared. A short form letter was sent directly from the CWB to end users and was accompanied

by an enclosed "type sample" of the grain. The long form of letter contained more detail and was intended to encourage follow-up by an end user. The form of letter forwarded to accredited exporters makes no reference to an enclosed sample. The latter is the form of letter sent to Conagra which was forwarded to Guetta who sent it to Pagnan. The CWB continued to revise these three forms of information letters throughout the fall and winter of 1982-83 as more information became available. Substantive changes to these letters were made in late February or early March of 1983, but the plaintiffs did not receive these revised letters.

### The CWB's Information Letter and Table of Data

[24] On November 24, 1982, the CWB distributed to potential customers and to its accredited exporters, including Conagra, an information letter (Ex. 1, Tab 108) relating to the frost-damaged Canada Western Red Spring Wheat, describing it as "Wheat – Ex. Special Bin", and a Table of Data, based on tests and the analysis of this grain conducted by the Laboratory of the Commission (see Appendix "A" attached hereto). The letter stated that a "type" sample had been prepared by the Commission to illustrate the average quality of the wheat.

It also stated:

... Milling and baking tests conducted by the Grain Research Laboratory of the Canadian Grain Commission shows that this wheat possesses what is known as "fair" milling quality and would be quite suitable for milling purposes.

Conagra sent a copy to Guetta who forwarded the information to Pagnan. The Table of Data provided information in respect of the quality and internal characteristics of both "low average" and "high average" samples of the wheat. The letter, relating to the external characteristics, stated that this Red Spring Wheat crop had suffered from an early frost and did not meet the **visual** specifications of the top three grades of Canada Western Red Spring Wheat (Nos. 1, 2 and 3). The letter also stated that:

... It is anticipated that the quality of individual cargo shipments of this wheat will be better than that represented by the "low" average sample and will likely be close to that represented by the "high" average sample.

The Table also stated that this wheat did not qualify for the top three grades of Canada Western Red Spring Wheat. The plaintiffs allege that the letter and Table misrepresented the quality of the grain received by them.

[25] The CWB had experience with frost-damaged wheat, resulting from a previously damaged crop in 1974. The Commission and the CWB were aware that the results of frost-damage can be highly variable. Dr. Tipples stated that some of this wheat could be at the upper limit of Canada Red Spring Wheat grade No. 3, while other portions of it would be significantly lesser in quality. In a September 29, 1982 memorandum to the CWB and the Commission (Ex. 1, Tab 99), Dr. Tipples stated that a major note of caution must always be used when interpreting data for a "type sample" because there were no grade specifications and Canada Feed Wheat was a "bottomless pit". He noted that individual samples might be much poorer than the sample created to represent

the "low average". In a memorandum of October 21, 1982 (Ex. 1, Tab 102), Dr. Tipples opined that the type of variability seen between the "high" and "low" average samples was to be expected in samples of this grade.

[26] A memorandum of Mr. Spafford dated November 8, 1982, notes that the CWB had been advised by Commission officials that in order to ship this grain on an export sale, as "Wheat – Ex. Special Bin", rather than as the grade "Canada Feed Wheat", it was required to leave the export terminal from bins registered as "Special Bins" with the Commission. Mr. Spafford's memorandum also refers to the Commission's indication that for a specific customer, it was possible to special bin a "Cadillac" package of frost-damaged wheat, as "Wheat – Ex. Special Bin" **to meet much higher specifications.**

[27] A number of drafts of the CWB letter were prepared and revised prior to its distribution in its final form. Dr. Tipples, of the Commission, expressed a concern with respect to the use of the words "fair milling quality and quite suitable for milling purposes". In a letter dated February 23, 1983 (Ex. 1, Tab 115) to the CWB's Chief Commissioner, Dr. Tipples stated:

I have warned Mr. Suderman that the Canadian Wheat Board should probably modify their letter that accompanies type sample packages that they send out since Laboratory milling data (Allis-Chalmers) appear to indicate a somewhat higher flour yield potential for this wheat than can be obtained commercially. ... [Emphasis supplied]

In the same letter, Dr. Tipples noted that the second "type sample" had a somewhat lower milling quality than the first "type sample".

[28] In a memorandum of March 3, 1983 to Mr. Suderman (Ex. 1, Tab 120), Dr. Tipples suggested that a six-page paper, prepared by the Laboratory, entitled, "The Quality Characteristics of 'Wheat – Special Bin'", "would be suitable material to send in its present form to potential buyers of Wheat – Special Bin." An identical paper entitled, "The Quality Characteristics of 'Wheat – Canada Feed'" was enclosed. Nevertheless, the CWB decided and Mr. Suderman confirmed that 'it was understood that this paper would only be sent if a customer requested further quality information on Wheat Special Bin and would otherwise not be sent out with the type sample'. After receipt of Dr. Tipples' memorandum of March 3, 1983, Mr. Spafford directed Mr. Suderman, the CWB's Director of the Market Development Department of the Sales and Market Development Division, to draft a simpler, shorter and if possible, more "honestly positive" text of Dr. Tipples' paper of March 3, 1983. Thereafter, a revised information letter of March 14, 1983 stated that 'some variability in the milling and baking quality of Wheat Special Bin can be expected from one shipment to another but it is anticipated that the quality of individual cargo shipments of Wheat Special Bin will be somewhat better than that represented by the "low" average sample and may be close to that represented by the high average sample.' This letter also provided the additional information that 'the most efficient and effective way in which Wheat Special Bin can be used is in a blend with soft wheats.' The reference to "fair milling quality and quite suitable for milling purposes" was omitted. More information was provided relating to the

hardness of the wheat and that more mechanical work would be required to mill it. In a letter of March 14, 1983 to members of the CWB and to employees of the Laboratory, Mr. David Suderman stated that "the revised letter, therefore, simply states that tests have been conducted, that the data is attached and leaves the reader to draw his own conclusion".

[29] The "Quality Characteristics of Wheat Special Bin" report stated that this wheat was physically much harder than normal Canada Western Red Spring Wheat, that extra grinding would be required resulting in more mechanical damage to starch granules, and that the damaged starch would absorb more water than intact, undamaged starch granules. It also specified that some variability in milling and baking quality could be expected between shipments of this grain and that the quality of individual cargos was anticipated to fall **between** the "low" average and "high" average specified in the Table. The memorandum also indicated that the most efficient and effective use of Wheat Special Bin would be to blend it with soft wheats, and that a baker would be well advised to blend it with a wheat flour of lower starch damage, in order to optimize absorption, dough-handling characteristics and baked product quality. It noted that the extent to which blending could successfully be accomplished with soft wheats would be limited by the protein content requirement for the end product.

[30] This more detailed description of the wheat was not provided to potential buyers unless they asked the CWB for further information. Neither Conagra nor Pagnan received this additional information.

[31] Dr. Tipples opined that buyers put greater stock in representations made by an independent body such as the Commission, than on representations made solely by a seller on behalf of the Commission. Dr. Tipples did not see or approve the CWB's information letter and Table of November 24, 1982. He was not in the country at the time of its preparation and distribution. Nor is there evidence that any other representative of the Commission approved the form of letter before it was published by the CWB in its final form.

[32] The decision to use the words "fair milling quality and quite suitable for milling purposes" was that of the CWB. This description had not been used by the Commission/Laboratory personnel in memoranda to the CWB. Although Mr. Spafford, on behalf of the CWB, stated that the Commission had approved their use, I accept the evidence of Dr. Tipples that he did not see or approve of the form of letter dated November 24, 1982 sent to Conagra. Without a more detailed explanation of the characteristics of the wheat for purposes of milling and baking, Dr. Tipples had opined to the CWB that these words could be misleading. He had requested that the final version of this letter be forwarded to him for review. He later requested in a memorandum of March 3, 1983 that the six-page paper prepared by the Commission, entitled, "The Quality Characteristics of 'Wheat – Special Bin'" should be included in the material

forwarded to a potential purchaser. This suggestion was not adopted by the CWB.

[33] For interested potential purchasers, the Commission had prepared a first "type sample" of the grain, which the CWB's information letters indicated was "to illustrate the **average quality** of this wheat". The CWB's and Conagra's expectations were that any interested party who obtained a "type sample" would conclude that it was representative of the quality of the wheat to be delivered.

[34] During his examination for discovery of April 5 to 7, 2000, Mr. Spafford agreed that two two-kilogram "type samples" of Wheat Special Bin were forwarded by the CWB to Conagra on December 14, 1982. But the business records of the CWB indicate that two samples of "CFW" (Feed Wheat) were sent to Conagra on December 7, 1982 – a 20 kilogram and a two kilogram sample. He also agreed, based on a review of the CWB's records (Table of sent samples – Ex. 1, Tab 142), that two five-kilogram "type samples" of Wheat Special Bin were sent by the CWB to Conagra on January 5, 1983 and that additional samples were also sent on January 11 and January 26, 1983.

[35] In his examination for discovery, Mr. Seymour Craimer, Conagra's Controller in 1982, admitted on behalf of Conagra that it sent a sample of Wheat Special Bin to Pagnan on December 7, 1982 (p. 61, Q & A 274). He stated that at that time a two-kilogram sample was sent through Malchy Grain on its behalf. This sample originated in Winnipeg and was shipped to Padova, Italy. Initially in its amended statement of defence [para. 6(a)], Conagra had admitted that it

delivered a sample of Wheat Special Bin to Pagnan in early December 1982. As a result of Mr. Craimer discovering and disclosing further documentation in his possession during the trial which referred to the sample as Feed Wheat, Conagra filed a re-amended statement of defence on February 5, 2008. It resiled from its former position, only admitting that it sent a sample of "wheat" to Pagnan. It was also Mr. Craimer's understanding that Conagra shipped an 11-kilogram sample of Wheat Special Bin from Winnipeg to Montreal, which arrived on January 5, 1983 and was provided to Mr. Attilio Pugina for Pagnan. It was Conagra's intention that the sample reflect the quality of wheat which Pagnan might purchase through Conagra. Mr. Craimer stated that generally all of its samples came from the CWB.

[36] The evidence at trial is confusing as to the description of the December 7, 1982 sample sent by Conagra and received by Pagnan on December 8-10, 1982. The examinations for discovery of Pagnan were conducted on the basis that Conagra had admitted in its statement of defence that it forwarded a sample of Wheat Special Bin to Pagnan at the request of Guetta in early December of 1982. However, 25 years later, during the course of the trial, Mr. Craimer, for Conagra, produced documents which he had had in his possession throughout his meetings with Conagra's legal counsel and at his examinations for discovery. The evidence now discloses that Guetta requested a sample of "Canada Feed Wheat" which was forwarded by Conagra. The records of the CWB disclose that in November and December of 1982 and thereafter, any samples requested by

any potential client or accredited exporter were described as either "CFW", i.e., Feed Wheat, or as a "T sample of WSB", i.e., a "type sample" of Wheat Special Bin. Therefore, Wheat Special Bin was not included in the designation CFW or Feed Wheat by the CWB in its records.

[37] Therefore, based on the evidence at trial, I have concluded that Conagra provided a CWB sample of Canada Feed Wheat to Pagnan in early December of 1982. Based on the evidence of Paolo and Mr. Annito Quaglia, an Italian miller with whom Pagnan had a business relationship, this sample of Feed Wheat was of a higher quality than that referred to by the Commission and Laboratory in the Table of Data's reference to "high" average sample.

### Pagnan's Course of Conduct

[38] Pagnan was familiar with Canada Red Spring Wheat No. 1. Because this grain was graded by the CWB, Pagnan had purchased it based on its name, relying on the reputation of the CWB and the wheat's known standard of high quality and without obtaining a sample. However, when a grain was unknown to it, Pagnan's course of conduct would be to obtain a sample. If a small sample seemed satisfactory, then Pagnan would request a larger sample. The grain would be examined visually to determine if its appearance was homogeneous, the kernels untouched by disease, and how it smelled before milling. Pagnan's practice was also to send a sample for analysis by alveograph. In 1982, Pagnan had never purchased inferior qualities of wheat from Canada or the United States

as it was economically unprofitable to do so, due to the duty imposed and the availability of inferior quality duty-free wheat within Italy.

[39] Romano first received a sample of Wheat Special Bin from Guetta at the Milan market in the fall of 1982. Pagnan requested a larger sample through Guetta. Conagra sent the first sample on December 7, 1982. It was received between December 8-10, 1982. I have concluded that Conagra sent a sample of Canada Feed Wheat. Romano and Paolo handled and smelled the sample, which they then forwarded to the firm of Molino Quaglia S.p.A. (hereinafter "Molino Quaglia") for analysis. Paolo stated that his intention was to obtain an evaluation of the grain for milling purposes, as compared to wheat available in the Italian marketplace at the time. Pagnan received a report of analysis by alveograph, i.e., an alveogram dated December 23, 1982 from Molino Quaglia (Ex. 7 – original copy part of Ex. 55). The alveogram's relevant results were:

W (strength of dough)	243
P	116
P/L (balance of viscous and elastic properties of dough)	1.70
F.N. (falling no.)	370

[40] Dr. Russell Carl Hoseney was called by the plaintiffs to provide expert opinion evidence in respect of the evaluation of wheat for purposes of milling into flour for baking. He is eminently qualified, having 45 years of experience working on wheat quality, including the milling, baking and other uses of wheat and other cereal grains. His qualifications are reviewed in more detail at para. 101. He stated that flours used for bread-making will have a higher W value, an

average being 200. Flour used to bake cookies or biscuits need only have a W value of  $100\pm$ . A P/L ratio of 1.00 or less is desirable for bread-making. Higher values indicate that the dough is excessively elastic.

[41] Paolo telephoned Mr. Quaglia and discussed the results of the analysis. Both Paolo and Mr. Quaglia considered the results positive. On the basis of these discussions and the alveogram results, Paolo formed the opinion that this was a good wheat. He immediately contacted Romano and a decision was made to send Mr. Pugina to Canada to obtain other samples.

[42] Subsequently, on December 30, 1982, Pagnan received a telex from Guetta. This telex provided the information referred to in the CWB's information letter and Table of Data of November 24, 1982. Paolo translated it from English to Italian for Pietro and the other members of Pagnan. Guetta had received this information from Conagra. The advice in the letter that the wheat was of "fair milling quality and quite suitable for milling purposes" was an important consideration for Paolo, who concluded that the wheat was suitable to be milled and to produce bread. Paolo said that the information reinforced Pagnan's decision to obtain further samples (Transcript of September 7, 2007, p. 5, lines 6-25).

[43] Paolo stated that he also relied on this information because paragraph two of the letter stated that milling and baking tests had been conducted by the Commission's Laboratory and he assumed that it was a sophisticated and advanced laboratory. He stated that although he reviewed the data contained in

the Table attached to the letter, he did not understand much of the information. He assumed that the data was consistent with the general statement in the letter that the wheat was of "fair milling quality and quite suitable for milling purposes". He also relied on the statement in paragraph three of the letter that "the quality of individual cargo shipments of this wheat will be better than that represented by the 'low' average sample and will likely be close to that represented by the 'high' average sample."

[44] However, **Pietro** stated during his examination for discovery of May 12, 1986 (p. 147, Q & A 807), read in on February 19, 2008 (p. 37, lines 16-28), that Pagnan did not "believe only the paper or through the word of Guetta, but we would check if the wheat was in conformity with the explanation given to us". Pietro stated that in the ordinary course of business, Pagnan bought Canada Red Spring Wheat on the basis of grade. But in this case, he needed to take reasonable precautions (p. 38 of February 19, 2008 read-ins).

[45] Where the evidence of Paolo differs from that of Pietro, I have relied on that of Pietro, who was directly involved at the relevant time and who was examined for discovery in closer proximity to the events. I have, therefore, concluded that Pagnan did not intend to rely only upon the CWB's information letter and Table of Data but wanted to obtain further grain samples and, if satisfactory, to contract on the basis of a sample or samples.

[46] On January 4, 1983, Pagnan sent Mr. Pugina to Montreal, Canada to obtain samples of this wheat. He obtained two samples, one from Montreal

(hereinafter "the Montreal sample") and another from Winnipeg (hereinafter "the Winnipeg sample"), and returned to Italy, arriving on January 6, 1983. Mr. Pugina advised Pagnan that he was not satisfied with the quality of the sample of the wheat obtained from an elevator and being loaded in Montreal, which had been described to him by Mr. Ceretti of Conagra as "Wheat Special Bin". Mr. Craimer confirmed that Mr. Pugina was provided with an 11-kilogram sample of "Wheat Special Bin" from Winnipeg through its agent, Malchy. Mr. Craimer's statement is supported by a waybill from Winnipeg. One sample of wheat (the Winnipeg sample) was provided to Molino Quaglia which analyzed it by alveograph and provided the results to Pagnan. The alveogram received by Pagnan on January 7, 1983 from Molino Quaglia (Ex. 9) in respect of the Winnipeg sample denoted better quality than the first sample received by Pagnan from Conagra in early December of 1982. However, the second alveogram (the Montreal sample), which was tested by A.G.E.R. and which was received by Pagnan shortly thereafter (Ex. 10), indicated that no criteria could be provided on the analysis due to its poor quality. The CWB's business records indicate that the CWB provided Conagra with two five-kilogram "type samples" of Wheat Special Bin on January 5, 1983.

#### Mr. Annito Quaglia

[47] The alveogram of December 23, 1982 received from Molino Quaglia in respect of the December 1982 sample were important considerations for Pagnan. Mr. Quaglia was called by the plaintiffs and qualified by the court to give opinion

evidence with respect to the evaluation, purchase, and commercial milling of wheat into flour for baking purposes. Mr. Quaglia has been a buyer of grain for his family's mill, i.e., the business of Molino Quaglia, since 1945. He was trained in the evaluation and purchase of grain by his father. The family mill has been in operation since 1928 in Italy. In 1945-46, Mr. Quaglia had completed a two-year course respecting the operation of a mill. He had received training related to mill and laboratory testing equipment and the assessment of grain for purchase and for milling purposes. Since 1945, Mr. Quaglia had performed any and all tasks in the family milling business. He had operated a successful business in Italy, increasing the mill's capacity from eight metric tons of wheat per day in 1945 to approximately 400 metric tons per day in 1998. Since 1955, one of Mr. Quaglia's responsibilities has been to determine which wheat is to be blended, depending on the variety and characteristics of the wheat and depending on the particular purpose. In order to strengthen French and Italian wheat, he has blended them with U.S. Northern Spring Wheat, Argentinean Plata, and/or Canada Red Spring Wheat No. 1. Prior to 1983, Mr. Quaglia was not aware that there were three grades of Canada Red Spring Wheat.

[48] Mr. Quaglia also received training in the reading and understanding of alveograms, i.e., the report resulting from the alveograph analysis, although he has never performed the analysis himself. These functions are performed by Molina Quaglia's laboratory technician.

[49] Molina Quaglia has had a long working relationship with Pagnan. Mr. Quaglia admitted that his company had never previously tested frost-damaged wheat, nor had he ever examined any. Although he expressed the opinion that no adjustment need be made to the alveograph equipment in order to assess frost-damaged wheat and that the alveogram would reveal its characteristics, I have not relied upon Mr. Quaglia's evidence in that respect. I prefer and rely upon the evidence of the expert witnesses, Dr. Hosney and Dr. Bushuk in respect of the operation of the alveograph equipment and their opinions relating to this particular frost damaged wheat. Both of these latter expert witnesses are highly qualified and experienced in this field.

[50] In 1982, Mr. Quaglia was the sole buyer of wheat for Molina Quaglia. His purchases were made on the basis of a sample, not on the basis of an established grade. In 1982, his usual practice was to submit any samples, after visual and sensory examination, to his laboratory for analysis by alveograph. These tests provided information respecting specific weight, humidity, protein, falling number, and glutens, both wet and dry.

[51] Molina Quaglia received samples of wheat from Pagnan and performed alveograph tests. The five alveograms (Ex. 44) produced by Molino Quaglia and provided to Pagnan are as follows:

- (i) alveogram of December 23, 1982;
- (ii) alveogram of January 7, 1983;
- (iii) second alveogram of January 7, 1983;

- (iv) alveogram of May 18, 1983; and
- (v) alveogram of May 19, 1983.

[52] Both samples tested on May 18 and 19, 1983 from the Bandar Denpasar suggested poor and very poor grain in Mr. Quaglia's opinion, based on the analysis performed by his company's technician. However, the December 23, 1982 alveogram results suggested to him that this was a good grain, with characteristics that could reinforce much weaker types of grain. He based his opinion on the falling number and the gluten and protein results. On reviewing the alveogram of December 23, 1982, Mr. Quaglia told Paolo by telephone that the analyzed grain sample was good wheat and would be appropriate for blending with Italian or French domestic grains in order to obtain a good flour for baking. He suggested that he would pay 39,000 Lira per quintal for this wheat. He expressed the opinion that its value would be approximately 1,000 to 2,000 Lira less than the cost of U.S. Northern Spring Wheat, which Mr. Quaglia said he purchased on a regular basis. He viewed its value as being to reinforce weaker or milder wheat.

[53] Mr. Quaglia said that Molina Quaglia tested two samples of wheat delivered by Mr. Pugina on behalf of Pagnan in January of 1983. One sample was "very bad" grain (the Montreal sample), while the other sample was good (the Winnipeg sample). He communicated his opinion with respect to these two samples to Paolo and sent a letter dated January 8, 1983 enclosing the results of

the alveograph which had tested the good sample (the Winnipeg sample). He did not forward the test results with respect to the sample which was not good.

[54] A sample of the cargo wheat was tested by Molina Quaglia on May 18 and 19, 1983. It indicated very poor wheat, in his opinion. On May 19, 1983, water was added to bring the humidity to 15%. In Mr. Quaglia's opinion, both test results suggested a very poor dough.

[55] Mr. Quaglia indicated that he purchased and milled part of Pagnan's cargo in May of 1983. He sold flour milled from this wheat to others, but took it back and resold it as animal feed. He said that Molina Quaglia had suffered a loss and Pagnan has offered to pay for it.

[56] During cross-examination, Mr. Quaglia stated that he did not discuss his evidence with any member of Pagnan. However, Ex. 50 is an undated letter from Pagnan, located in Mr. Quaglia's file, which provided information with respect to customers who had purchased wheat shipped on the Bandar Denpassar from Pagnan, including information respecting four truckloads of the wheat purchased by Molina Quaglia. Also, Mr. Quaglia had prepared four pages of notes, representing 128 answers to questions forwarded to him on November 10, 2006 by plaintiffs' counsel. He had denied receiving a list of questions from Pagnan or its counsel. He reviewed these notes prior to giving evidence at the hearing and tried to memorize them.

[57] Mr. Quaglia's credibility was called into question when he insisted that despite having reviewed over 50,000 alveograms in the past 25 years, he could

recall the circumstances surrounding the five alveograms produced by Molina Quaglia in respect of this matter (Ex. 44). He stated that although he made no written notes of the taste of the December 23, 1982 sample which he chewed, he recalled his visual inspection. He said that his lack of notes led him to assume that the wheat was perfect. Although the alveogram dated December 23, 1982 indicated that the sample was delivered by a Pagnan broker named "Zoppellaro", Mr. Quaglia insisted that he recalled Paolo delivering that sample. Considering that 25 years have elapsed, these statements are suspect.

[58] Mr. Quaglia denied that Molina Quaglia consults experts such as plant biologists or bakers, or any other type of expert in order to produce top quality products. However, when referred to the Molina Quaglia website, which states that the team avails itself of skilled experts (farmers, biologists, bakers, confectioners, chefs, technicians, pizza chefs) whose skills cover various products, Mr. Quaglia stated that his response had been in relation to the purchase of wheat. He did not admit the obvious inconsistency.

[59] When questioned on cross-examination by counsel for the CWB with respect to the missing pages of a letter received from Pagnan, one page of which had been located in his file, Mr. Quaglia suggested that the missing pages were removed by counsel for Conagra when he reviewed the file.

[60] Mr. Quaglia initially denied that Molina Quaglia purchased the majority of its foreign wheat from Pagnan. When shown his written answer at No. 60 of Ex. 49, he admitted that in 1982 Molina Quaglia purchased the majority of its wheat

produced outside of Italy from Pagnan. To explain this inconsistency, he stated that whether these purchases of foreign wheat from Pagnan were "in the majority" or only "in part" was the same to him.

[61] Although Mr. Quaglia insisted, during the giving of his testimony at trial in 2008, that Paolo had delivered the December 1982 sample of grain to him, his notes (Ex. 49, No. 78) indicated that he recalled receiving the sample from the broker, Zoppellaro. In explaining the inconsistency, Mr. Quaglia said that he might have suffered from a lack of memory at the time he prepared his notes, 10 years earlier, but that his testimony at trial was correct. He admitted that memory does not improve with the passage of time. On further questioning and on being directed to No. 106 of the notes (Ex. 49), Mr. Quaglia admitted that he could have prepared that document on November 11, 2006, one to two years previously, not 10 years previously.

[62] I have taken into account that English is not Mr. Quaglia's first language. However, his evasiveness, inconsistent testimony, and statements which strain credulity have led me to conclude that I cannot place reliance on all of his testimony. I do accept the results of the alveograph tests (Ex. 44) performed by the Molina Quaglia technician, but have relied on the interpretation of these alveograms by the expert witnesses, Drs. Hosenev and Bushuk. I also accept Mr. Quaglia's evidence of the information which he provided to Pagnan with respect to the alveogram dated December 23, 1982 and one alveogram of January 7, 1983 (the Winnipeg sample). I also conclude that he did not provide

Pagnan with the second alveogram, related to the poor sample tested on January 7, 1983, which produced no results (the Montreal sample). I accept Mr. Quaglia's evidence that in 1982 Pagnan was aware that up to that date, Molina Quaglia had only purchased Canada Red Spring Wheat No. 1. I also accept that when initially contacted by Paolo in December of 1982, Mr. Quaglia was told that Pagnan would be sending him a sample of wheat which should be a good wheat and that he was asked to do tests to determine its characteristics.

### Type Samples

[63] The first "type sample" provided by the Inspection Division of the Commission to the CWB and tested by the Commission was slightly better than the "high average" specified in the Table of Data, according to the brainstorming discussion paper prepared by Mr. Abou-guendia and Mr. Spafford of the CWB, dated November 10, 1982. Mr. Abou-guendia was the CWB's Coordinator of Technical Programs within its Sales and Market Development Division. For example, the flour percentage yield of the "type sample" was 72.0, compared to 71.8% for the "high average"; its protein percentage was 13.4, compared to 12 for the "high average"; the "type sample's" starch damage was 50, compared to 51 for the "high average"; its ash percentage .54, compared to .55 for the "high average"; the "type sample's" colour was 3.2, compared to 3.4 for the "high average". The test weight was the same for both. (This comparison is based on "type sample" characteristics found at Ex. 1, Tab 107, p. 2 and the CWB's Table of "high average" characteristics found at Ex. 1, Tab 108).

[64] Two kilograms of wheat were sent by Conagra to Pagnan on December 7, 1982 with a Phytosanitary Certificate describing it as "Canada Feed Wheat". Mr. Cramer said that its agent Malchy's usual practice was to obtain its samples from the CWB delivery room. There is no evidence based on the CWB's records that the sample received by Pagnan on December 8-10, 1982 was Wheat Special Bin. The plaintiffs bear the onus of proving that the sample of wheat which originated from the CWB was a sample of Wheat Special Bin, as their allegations of negligent misrepresentation by the CWB are based in part on the allegation that the "type sample" of Wheat Special Bin, provided to Pagnan in early December of 1982, was of better quality than the "high average" sample and misrepresented the quality of the wheat. I have concluded that the plaintiffs have not established on a balance of probabilities that the sample Pagnan received in early December of 1982 was a sample of Wheat Special Bin.

[65] The evidence establishes that the "type samples" were of superior quality to the **overall quality** of the 1982 frost-damaged crop. In particular, the first "type sample" was far superior. The Commission and the CWB were aware of the variability of the quality of the crop. An internal memorandum dated March 4, 1983 (Ex. 1, Tab 121), signed by the Executive Director of the Commission, W. J. O'Connor, was sent to D.G. Stephens, the Executive Director of the Canadian International Grains Institute, expressing the Commission's conclusion that Wheat Special Bin is of **poor** milling quality, that shipments will "exhibit considerably more variability in milling and baking quality than shipments of

higher grades of Canadian wheat", and that it is very difficult to talk in terms of **average** Wheat Special Bin or of **typical** flour from the said wheat. He strongly recommended that the Institute not attempt to demonstrate the milling and baking qualities of the wheat in any Institute programs and use extreme caution in discussing the quality of this wheat with potential users.

[66] The Commission did an extensive analysis with respect to 15 cargoes of the wheat which were shipped from Canadian ports in March and April of 1983, using "loading samples", obtained at the time of loading. Reports prepared by Drs. Dexter and Martin of the Commission in a paper dated September 6, 1983 (Ex. 1, Tab 135), by Drs. Dexter, Preston, Tipples and MacGregor in a paper published in the journal of the American Association of Cereal Chemists (Ex. 99), and a 1983 report of the Laboratory (Ex. 3) were tendered in evidence. Ultimately, these experts concluded that to produce a commercially acceptable product, Wheat Special Bin had to be blended with 70% of a higher quality milling wheat. This would not have been required in the case of the "type sample".

[67] The CWB's "bulk sample" (usually 500 kilograms provided by the Commission's Inspection Division) was the source from which smaller samples, referred to as "type samples", were sent to potential buyers with the information letter. The "type sample" was described by the CWB as representing the **average quality** of the wheat. However, the evidence establishes that the "type sample" (whether the first, second or third) was of superior quality to the

overall quality of the 1982 crop, and, in particular, to the wheat shipped on the Bandar Denpasar. The CWB chose not to disclose quality data from the Commission, i.e., Dr. Tipples' report of March 3, 1983, which it had in its possession. That latter fact is not relevant, unless the statements in the information letter, considered with the Table of Data, and any CWB "type samples" provided to Pagnan constituted a negligent misrepresentation of the quality of the wheat.

### **THE CONTRACTS**

[68] A contract was entered into by Pagnan with Conagra in March of 1983, although it was dated January 10, 1983. Conagra undertook to sell and ship 96,000 metric tons of "best quality Canadian Spring Wheat – Ex. Special Bin, excluding Feed Wheat" for a price of \$124 U.S. per metric ton F.O.B., i.e., Pagnan was responsible for shipping costs. Conditions included in the said contract were that the bills of lading were "to show 'Canadian Spring Wheat'" (at Pagnan's request), and that Conagra was to supply Phytosanitary Certificates. The contract further described the quality of the wheat by the following specifications, i.e.:

- TEST WEIGHT	MINIMUM 76.0 KG/HL
- TOTAL FOREIGN MATERIAL (INCLUDING OTHER CEREALS)	MAXIMUM 3.0 PERCENT
- INCLUDING SEEDS	MAXIMUM 0.5 PERCENT
- WHEAT OF OTHER CLASSES	MAXIMUM 5.0 PERCENT
- HEAT DAMAGED KERNELS	MAXIMUM 1.0 PERCENT

The contract provided that the official Canadian Certificate of Inspection was to be final as to quality and condition, at loading. This contract and the subsequent contract with Albionex were signed by representatives of the contracting companies.

[69] In March of 1983, Pagnan requested that Conagra substitute Albionex as the buyer of the wheat in its stead. Conagra agreed to do so, on the condition that Pagnan provide its guarantee, which Pagnan did. This contract is also dated January 10, 1983, although not entered into until March of 1983. It is identical to the contract between Pagnan and Conagra. Paulo stated that this approach was taken to minimize the risk of exposing Pagnan's position in the Italian marketplace.

[70] On April 15, 1983, a contract of sale and purchase (Exs. 18, 19, 20 and 23) was entered into between Albionex and Pagnan for the sale to Pagnan of 25,000 metric tons of this grain, at a cost of \$144 U.S. per metric ton, including freight costs. It is signed by representatives of Albionex and Pagnan. By letter dated April 18, 1983, signed by representatives of both parties, it was agreed that the cargo was intended to be identical in quality and specifications to that described in the contract between Conagra and Albionex dated January 10, 1983.

### The Shipment

[71] The description of the wheat on the Certificate for Canadian Grain (hereinafter the "Certificate Final") is "Wheat – Ex. Special Bins" (Ex. 1, Tab 32),

which is a "certification as to grade only". This is a Canadian Grain Commission certificate for Canadian grain export.

[72] It is known in the trade that a Certificate Final is considered final as to quality, unless fraudulent. Section 44 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, provides that:

A document purporting to be a certificate ..., issued and signed by an inspecting officer under the authority of *The Canada Grain Act*, specifying the **grade** of any grain that has been inspected by that officer, is evidence of the grade of that grain. [Emphasis supplied]

[73] On April 20, 1983, 24,849.755 metric tons (two combined shipments) of "Wheat Special Bin" were loaded from CWB terminals onto the vessel Bandar Denpassar at Baie Comeau, Quebec and transported to Italy. A loading sample of the shipment was sent by Air Lufthansa from Scandia Shipping Agencies Ltd. to Pagnan on April 21, 1983 and received on or about April 25, 1983 (Ex. 12 – air waybill).

[74] When the cargo arrived, Pagnan obtained a sample, inspected it, and sent it to A.G.E.R. Laboratories for analysis. A.G.E.R. Laboratories is an Italian association of companies and individuals involved in the Italian grain business. It provided an alveogram on April 27, 1983, which results caused Pagnan concern.

[75] Pagnan forwarded another sample of the shipment to Molino Quaglia for analysis and received two alveograms on May 18 and 19, 1983. The results were also concerning.

[76] A visual inspection of the grain raised Pagnan's concerns. Pagnan had also received an official ship receipt describing the wheat as "Canada Feed

Wheat Special Bin", which also raised concerns. The Bandar Denpassar arrived in Chioggia, Italy on May 8, 1983 and began discharging its cargo on May 9, 1983. This was completed on May 12, 1983.

[77] On April 27, 1983, Albionex paid \$3,090,232.03 U.S. to Conagra for the cargo shipped on the Bandar Denpassar. Conagra's profit was approximately \$40,000 U.S. On May 3, 1983, Albionex invoiced Pagnan \$3,578,364.72 U.S. (24,849.755 metric tons x \$144 U.S. per ton). On September 3, 1985, Albionex and Pagnan agreed to settle the debt for a lesser sum. Pagnan paid to Albionex, \$2,544,182.36 U.S. between November of 1984 and October of 1985. As part of the settlement, Pagnan agreed to pursue this action on behalf of Albionex, as well as to reimburse Albionex, if successful, for its share of any awarded damages.

[78] Before the shipment's arrival, Pagnan had pre-sold parts of the shipment to three customers. After delivery to these customers, Pagnan received a number of complaints. On May 11, 1983, as a result of Pagnan's expressed concerns, representatives of Conagra, the CWB, and three members of Pagnan, including Paolo, met at Guetta's offices in Milan, Italy. Pagnan complained about the unacceptable quality of the wheat and unsuccessfully requested that Conagra accept its return. On May 17, 1983, the wheat was formally rejected in writing by Pagnan, on behalf of Albionex, in a telex to Conagra from the broker, through Fruico S.A., a company owned by Pagnan. Pietro was Fruico S.A.'s Managing Director. Albionex sought replacement of the cargo with grain conforming to the

quality agreed upon in the contract. By telex dated May 18, 1983, Conagra refused. Further telexes were then exchanged between Albionex and Conagra during May and June of 1983. Ultimately, Albionex refused to accept the remaining six shipments of wheat from Conagra.

[79] The position of the CWB is summarized in a memorandum from Mr. Spafford dated July 6, 1983 (Ex. 101), which states that it was not involved as a direct seller to Pagnan, that the cargo and its physical specifications clearly exceeded minimum export specifications and recent Wheat Special Bin cargo specifications, that Pagnan could not have expected a Canada Western Red Spring Wheat grade at \$124 U.S. F.O.B., and that the CWB could arrange for consultations with the Commission for technical assistance, which Pagnan had rejected.

[80] The plaintiffs take the position that the goods provided by Conagra and the CWB did not conform to the quality description in the contract, i.e., "best quality Canadian Spring Wheat – Ex. Special Bin – excluding Feed Wheat". Conagra takes the position that the cargos of "Wheat Special Bin" delivered to Albionex met the specifications of the contract and excluded Feed Wheat. Both Conagra and the CWB argue that the wheat was capable of being milled into flour and used for baking products fit for human consumption. (Paragraphs 19 and 20 of Conagra's Re-Amended Statement of Defence filed February 5, 2008; paragraphs 21 and 25 of Statement of Defence of the CWB.) Conagra's pleadings state that the quality specifications of the cargo exceeded the CWB

specifications, that it was not "Feed Wheat", and that Conagra was under no obligation to test it prior to delivery.

[81] The question of whether the quality of the wheat provided by Conagra through the CWB complied with the description in the contract is the first issue to be determined. Negotiations between Conagra and Pagnan respecting the quality description of the wheat are, therefore, relevant.

### **NEGOTIATIONS BETWEEN PAGNAN AND CONAGRA RESPECTING QUALITY**

[82] The persons primarily involved in the contract negotiations in 1982-83 on behalf of Pagnan were Pietro and Romano. Paolo, Pietro's nephew, joined the Pagnan family business in 1969. He testified based on his personal knowledge gleaned from being present during discussions. At the trial, which commenced in April of 2007, he said that his Uncle Romano had died in 1989 and that his Uncle Pietro was 94 years of age and suffering from Alzheimer's disease. Pursuant to Queen's Bench Rule 31.11(7), the plaintiffs were granted leave to read into evidence portions of Pietro's examination(s) for discovery. His affidavit of February 8, 1993 was filed as Ex. 32 in these proceedings. Pietro died later in 2007.

[83] The agreement was primarily negotiated by Pietro on behalf of Pagnan. Mr. Ceretti represented Conagra in those negotiations. Mr. Ceretti is now deceased. Both parties were assisted by the broker, Guetta. Guetta was not called as a witness by either party. Gianni, Paolo's brother, was responsible for

the execution of contracts. Gianni presently suffers from early on-set Alzheimer's disease. At the commencement of the trial in April of 2007, Paolo was the only remaining member of the family able to testify with respect to the contract negotiations.

[84] In 1982-83, Pietro and Gianni were Pagnan's Chief International Trader and Chief Administrator, respectively. Romano, Gianni and Paolo's desks were all located in one room. Discussions respecting the business took place in an open forum.

[85] Pagnan decided to negotiate with Conagra for the purchase of Wheat Special Bin. Originally, Pagnan's intention was to negotiate a contract based on a sample, so as to obtain wheat which was of the quality of the better sample received by Pagnan, i.e., the Winnipeg sample (Ex. 9). (See Transcript of Pietro's evidence read in at trial on February 19, 2008, pp. 104-5, Q & A 512 to 517). This sample was better than the Table's "high average". A description suggested by Conagra of "Canada Wheat Special Bin" was not acceptable to Pagnan. However, Conagra refused to sell the wheat on a sample contract basis. Pietro said that Pagnan had initially intended to identify the "best possible lots" equal in quality to the December 1982 sample, but learned before Mr. Pugina was sent to Canada that lots were spread out throughout the country and that this was not possible. Pagnan had hoped to identify certain lots, take samples from these identified lots, and then reach an agreement with Conagra for the purchase of these particular lots, consistent with the samples taken.

[86] Telexes were exchanged between Pagnan and Conagra. In an attempt to arrive at a compromise, Conagra sent a telex dated January 11, 1983 (Ex. 1, Tab 18) to Guetta, who sent it to Pagnan. Mr. Ceretti, on behalf of Conagra, confirmed that "as explained on the phone, we will arrange to select the best possible lots ... on this wheat". He confirmed that this would not be a sample contract (Ex. 1, Tab 18). This term, whereby Conagra agreed to select the "best possible lots on this wheat", was important to Pagnan, which was giving up its request for a sample contract. Pagnan replied by telex the same day (Ex. 1, Tab 20), through Guetta, that it would accept as a description: "Best Quality Canadian Spring Wheat – Ex. Special Bin – with absolute exception of feed quality". Pagnan had made it clear that it would not accept Feed Wheat quality grain and that it wanted the best possible quality of this wheat. By reply the same day, Conagra, through Guetta, accepted that description (Ex. 1, Tab 22). Pietro stated during his examination for discovery that negotiations had taken place between Mr. Ceretti of Conagra and Gianni of Pagnan on January 11, 1983 and that Mr. Ceretti had undertaken to select the best possible lots of Wheat Special Bin (examination for discovery of Pietro of November 30, 1989, p. 124, Q & A 556).

[87] At his examination for discovery of May 12, 1986, Pietro admitted that he intended to market the wheat in Italy as "Canadian Spring Wheat". Pagnan did not intend to advise potential buyers that this wheat was frost-damaged. This was the first time that Pagnan was purchasing Canadian wheat based on

conformity to specific milling and baking characteristics. The contract negotiated by Pagnan with Albionex used the term "Canadian Spring Wheat" to describe the cargo, he said, because the contract would be required for customs and import departments in Italy, because this description was known within the Italian market, and because using the words "best quality Wheat Special Bin" would have depreciated the wheat's value within the marketplace. Pietro believed that Pagnan's contract with Conagra guaranteed that Pagnan would receive wheat of a quality above the "high average" referred to in the CWB's Table. The plaintiffs take the position that the contract between Albionex and Conagra guaranteed the same quality of wheat.

[88] Pagnan agreed to pay an additional \$7 U.S. per metric ton in order to obtain Wheat – Ex. Special Bin of the "best quality". The price of \$124 U.S., F.O.B., to be paid to Conagra included this additional \$7 premium.

[89] Additionally, Pietro stated during his examination for discovery that Mr. Ceretti of Conagra had agreed to provide wheat of a quality above the "high average". Pagnan sought to guarantee that it would receive a quality of wheat better than the "high average" sample referred to in the CWB's letter and Table.

[90] Pagnan, through negotiations with Conagra, was seeking to purchase wheat which would correspond with the sample (referred to in the evidence as the Winnipeg sample), of which the test results by Molino Quaglia were higher than the first sample received by Pagnan. Pagnan also sought to assure that it would not receive grain of the quality tested by Molino Quaglia from which no

results could be obtained by alveograph testing (the Montreal sample). To assure receipt of this higher quality wheat, Pietro stated that it was agreed with Conagra that the grain to be delivered to Pagnan would be better than the high average of the Table.

[91] Pietro admitted, during his examination for discovery of May 12, 1986, that Pagnan sent Mr. Pugina to Canada because it did not intend to rely solely on the information which it had received from Guetta. He said: "... but we would check if the wheat was in conformity with the explanation given to us" (p. 147, Q & A 807). Pietro stated that when considering intrinsic characteristics of wheat, he was referring to milling and baking characteristics as disclosed by the alveograph test. When referring to external characteristics, he was referring to the CWB's letter setting out test weight, the size and appearance of the kernels, the water content, and the soundness of the kernel.

[92] Pietro knew, before concluding the contract with Conagra, that Pagnan was purchasing wheat of lesser quality than Canadian Spring Wheat Nos. 1, 2 or 3 (examination for discovery of Pietro of May 20, 1986, p. 546, Q & A 2670). Pagnan was aware that there was a risk involved in selling frost-damaged Canada Red Spring Wheat in the Italian market by describing it as Canada Red Spring Wheat, without advising that it was frost-damaged. It decided to take that risk. Pietro stated that although Pagnan was interested in purchasing the wheat after the analysis of the first sample by Molino Quaglia, it had not yet made a decision, even after receiving the Conagra telex which contained the

information set out in the CWB's letter and Table of Data. Pagnan intended to look into the matter further (examination for discovery of Pietro of November 30, 1989, p. 73, Q & A 326 and 327). Pietro stated that the quality specifications set out in the CWB letter were external characteristics only and too nebulous. Pagnan received information from Mr. Pugina, that he did not recommend that Pagnan buy the wheat which he had seen being loaded at the Montreal terminal onto a Russian vessel. Mr. Pugina indicated that it was of lower quality. When tested by Molino Quaglia, that sample was deemed not suitable for Pagnan's purposes (the Montreal sample).

[93] Regarding the CWB, Pietro admitted during his examination for discovery of November 30, 1989 that Pagnan had no information or evidence to suggest:

- (a) that the CWB was selling wheat on the basis of the Table's "high average" (pp. 110-11, Q & A 500);
- (b) that the CWB ever promised to provide "high average" specifications of the Wheat Special Bin (p. 111, Q & A 503);
- (c) that the CWB would be selling this wheat as "Best Quality Canadian Spring Wheat – Ex Special Bin Excluding Feed Wheat" (pp. 112-13, Q & A 509).

[94] Pagnan's position that it wished to negotiate a contract based on the "Winnipeg sample" of the wheat was confirmed by a telex sent to Guetta on January 11, 1983 (Ex. 1, Tab 16). Pagnan was not interested in the inferior quality wheat being shipped at Montreal (the Montreal sample). The telex

confirms that Pagnan wanted the best quality wheat with the specifications described under "high average" of the Table, not the "inferior quality". Pagnan was prepared to pay \$7 U.S. per metric ton more to obtain a higher quality of this wheat. This telex was forwarded to Conagra, but there is no evidence that this information was ever provided to the CWB. Pietro agreed that there was no contract for a sale by sample. The description ultimately agreed upon was intended by Pagnan to address its intention to purchase wheat of the quality of the "Winnipeg sample" because a sale by sample could not be made. Pietro said that Pagnan wanted "the best of the best", i.e., wheat having a quality higher than the high average (examination for discovery of Pietro of November 30, 1989, p. 132, Q & A 593). Pietro stated that he would not have concluded the contract if only "Wheat – Ex. Special Bin" had been specified as the description (examination for discovery of Pietro of November 30, 1989, p. 134, Q & A 602 and 603).

[95] On behalf of Conagra, Mr. Craimer admitted (his examination for discovery of June 28, 1995, p. 305, Q & A 1390) that the wheat shipped and delivered to Italy had 'poor milling and baking qualities and the results would not be acceptable in respect of baked products'. Mr. Craimer admitted that Conagra knew that any Canada Western Red Spring Wheat that did not meet the grade standard for Nos. 1, 2 and 3, would be graded as "Canada Feed Wheat". The information in the CWB's letter and Table of Data were sent by Conagra to potential buyers on its letterhead, so that any potential buyers would respond to

Conagra, rather than to the CWB. Mr. Cramer admitted that the CWB was not privy to the contract between Conagra and Pagnan.

[96] Mr. Cramer stated that between January and July of 1983, the price for Conagra to purchase from the CWB, Canada Western Red Spring Wheat No. 1 was \$223.38 Cdn. per metric ton, Canada Western Red Spring Wheat No. 3 was \$208.38 Cdn. per metric ton, and Canada Feed Wheat was \$153.10 Cdn. per metric ton. On December 29, 1982, Conagra quoted a price to Guetta of \$154.23 Cdn. per metric ton for Wheat Special Bin. Conagra's sale to the plaintiffs at \$124 U.S. per metric ton included tariffs, interest, bank charges, a broker's commission, and exchange rate (between Canadian and U.S. dollars).

### **EXPERT WITNESSES**

[97] Opinions respecting the quality of the Wheat Special Bin were expressed by Dr. Keith Tipples of the Commission's Laboratory. He was called by the CWB. Dr. Tipples was fair and straightforward; he was not defensive or evasive. He impressed me as being an honest and clear witness. Opinion evidence was also provided by Dr. Russell Carl Hosenev, called by the plaintiffs, and by Dr. Walter Bushuk, called by Conagra. All of these expert witnesses were highly qualified to express opinions relating to the quality of the wheat in question and as to its milling and baking properties. The credibility of each of these witness's testimony was not impugned, although their opinions differed in some respects.

[98] Dr. Tipples obtained a Ph.D. in 1962 from the University of Birmingham, England, Department of Applied Biochemistry. Prior to obtaining his Ph.D.,

Dr. Tipples obtained a Higher National Bakery Diploma from the London Borough Polytechnic in 1956. He began work as a research scientist in 1963 with the Laboratory of the Commission on a National Research Council Postdoctoral Fellowship, studying wheat enzymes, and then became Head of the Milling and Baking Research Department of the Laboratory. He carried out research aimed at understanding the physical, chemical and biochemical basis of wheat "quality" related to value and suitability for flour millers and bakers in Canadian and international markets. His responsibilities also included developing new and improved methods of assessing milling and baking quality. On an annual basis, he oversaw and interpreted ongoing wheat quality evaluation of new harvest production, cargo shipments, grading standards, and potential new varieties of grain. He became Director of the Laboratory in 1979 and held that position until 1998. As Director of the Laboratory he was responsible and accountable for the planning and conduct of basic and applied research and related scientific activities in support of Canada's grain quality and safety assurance system. This included the dissemination for marketers and end users of reliable information on the quality of new harvest production and ongoing cargo shipments. As the Chief Chemist of the Commission, he acted as the principal scientific advisor to the Commission and the grain industry on matters of grain quality and safety. He was responsible for Canada's international liaison on grain quality standards and methods of analysis, and he participated in, and coordinated, market support activities of the Laboratory in many market countries. As Chief Chemist

for the Commission, he was a member of the committees on Western and Eastern Grain Standards.

[99] Dr. Tipples also had prior experience with frost-damaged Canada Western Red Spring Wheat as a result of the analysis and information obtained from the 1974 frost-damaged harvest.

[100] In his report of March 3, 1983, entitled "The Quality Characteristics of 'Wheat – Special Bin'", Dr. Tipples opined, as follows:

This frost-affected wheat, although not eligible for the top milling grades, was found to possess a number of desirable characteristics which suggested that it could find a place as a food-use grain. ...

He expressed the view that the major effect of frost was reflected in poor milling quality relative to top grade wheat and that the harder kernels would require extra grinding resulting in more mechanical damage to starch granules. He opined that the baking quality of flour milled from 100% Wheat Special Bin was considerably poorer than flour milled from top grade Canadian wheat, not just because of lower gluten quality but because of the compounding effect of high starch damage. He recommended judicious blending with other wheats.

[101] Dr. Russell Carl Hosenev was called by the plaintiffs. He obtained a Ph.D. degree from Kansas State University in 1968 and worked as a research chemist for the United States Department of Agriculture from 1956 to 1970 in the Hard Winter Wheat Quality Laboratory in Manhattan, Kansas. In 1971, he was appointed an Associate Professor of the Department of Grain, Science and Industry at the Kansas State University and became a full Professor in 1975 and

Professor Emeritus in 1997. From 1997 on, he did consulting work as part of R&R Research Services, Inc. He is a member of the American Association of Cereal Chemists and has been Editor in Chief of "Cereal Chemistry" since 2001. In 1991, he was designated a Fellow of the American Association of Cereal Chemists. In 1995, he received the Harald Perten Award from the International Association of Cereal Chemists.

[102] Part of his responsibilities as a research chemist in the Hard Wheat Quality Laboratory was to evaluate hard bread wheat samples submitted by wheat breeders from the central United States, evaluating same for milling and baking quality. The laboratory also conducted research into the factors responsible for wheat and flour quality. As a Professor at Kansas State University for 25 years, he taught courses in flour and dough testing, cereal science, and advanced cereal chemistry. The flour and dough testing courses included use of the alveograph and its use in the evaluation of flours. Dr. Hosney has published extensively; his curriculum vitae includes 341 publications.

[103] Based on his extensive experience, he stated that grade Nos. 1, 2 and 3 of Canada Western Red Spring Wheat are sought in the international marketplace for the purpose of strengthening or "carrying" low quality flours and, thus, producing better quality bread.

[104] Dr. Hosney was asked to express what he would have concluded from reading the statements in the CWB's letter and Table of Data, i.e., statements respecting Wheat Special Bin that:

- (a) it did not meet the visual specifications of the top three grades of Canada Western Red Spring Wheat;
- (b) milling and baking tests conducted by the Laboratory of the Commission showed that this wheat possesses what is known as fair milling quality and would be quite suitable for milling purposes.

[105] He stated that the terminology "fair milling quality" is used to describe Canada Western Red Spring Wheat No. 3 in Schedule III of the *Canada Grain Act* Regulations, as of August 1, 1980, and for Canadian grain standard specifications of official grades of Canadian grain by the Commission. Therefore, he would have concluded that the difference between Wheat Special Bin and Canada Western Red Spring Wheat No. 3 was a visual one, i.e., that the former would have more visually obvious shrunken and/or immature kernels. With respect to the phrase "quite suitable for milling purposes", he would interpret that to mean that the Wheat Special Bin could be **economically** milled to produce flour suitable to make acceptable bread products.

[106] With respect to the data obtained from an alveograph test, he opined that the two most important pieces of information are the "W" factor and the "P/L" ratio. The "W" is related to the strength of the dough. Flours used for bread-making will have higher "W" values, close to or higher than 200. Flours for baking cookies or biscuits have "W" values in the order of 100±. The "P/L" ratio indicates the balance of elastic and viscous properties of the dough. A "P/L" of approximately 1 or less is desirable for bread-making. Higher than 1 values

indicate that the dough is excessively elastic. That type of flour may be used for blending with less strong flours, but it does not make good bread by itself.

[107] After reviewing the alveograms received by Pagnan, dated December 23, 1982 (relating to the December 7, 1982 sample), dated January 7, 1983 (analyzed by Molino Quaglia), and dated March 18, 1983 (analyzed by A.G.E.R.), Dr. Hosenev opined that these alveogram reports indicate a strong flour that would be suitable to blend with weaker flour. He noted that these alveogram results are similar to those reported in "Canadian Red Spring Wheat 1982 Crop", Crop Bulletin No. 154, prepared by the Commission and the Laboratory. He expressed the opinion that these alveogram results suggest that this wheat would have improved a weaker French and Italian wheat in 1982-83. These alveograms suggested that flour produced from milling this wheat, when blended with weaker wheat, would produce dough with properties necessary to produce commercially acceptable bread products.

[108] He also reviewed alveograms dated April 27, 1983 (prepared by A.G.E.R.), May 18, 1983 and May 19, 1983 (prepared by Molino Quaglia), relating to samples of grain taken from the shipment on the Bandar Denpassar. The results indicate high to extremely high "P/L" ratios. In Dr. Hosenev's opinion, the test results indicate a severely damaged wheat which would not be useful for blending with weaker flour. He notes that an alveogram dated July 11, 1983 (prepared by the Commission) provides similar results in respect of the cargo grain as those reported in these alveograms. It also suggests a poor wheat.

[109] He reviewed the memorandum of November 3, 1982 prepared by Dr. Tipples of the Commission, which provided data relating to the first "type sample". Dr. Hosenev opined that the "type sample" was frost-damaged, showed low kernel weight, and high starch damage, resulting in flour of a dark colour and in a dark crumb colour of bread. Nevertheless, the loaf volume BSI and flour yield were in the normal range. This first "type sample" was a reasonable wheat for milling and baking, particularly for blending with other wheat to produce bread. He opined that it would be suitable for blending with weaker French or Italian flours. He stated that the "type sample" of Wheat Special Bin would produce flour which, when blended with weaker flours, would result in stronger dough and better bread. Although reasonable bread products could be made from this blended flour, the product would have a slightly darker colour.

[110] Having reviewed information relating to the cargo shipped on the Bandar Denpassar on April 23, 1983, Dr. Hosenev opined that this wheat was severely damaged which affected both its milling and its baking properties. The SIG was 57%. The power consumption for milling purposes was high and the yield low. Baking results showed a low BSI, poor loaf appearance, and a dark crumb colour. This wheat would not be suitable for blending with French or Italian wheat. Even if blended, the product would be of poor quality with poor appearance and dark colour.

[111] Dr. Hosenev opined that the Wheat Special Bin shipped on the Bandar Denpassar on April 23, 1983 was not of "fair milling quality". In his opinion, the baking results were dramatically poorer than those of Canada Feed Wheat shipped on the Jillcord. He opined that the Bandar Denpassar cargo was not suitable for milling purposes and that the flour resulting from the milling of this grain was not capable of producing acceptable bread.

[112] Dr. Hosenev also noted that the baking data with respect to the Jillcord was slightly better than the baking data related to the "type sample" and much better than the Bandar Denpassar cargo sample. Both the Jillcord cargo sample and the "type sample" would be capable of blending with French or Italian wheat to produce flour acceptable for bread-making in Italy. When the Bandar Denpassar cargo sample was compared to the "high average" sample referred to in the CWB's information letter, the cargo sample had much poorer milling and baking qualities. When the cargo sample was compared to the "low average" sample referred to in the letter, the baking data of the cargo sample revealed a slightly better loaf volume, i.e., BSI. However, the bread loaf's appearance and crumb colour was poorer than the "low average" sample. Both the Jillcord cargo sample and the CWB's "type sample" had higher quality milling and baking characteristics than the Bandar Denpassar cargo sample.

[113] Dr. Walter Bushuk was called as an expert witness by Conagra and also provided a report. Dr. Bushuk obtained a Ph.D. in physical chemistry from McGill University in 1956. He was a Postdoctorate Fellow in Strasbourg, France. He

worked as a research chemist with the Laboratory from May of 1953 to January of 1961. He became Head of the Basic Wheat Research Section of the Laboratory in 1961 for 13 months. In May of 1962, he took the position of Director of Research for The Ogilvie Flour Mills Company until September of 1964, when he returned as Head of the Wheat Section of the Laboratory for approximately two years. He became a Professor in the Department of Plant Science of the University of Manitoba between October of 1966 and June of 1972. For one year he was Director of Technology for the Canadian International Grains Institute. He returned as a Professor in the Department of Plant Science of the University of Manitoba in July of 1973 until August of 1986. He continued as a Research Professor and Research Consultant until May of 1994, when he became a Professor Emeritus at the University of Manitoba. Among his various national and international committee memberships, Dr. Bushuk remains a member of the Scientific Advisory Committee of the American Institute of Baking since 1974 and of the Canadian National Committee of the International Standards Organization since 1980. He is an Associate Editor of the Journal of Cereal Science. He is the Chairperson of the Faculty of Agriculture Research Committee and has lectured extensively. In 1990, he was elected a Fellow of the Agricultural Institute of Canada and of the American Association of Cereal Chemists. He has been bestowed numerous awards and honours, including the Order of Canada for life-long contributions to Canadian

science, education, and the agricultural industry. He has published over 300 scientific and technical papers on a variety of topics in cereal chemistry.

[114] Dr. Bushuk discussed the various equipment and methods used to test wheat. The alveograph was developed for the testing of soft European wheat. The grinding of soft wheat does not result in much starch damage, so that the results of the alveograph are reasonable. He stated that there is a disagreement at present as to whether the correct procedure to follow is one of constant water, or one of constant dough consistency. In the latter, adjustments in the amount of water may be required. A farinograph measures the amount of water that must be added to flour to form a dough of appropriate consistency for baking, and it measures the time required to mix the dough to its peak consistency. An extensograph measures resistance to extension by the height of the curve and extensibility by its length. The information provided is similar to that of an alveograph test in terms of fundamental properties.

[115] In Dr. Bushuk's opinion, the extensograph provides more reliable, more useful information than the alveograph because the test takes into account the requirements for different amounts of water to produce dough of the right consistency. The alveograph provides similar information **if the starch damage does not interfere** with the result that is obtained, i.e., when dealing with softer medium wheat, where the starch damage is low and the protein plays the major role on the shape and size of the alveogram curve.

[116] Although the alveograph is used in Europe and in North America to provide data and analyze grain samples, Dr. Hosney, in his report of November 15, 2006 at p. 6 (Ex. 57), notes that protein content in Europe is generally reported on a **dry weight basis**, while in North America it is reported on a 13.5% to 14% **moisture basis**. Therefore, data reporting 12% protein content in Europe is equal to 10.3% protein content in North America (on a 14% moisture basis).

[117] Dr. Bushuk reviewed the CWB's letter of November 24, 1982 and the attached Table of Data. In his opinion, the Table's data with respect to both "low average" and "high average" samples does not support the statement in the letter that the wheat is of fair milling quality. The Table information discloses that the flour ash content is too high, relative to the yield value, and that the starch damage value is much too high. Dr. Bushuk stated that test results relating to protein, to starch damage, to the wet gluten, and amalyse activity of flour are relevant in a determination of baking quality. He stated that protein is very important, as the higher the protein content, the better the quality of the flour for bread-making. The falling number test relates to the amalyse activity of flour, to the starch damage, and to the production of gas during fermentation. Wet gluten plays a role in the retention of gas during the baking process, and it controls the volume and texture of bread.

[118] He stated that a baking test is the ultimate test of the baking quality of the flour. The remix test, where the flour is blended with other flour, not only

reflects the quality of the test flour, but also its ability to carry weaker flours. The Table of Data attached to the CWB's letter of November 24, 1982 (Ex. 108) does not disclose the results of alveograph tests. In his opinion, the dough test performed suggests that a farinograph and extensograph were used.

[119] Dr. Bushuk expressed the opinion that an experienced and competent miller or baker would interpret the information in the Table of Data to conclude that this wheat was not of "fair milling quality", based on the relationship between the weight per 1,000 kernels and the flour yield. An experienced and competent miller or baker would conclude from reading the Table of Data that neither the "low average" nor the "high average" of this wheat would produce satisfactory bread, mainly due to the extremely high starch damage. He opined that the bread results confirmed this opinion. He stated: "These samples indicate wheat is of low quality and could not be used either alone or in a blend to produce high quality bread" (Transcript of trial, direct examination of September 27, 2007, p. 20). He based this opinion on the baking aspect, i.e., on the data respecting the loaf volume for 100% Wheat Special Bin and for 50% of it blended with other flour. He opined that the amount of starch damage was exceptionally high compared to normal flour. The "high average" sample referred to in the Table of Data did not improve the volume of a loaf of bread when blended with other flour, nor did the "low average" sample improve it to any significant degree.

[120] Based on the Table of Data, he would expect that when blended, the flour produced from these Table samples could be used, but the suitable amount would need to be determined by experimentation. In his opinion, because soft wheat is usually of low starch damage, adding it to Wheat Special Bin would help in the milling process and could slightly improve the baking quality because of the diminished amount of damaged starch overall. However, the Table of Data indicated that adding 50% soft wheat to the "low average" sample improved its baking performance, but it decreased the baking performance of the "high average" sample.

[121] Dr. Bushuk referred to the Laboratory's 1983 annual report (Ex. 3, p. 5), not available until 1984, which concluded that "**poor gluten properties** rather than high starch damage was the major factor contributing to poor baking quality". The report suggests that to exhibit commercially acceptable milling and baking performance, the frozen wheat had to be blended with at least 70% higher quality wheat.. Dr. Bushuk opined that blending a high protein wheat with one having poor gluten properties would help to correct this defect.

[122] Therefore, if the baking quality was being affected by **high starch damage**, then blending with soft wheat would help correct it. However, if the poor baking results were due to poor gluten properties, then blending with high quality or other hard wheat would help resolve that defect.

[123] Dr. Bushuk agreed with the opinion expressed by Dr. Robert Matsuo, a research scientist and Head of the Durum Wheat Section of the Laboratory, in his

memorandum dated July 11, 1983 (Ex. 1, Tab 96), that the alveograph results respecting the Bandar Denpassar cargo suggested **high starch damage** which affected its poor milling quality. He stated that the results reflect a "very poor quality wheat" from a milling and baking perspective compared to Nos. 1, 2 or 3 Red Spring Wheat (Transcript of trial evidence of February 15, 2008, p. 77, lines 30-33).

[124] Dr. Bushuk expressed the opinion that the characteristics of the Wheat Special Bin loaded on the Bandar Denpassar fell between the "low average" and the "high average" described in the Table of Data and was not significantly different from the "high average". In Dr. Bushuk's opinion, even if the cargo had been equivalent to the "high average" sample described in the Table of Data, it would have made little difference in the milling and baking performance. He opined that the official cargo sample was within the quality specifications set out in the contract of January 10, 1983 and consistent with the CWB's Table of Data.

[125] Dr. Matsuo had analyzed the CWB's "type 3" sample. In Dr. Bushuk's opinion that sample was only slightly different from the "high average" sample referred to in the Table of Data. The "type 3" sample was closer to the "high average", although it fell between the "low" and "high" average. In Dr. Bushuk's opinion, whether the "low" average or the "high" average was provided, the difference in baking quality would be slight.

[126] Dr. Bushuk referred to a comment in Dr. Matsuo's memorandum that the alveogram curve can indicate either dough strength or high starch damage. He

agreed with Dr. Matsuo that the curve for frost-damaged samples indicated a high level of starch damage. He disagreed with Dr. Hosenev's opinion that it suggested a strong flour, stating that Dr. Hosenev had overlooked the effect of high starch damage on the alveogram curve. Without having performed any laboratory baking tests, Dr. Bushuk opined that based on his experience, blending 10%-15% of frost-damaged flour with high quality strong flours would give acceptable baking quality.

[127] Dr. Bushuk agreed with Dr. Hosenev that the alveogram results of January 7, 1983, of December 23, 1982, and of March 18, 1983 suggested that the wheat would improve the French and Italian soft wheat, provided that the soft wheat was not frost-damaged, i.e., starch-damaged. Italian and French wheat in the 1980s had lower protein content than Canada Western Red Spring Wheat.

[128] However, before the trial, Dr. Bushuk had not been provided with the results of the Martin and Dexter Report No. 4, dated September 21, 1983, entitled "Mill-induced starch damage levels and their effect on milling and baking quality of Wheat – Special Bin" (Ex. 1, Tab 138). Dr. Dexter was the Laboratory's milling specialist.

[129] At p. 2 of their report, Drs. Martin and Dexter concluded that **starch damage** was not a limiting factor in Wheat Special Bin's baking quality. They suggested that starch properties and protein quality were other factors to consider. However, Dr. Bushuk disagreed with this opinion and agreed with

Dr. Matsuo that the Special Bin flour exhibited high starch damage. Dr. Matsuo's report of July 11, 1983 states:

Alveograms were run on the cargo sample and on a 50:50 blend with soft wheat flour. The attached curves show that the "Special Bin" flour in a blend produces a reasonable curve. The reason is that the level of starch damage in soft wheat flours is very low and in combination **with "Special Bin" flour of high starch damage** the level of starch damage in the blend is lowered sufficiently to produce a reasonable alveogram. [Emphasis supplied]

[130] In Dr. Matsuo's opinion, "Special Bin" flour could be blended with soft wheat flour for leavened products, although it would not perform well by itself. Dr. Bushuk agreed with counsel for the plaintiffs that when tested by Dr. Matsuo, the remix blend baking test (i.e., 50:50) demonstrated that the soft wheat was carrying the sample of cargo wheat (see Ex. 59, p. 2). He agreed that this is the opposite of what one would have expected if the cargo wheat was a strong one. In fact, Dr. Bushuk stated that the cargo wheat was "terrible wheat". He noted that the information on the CWB Table of Data with respect to the "low average" sample indicated that it also was being carried by the soft wheat, if you examined the baking test loaf volume results. However, the "high average" sample of Wheat Special Bin did carry the soft wheat in the blended test. Dr. Bushuk stated that the term "milling quality" is commonly used in the grain trade to indicate **both milling and baking quality**.

[131] Dr. Bushuk stated that any knowledgeable person within the grain industry would have had a clear understanding of the product being offered upon reading the CWB's letter and Table of Data. Although in his opinion this

was poor wheat, a miller who could blend 10% of Wheat Special Bin with a higher quality wheat to make an acceptable flour for bread-making purposes might consider it cost effective when the cost of this wheat was \$50 to \$70 per ton less than the top three grades of Canada Red Spring Wheat. Any increased costs related to power consumption and additional wear and tear on machinery to grind this harder wheat would be small factors in his opinion, compared to the cost of the wheat. He concluded that the information in the CWB Table of Data was factually correct and that the Bandar Denpassar cargo fell within the range between the "low" and "high" average samples of the Table of Data.

[132] Dr. Bushuk compared the test results between the Bandar Denpassar cargo sample, the "high average" sample, and the CWB's "type 3" sample and concluded that there was little to choose between them (Ex. 59). He opined that each of these wheat samples could provide some improvement of flour, if blended with soft wheat which was not starch-damaged.

[133] Dr. Hoseney expressed the opinion, based on information obtained from the American Society of Agronomy and other sources, that the wheat grown in Italy in 1982-83 was of generally low quality, having low protein content and poor gluten strength. However, he noted that it had improved substantially, so that by 1996, 64% of the wheat produced in Italy was suitable for bread-baking.

[134] In a notation on Dr. R. Matsuo's report of July 11, 1983, D. Pound, the Chief Commissioner of the Commission in 1983, opined that the milling and baking quality results respecting the Bandar Denpassar cargo indicated that "this

was the worst cargo yet leaving Cdn. ports" (Ex. 1, Tab 96). A sample was taken from every cargo departing a Canadian port and Dr. Matsuo's report includes an analysis of a sample taken from the Bandar Denpassar cargo. The CWB takes no issue with Dr. Matsuo's analysis of this official loading sample.

[135] The CWB received a complaint from another purchaser of Wheat Special Bin, i.e., Nissho Iwai American Corporation. Mr. E. C. Isaac, the General Director of the CWB's Sales and Market Development Department, replied in a letter dated March 13, 1983 (Ex. 107), by including two reports authored by the Commission, confirming that more milling was required to grind this wheat which was harder than normal. Therefore, the flour yield was lower than the top grades of Canada Western Red Spring Wheat, the ash content was higher, and the flour colour darker. Because more milling was required, more starch damage occurred, as well as higher water absorption which could result in a softer product. Because it required careful adjustment of the water absorption, he concluded that the most effective and efficient use of this wheat was to blend it with soft wheat.

[136] Mr. Spafford stated that the CWB does not dispute the opinion expressed by the Commission in a December 1983 report of the Laboratory (Ex. 3) that "[t]o exhibit commercially acceptable milling and baking performance, the frozen wheat had to be blended with at least 70% higher quality wheat". He stated that "higher quality wheat" could be defined as any wheat that meets the requirements for the Commission's milling grades, or wheat of equivalent quality

from other sources. Mr. Craimer, on behalf of Conagra, also accepted the accuracy of this statement.

[137] During his examination for discovery of October 23, 2001, Mr. Spafford advised that the CWB took no issue with respect to information contained in the Tables, reports or other documentation prepared by the Commission, including any information provided by the Laboratory.

[138] Counsel for Conagra agreed during Mr. Craimer's examination for discovery of June 28, 1995 (Vol. 2, p. 300, Q & A 1385), that Wheat Special Bin, used on its own, would not produce a commercially acceptable leavened loaf of bread. Counsel for Conagra also agreed that the products produced from the flour milled from Wheat Special Bin only, without blending with other flour, would not produce commercially acceptable baked products for the Italian marketplace and that this grain had **poor** milling and baking qualities (p. 305, Q & A 1390 and 1391).

[139] On behalf of Conagra, its counsel also stated that Wheat Special Bin was not, in fact, of "fair milling quality" (p. 312, Q & A 1404 and 1405). Further, counsel on behalf of Conagra also admitted (p. 325) that the milling and baking quality revealed by the data in the Table under "high average" reflected a better milling and baking quality than that of the Bandar Denpassar cargo.

## **DAMAGES**

[140] Pagnan seeks damages for loss of profit based on a price of 43,000 Lira per quintal. The price of 43,750 Lira per quintal is arrived at, based on the fact

that some of this wheat was sold in advance, sight unseen, for 43,500-44,000 Lira per quintal. It is also based in part on a proposed valuation suggested by Mr. Quaglia to Pagnan on December 23, 1982 of 39,000 Lira per quintal, which represented a value between Argentine Plata and U.S. Northern Spring Wheat, reflecting a reduction of 8,000 Lira per quintal due to the inferior quality of the wheat and of 1,500 Lira per quintal for transportation costs. Pagnan also suggested that a valuation based on an average between the minimum price for U.S. Northern Spring Wheat of 46,500 Lira per quintal and the maximum price for Canada Red Spring Wheat No. 1 of 49,500 Lira per quintal (i.e., an average price of 48,000 Lira per quintal), less 2,000 Lira per quintal for the inferior quality of the wheat, and less 1,500 Lira per quintal for transportation costs, would be reasonable. Applying the exchange rate at the time, Pagnan now says that it expected to sell this wheat at a price of \$282.91 U.S. per metric ton (Ex. 16). However, Pietro stated during his examination for discovery of May 15, 1986 (Transcript, p. 332, lines 1689-1691) that Pagnan expected to make a profit of \$20 to \$30 U.S. per metric ton. After Pagnan's claimed expenses, the selling price required to make that profit would have been \$267.79 U.S. per metric ton ( $\$5,909,004.57 \text{ U.S.} \div 24,849.75 = \$237.79 \text{ U.S. per metric ton} + \$30 \text{ U.S. per metric ton}$ ).

[141] Pagnan incurred additional costs due to the fact that the grain did not sell within 120 days, as anticipated. The shipment was discharged into Pagnan's silos and then moved to other elevators to avoid having the grain sit undisturbed

for a lengthy period of time, to avoid mildew and disease. Some of the grain required that it be disinfected. Such expenses would not have been incurred had the wheat been sold within 120 days, as initially anticipated by Pagnan.

[142] Because of the lower quality of the wheat, the insurance costs were reduced by 10% at the end of 1983 and the levy/duty was also reduced in October of 1983. Pagnan claims the following expenses in U.S. dollars:

• Marine insurance	\$ 8,788.98
• levy/duty	1,680,504.89
• cost of discharging shipment from ship to silo	99,610.19
• shipping/forwarding agents' fees (\$4,934.54 + \$9,670.92)	14,605.46
• land transport charges between Pagnan's silos	131,067.81
• transport expenses re: Malcontenta/Pontelaguscuro	37,698.73
• brokers commissionS	5,104.22
• storage charges (based on public silo storage charges)	294,545.57
• disinfestation costs	16,991.61
• overhead & administration charges (based on 200 Lira per quintal)	31,662.56
• carriage expenses	<u>10,099.83</u>
T O T A L . . .	<u>\$2,330,679.85</u>

An exchange rate of 1546.44 Lira (the average for the period between May and August of 1982) was applied generally by Pagnan, except for administration costs and carriage expenses, where an exchange rate of 1716 was used.

[143] Pagnan's net proceeds from the sale of 24,849.75 metric tons of the wheat, amounted to \$2,049,610.60 U.S. (\$4,380,290.43 U.S. gross, less expenses of \$2,330,679.85). Pagnan paid \$2,544,182.36 to Albionex. It had originally agreed to pay to Albionex, \$3,578,364.72 for the shipment (\$144 U.S. per metric ton), inclusive of the freight costs from Canada to Italy. By further

agreement in September of 1985 (Ex. 31), Pagnan and Albionex agreed that 'the balance of Pagnan's outstanding debt to Albionex on account of this transaction is agreed to be offset and reduced to one-half of its balance before this agreement was reached – as Albionex's participation on a lump-sum basis for costs, expenses and losses suffered by Pagnan in managing the resale of this rejected wheat cargo.' It was further agreed that they would 'allocate on a 50/50 basis any and all recovery that may be obtained from Agro and from the Canadian Wheat Board (or from either of them) as the result of the above-mentioned claims now being asserted against them in Winnipeg.'

[144] Although Albionex had rejected the wheat, Conagra refused to accept its return. To mitigate damages, Pagnan purchased it from Albionex and then disposed of the wheat during the period between May of 1983 and January of 1985.

[145] Albionex claims the following expenses in U.S. dollars:

• Purchase price paid to Conagra @ \$124.35 per metric ton;	\$3,090,232.03
• Freight (from Canada to Italy)	360,514.35
• Loading costs paid to Scandia Shipping	19,494.10
• Interest paid to Conagra for 5 days	<u>5,579.60</u>
S U B-T O T A L . . . .	\$3,475,820.08
• Less received from Pagnan	<u>2,049,610.60</u>
T O T A L . . . .	<u><u>\$1,426,209.48</u></u>

[146] In addition, both plaintiffs claim loss of profit. Pagnan assesses its loss of profit on 24,799.7 metric tons at \$1,447,099.76 U.S., based on an anticipated

selling price of \$282.91 U.S per metric ton. Albionex claims for loss of anticipated profit of \$108,124.24 U.S. in respect of its sale to Pagnan, based on a selling price of \$144 U.S. per metric ton specified in their agreement. In addition, it also claims an indemnity for Pagnan's loss of profit of \$1,447,099.76 U.S., based on the principles related to "string contracts".

## **LAW AND CONCLUSIONS**

### **Contractual Claim Against Conagra**

[147] The plaintiffs allege that Conagra breached a term of the contract with respect to the quality description of "best quality Canadian Spring Wheat Ex. – Special Bin – excluding Feed Wheat", and that it failed to provide the best possible lots.

[148] Conagra admits at para. 10(c) of its re-amended statement of defence that one of the terms of the agreement between Conagra and Pagnan was that the quality of the Wheat Special Bin would exceed the CWB specifications. Further, at para. 11, it admits that it advised Pagnan that it would arrange to select the best possible lots of the Wheat Special Bin to be purchased by Pagnan. However, it pleads that this advice had "no contractual or otherwise binding force".

[149] Conagra argues that the quality of the wheat was limited to the description set out in the specifications contained in the agreement relating to test weight, foreign material, wheat of other classes, and of heat-damaged kernels.

[150] Conagra further submits that the Certificate Final precludes any complaint about the quality of the wheat received by the plaintiffs. The plaintiffs submit that a Certificate Final can only be issued in respect of graded wheat and that Wheat Special Bin is not a "grade" of wheat.

[151] The Certificate Final, dated April 20, 1983, issued by the Commission, specifies "Wheat – Ex. Special Bins" as the "grade". The document specifies "certification as to grade only". I agree with counsel for the plaintiffs that the evidence establishes that Wheat Special Bin was not a grade established by the CWB and that the Certificate Final with respect to this wheat is, therefore, not binding on the plaintiffs.

[152] The general principles of contractual interpretation require the court to:

- (1) give meaning to all the words in the contract, if possible;
- (2) construe the contract as a whole;
- (3) consider the absence of certain words, if relevant.

See *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, (2003), 173 Man.R. (2d) 300.

[153] The surrounding circumstances may be considered by the court when interpreting a contract. From the words of the contract and the surrounding circumstances, the court may glean the contractual intent of the parties. The contract describes the quality by the specifications and by the description "best quality Canadian Spring Wheat Special Bin – excluding Feed Wheat". Both the

words of the contract and the negotiations must be considered in determining the parties' intent and agreement.

[154] I find that although a representative of Conagra confirmed to Pagnan that Conagra would select the best possible lots of this wheat and that the shipments of this grain would exceed the CWB specifications set out in the November 24, 1982 letter, no efforts were made by Conagra to comply with these representations. Mr. Spafford of the CWB suggested in a memorandum of November 8, 1982 that a "Cadillac" shipment might be made available to meet much higher specifications for a specific customer (Ex. 1, Tab 106, p. 2). No efforts were made by Conagra to arrange shipments with such higher specifications.

[155] I find, based on the negotiations between the representatives of Conagra and Pagnan, that Pagnan initially wished to enter into a contract by sample, based on the Winnipeg sample obtained in early January of 1983. Conagra refused to sell based on sample. I agree with Conagra's submission that the sale of this wheat constituted a sale by description and was not a sale by sample. Because the Montreal sample was of very poor quality, Pagnan sought some assurance from Conagra that it would receive the very best quality of this wheat, a quality consistent with the Winnipeg sample. Without this assurance, it advised Conagra that no agreement could be reached. In order to close the transaction, Conagra undertook to select the best possible lots and to provide "the best quality Canadian Spring Wheat Special Bin – excluding Feed Wheat".

This it did not do. This particular description as to quality was insisted upon by Pagnan and was a fundamental term of the agreement.

[156] As the actual grade of this particular wheat always remained "Feed Wheat", the use of this term in the contract is ambiguous. Conagra undertook not to provide "Feed Wheat". I have considered the contract as a whole and the surrounding circumstances leading thereto in respect of any ambiguity arising from the use of the words "excluding Feed Wheat".

[157] The evidence establishes that it was possible to make available a "Cadillac package" of this wheat, i.e., there was an ability to provide the best possible lots if the request had been made by Conagra to the CWB.

[158] There is evidence from a study dated September 6, 1983 of Dr. Dexter of the Commission (Ex. 1, Tab 135) that the quality of wheat shipped from the Western Seaboard (Vancouver) on cargo ships such as the Jillcord, a shipment described as Feed Wheat, was of a higher quality than the Wheat Special Bin shipped from the Eastern Seaboard, particularly that shipped on the Bandar Denpassar to Pagnan and Albionex.

[159] Conagra's representations that it would select the best possible lots and that the quality of the wheat it would ship to the plaintiffs would exceed CWB specifications were not met. Pagnan would not have entered into the contract without these assurances.

[160] Mr. Craimer admitted that Conagra entered into transactions involving Sri Lanka and Poland in which it sold Wheat Special Bin on conditions exceeding the

base specifications (Transcript of Mr. Craimer's trial evidence of September 26, 2007, pp. 35-39) and based on non-visual specifications, such as protein content. It is, therefore, reasonable to conclude that Conagra did agree to provide Wheat Special Bin to the plaintiffs, which exceeded the specifications of the CWB as to test weight, foreign materials, and heat-damaged kernels. Mr. Craimer also admitted that despite a long history of trade agreements between Conagra and Pagnan, Conagra had never sold wheat of feed quality into Italy and Pagnan had never bought wheat of that quality for importation.

[161] The evidence establishes that the wheat shipped to Albionex on the Bandar Denpassar was poorer in quality than the CWB's first "type sample", poorer than the Winnipeg sample provided to Pagnan, poorer than the "high average" referred to in the CWB's Table of Data, and poorer in quality than Feed Wheat shipped from the Pacific Seaboard on the Jillcord and other Pacific cargos of Wheat Special Bin (study by Dr. Dexter of the Commission at Ex. 1, Tab 135).

[162] I have concluded that Conagra failed to select the best possible lots and failed to provide "the best quality of Ex. Special Bin Wheat", in breach of its undertakings which were terms of its agreement with Pagnan and which were subsumed in the agreement between Albionex and Conagra. I have, therefore, concluded that the plaintiffs have established that Conagra breached the conditions of the agreements.

### Negligent Misrepresentation

[163] The plaintiffs allege negligent misrepresentation against both defendants. They take the position that the CWB's information letter of November 24, 1982 was inaccurate and/or misleading, particularly when considered with the CWB's "type samples" of the grain which were represented to be but were not in fact representative of the average quality of Wheat Special Bin, and were superior in quality to the Bandar Denpasar's cargo. The CWB's letter stated that the wheat to be shipped to purchasers would be equal in quality to the "type sample". The plaintiffs submit that the said cargo was of lesser quality than the "type sample" and that the words in the CWB's information letter "fair milling quality and quite suitable for milling purposes" was a misrepresentation in respect of that cargo. Further, the plaintiffs submit that the CWB failed in its duty of care owed to potential purchasers of this wheat, by failing to correct this information and by failing to provide a complete and accurate quality description of this wheat when that information became available through Dr. Tipples' Laboratory paper of March 3, 1983.

[164] Conagra admits that it forwarded a telex dated December 30, 1982 to the broker, Guetta, which incorporated the CWB's November 24, 1982 letter and Table of Data, and that it forwarded "type samples" received from the CWB, expecting Pagnan to rely on the information and "type samples". As such, if the letter, Table of Data, and "type samples" constitute negligent misrepresentations by the CWB, the same finding applies to Conagra.

[165] The plaintiffs rely on the decision of the Supreme Court of Canada in ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 87, in which Iacobucci J. identified the elements of negligent misrepresentation at p. 110:

... (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. ...

1. Did the CWB owe a duty of care to the plaintiffs?

[166] In ***Anns v. Merton London Borough Council***, [1978] A.C. 728 **[checked]**, Lord Wilberforce of the House of Lords set out a two-part test to be applied in determining the existence of a duty of care in tort. The Supreme Court of Canada articulated the test, as follows, in ***Kamloops (City of) v. Nielsen***, [1984] 2 S.C.R. 2, cited in ***Hercules Management Ltd. v. Ernst & Young***, [1997] 2 S.C.R. 165, at para. 20:

- (1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
- (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[167] Counsel for the plaintiffs rely on the statement of La Forest J. in ***Hercules Management Ltd.***, *supra*, at para. 24, where he discusses the issue of proximity:

... proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J. in *Cognos* ... the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

### Reasonable Foreseeability of Reliance

[168] At para. 37 of *Hercules Management Ltd.*, La Forest J. stated in respect of the issue of reasonable foreseeability by a defendant:

... in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the *Anns/Kamloops* test and a duty of care may quite properly be found to exist.

[169] Counsel for the plaintiffs also refer to the decision of Cromarty J. in *White Motor Credit Corp. of Canada Ltd. v. Fahrngruber*, [1985] O.J. No. 464 (S.C. Ont. - High Ct of Jus.), where the court considered whether representations included in a manufacturer's promotional materials gave rise to a duty of care to be factually accurate and not misleading. The court determined that such a duty of care arose and made the following statement (p. 40):

... it was well within the foreknowledge and expectation of Hesston that the audience to its film and brochures would predominantly if not exclusively consist of individuals looking to purchase a harvester, and that these individuals would purchase the Hesston Harvester if that film and those brochures were successful in fulfilling their purpose. ...

[170] Cromarty J. found that the subject area was clearly within the expertise of the manufacturer and that it distributed promotional films and brochures with the intent that the factual claims be relied upon by prospective purchasers and that they be induced to enter into purchase agreements with the manufacturer's dealers. The court concluded that the facts created a special relationship imposing a duty of care upon Hesston to be factually accurate and not misleading in the content of its film and brochures.

[171] Counsel for the plaintiffs argue that it was within the reasonable contemplation of the CWB that providing incomplete and inaccurate information, in respect of the information letter and the "type samples", with respect to Wheat Special Bin to prospective purchasers could result in damages. The CWB had a monopoly in respect of the export of Canadian grain, including Wheat Special Bin. Through the Commission, it had developed special experience and knowledge related to frost-damaged wheat. It possessed special skill, judgment and knowledge relating to the quality of this particular wheat. The CWB was aware that it was respected internationally and that its representations would carry significant weight with potential purchasers of Canadian wheat. Counsel for the plaintiffs argue, that in respect of both defendants, the test of reasonable foreseeability has been established. I agree.

[172] The CWB had a direct financial interest in marketing and selling Wheat Special Bin. The information letter and Table of Data were drafted to achieve that purpose. The CWB was and is a statutory agency possessed of special skill,

judgment and knowledge with respect to the marketing of Canadian grain. It receives detailed analyses of grain crops periodically, after each crop is harvested, and annually from the Commission and its Laboratory. The information letter and Table of Data were provided in the course of the CWB's marketing endeavour. The CWB forwarded these documents to Conagra and other accredited exporters with the knowledge that it could be used by these accredited exporters and provided to potential purchasers.

[173] I have concluded that it was reasonably foreseeable by the CWB that its accredited exporters and their clients, as well as any potential direct purchasers, would rely on the representations made in the information letter and Table of Data. The CWB has admitted that the "type samples" which it provided on request (or enclosed with certain letters) were held out to be representative of the average quality of the wheat. Reliance by the plaintiffs and Conagra on these documents and on the "type samples" was reasonable and foreseeable. Neither of the defendants has raised in its submission, any considerations which might negative or limit the scope of the duty or the class of persons to whom the duty is owed, or the damages to which a breach of this duty might give rise.

2. Were the representations untrue, inaccurate or misleading?

[174] Counsel for the plaintiffs argue that if the information letter and Table of Data were accurate when initially released, the CWB nevertheless had a duty to disclose when the information became inaccurate to its knowledge.

[175] The plaintiffs submit that the CWB's initial statement that this wheat was of "'fair' milling quality and would be quite suitable for milling purposes" in the information letter of November 24, 1982 was inaccurate and misleading. The plaintiffs submit that the consensus amongst the experts who testified at trial is that this wheat was of poor milling quality. The plaintiffs submit that the true quality of Wheat Special Bin is reflected in Dr. Tipples' letter and paper of March 3, 1983 (Ex. 1, Tab 120) and in a letter of March 4, 1983 prepared by Dr. Tipples and forwarded by Mr. O'Connor to Mr. Stephen (Ex. 1, Tab 122) of the Canadian International Grains Institute describing Wheat Special Bin as having poor milling quality.

[176] Although counsel for the plaintiffs argue that the information letter made no reference to the variability of the quality of the grain, I note that the attached Table of Data indicated variability between the "low average" and "high average" samples. However, I agree with counsel for the plaintiffs that the variability in quality of Wheat Special Bin had not been clearly explained by the Table of Data and had been completely omitted from the information letter. The expert evidence leads me to conclude that the cargo wheat was not of "fair milling quality". That statement in the letter was inaccurate in respect of the Bandar Denpassar cargo. Pagnan was not a miller or baker who could have been expected to understand the baking information. "Milling quality" includes baking quality. As the term "milling quality" is used to describe both milling and baking characteristics, this wheat could not be described as being of "fair milling quality"

in either respect. Whether Wheat Special Bin could be economically milled remains undetermined, although the evidence suggested it would require more grinding, would be harder on the milling equipment, and result in more ash. The CWB's representations are not limited to the information letter and Table of Data, but include the representative "type samples" forwarded to potential purchasers. When the statements in the letter are considered in conjunction with the Winnipeg "type sample" received by Pagnan in early January of 1983, which I have concluded originated from the CWB, a "type sample" which was superior to the "high average", the totality of the information is misleading.

3. Were the representations made negligently?

[177] Whether a representation was made negligently is to be determined on an objective standard. Did the CWB exercise the care which the circumstances required to ensure that the representations were accurate and not misleading? See *Cognos, supra*, at para. 55.

[178] Counsel for the plaintiffs submit that the terms "fair milling quality" and "quite suitable for milling purposes" were inaccurate to the CWB's knowledge by March of 1983. In November of 1982, when the information letter and Table of Data were forwarded by the CWB, only preliminary testing and analysis had been completed by the Laboratory and further testing for milling and baking purposes were ongoing. Further, counsel for the plaintiffs submit that the CWB knew that the "type samples" were of a better quality than the "high average" referred to in the Table of Data and in the letter. Counsel submit that the CWB was negligent

in ignoring the concerns expressed by Dr. Tipples, who suggested on November 3, 1982 that no further data be released (Ex. 1, Tab 103), and the Commission relating to the variability in the quality of this wheat. Although Dr. Tipples had suggested that the quality of individual cargo shipments "may" be better than that represented by the low average and "may" be closer to that represented by the high average, the CWB changed the wording so that the information letter read that "the CWB anticipated that the quality of individual cargo shipments would be better ...". The language used by the CWB suggests a stronger likelihood than the word "may".

[179] Further, the plaintiffs allege that the CWB acted negligently by publishing in the information letter the statement that the "type sample" represented the average quality of the grain in circumstances where the Commission was resisting the issuance of any "types samples" due to a concern that they were not representative, by sending out such "type samples" knowing that they were superior to the overall quality of the crop, and likely superior to any cargos to be shipped in future. Counsel argue that by early March of 1983, the CWB had relevant new information respecting the quality and characteristics of Wheat Special Bin which it owed a duty to provide to its accredited exporters and to any potential purchasers. By failing to do so, the CWB breached that duty. The CWB made a conscious decision to withhold the information, except for cases where further information was being requested by a particular customer.

[180] As I have concluded that the use of the words "fair milling quality" was a misrepresentation which Dr. Tipples had suggested to the CWB was misleading, the CWB was negligent in failing to rectify its error when the issue came to its attention. By November of 1982, the CWB was cognizant of the variability issue related to Wheat Special Bin, that the "type samples" were not representative of the total crop but superior to it and superior to the "high average" referred to in its Table of Data, that Dr. Tipples of the Commission had expressed a concern in respect of the language of the information letter, and that the Commission was resisting the issuance of "type samples" due to a concern that they were not representative. Further, the CWB acted negligently by forwarding "type samples" which were superior to the overall quality of this wheat, and stating that these "type samples" represented the average quality of the wheat. The CWB negligently misrepresented Wheat Special Bin's quality to Conagra and to Pagnan.

4. Did the plaintiffs reasonably rely on the CWB's information letter, Table of Data, and "type sample(s)"?

[181] Based on the applicable objective standard, the question is: What would a reasonable person in the position of Pagnan have concluded upon reading the letter and the Table of Data and receiving the Winnipeg "type sample"? Did Pagnan rely on the information and data contained in the letter and Table of Data, in whole or in part, and did it rely on the Winnipeg "type sample", or did it take other steps to determine the quality of this wheat? If so, did it rely to any

extent on the representations made by the CWB? Was it reasonable to do so?  
Did any damage ensue?

[182] The plaintiffs rely on the decision of the British Columbia Court of Appeal in *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, B.C.J. No. 968 (QL), which concluded that liability may be established where the misrepresentation was only one of several factors that induced the plaintiff to act. The court stated:

103 It is sufficient, therefore, for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. I am also of the view that where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred. The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor.

[183] Counsel for the plaintiffs also rely on the decision of the Supreme Court of Canada in *Hodgkinson v. Simms* (1994), 117 D.L.R. (4<sup>th</sup>) 161 at 200, where the court stated in respect of a submission that the plaintiff would have invested even if he had known the true facts:

What is more, the submission runs up against the long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach: ... This court recently affirmed the same principle with respect to damages at common law in the context of negligent misrepresentation: see *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1991), 84 D.L.R. (4<sup>th</sup>) 291 at pp. 296-9, ...

[184] Therefore, once a false representation of a material fact has been established, the burden shifts to the defendant to establish that the plaintiffs

failed to rely upon it. Nevertheless, **actual reliance** is a necessary element of negligent misrepresentation.

[185] Paolo testified at trial that he did not personally understand all of the information set out in the Table of Data but assumed that it was consistent with the text of the letter and relied on the statement in the letter that the "type samples" accurately reflected the average quality of the cargos to be delivered. He stated that he relied on the internationally respected reputation of the CWB as a Canadian government agency.

[186] However, it is also evident that at the time of negotiations, Pietro was well aware of the variability in the quality of the wheat and that a purchase based on the CWB's specifications only would not be sufficient for his purposes. I have concluded that Pagnan's reliance on the quality of the Winnipeg "type sample" received in early January of 1983 with the CWB's letter indicating that a "type sample" was representative of the average quality of this wheat was reasonable and that it induced Pagnan to seek an agreement for purchase and sale with Conagra. The quality of the "type sample" was an important representation upon which Pagnan relied.

5. Did the plaintiffs suffer damages from any such reliance?

[187] The evidence discloses that Pagnan expected to sell all of this cargo within 120 days based on its understanding that the quality of the wheat would be better than that actually shipped. The plaintiffs have alleged damages based on expenses incurred and loss of profit.

[188] A number of the expenses claimed by both plaintiffs represent costs which would have been incurred regardless of the quality of the grain. Further, the plaintiffs removed the grain from the market after receiving a number of complaints from purchasers to whom the grain had been pre-sold. Pagnan sold the cargo over a period of 18 months, which includes a period of withdrawal from the market. Except for the opinion of Paolo, there was no supporting or convincing evidence establishing the necessity of an 18-month period to dispose of the grain. In the absence of any specific evidence, I have allowed a period of 12 months from receipt of the shipment for its disposal. I have not granted damages based on claims for marine insurance, duty/levy, brokerage commissions, etc. These are costs which would have been incurred in any event. I grant Pagnan's claim for damages against both defendants based on the following additional expenses incurred to dispose of the inferior quality wheat during a 12-month period, in U.S. dollars, as follows:

• land transportation charges between Pagnan's silos	\$ 87,378.54
• transportation expenses re Malcontenta/ Pontelagusuro	25,132.49
• storage charges in silos	196,363.71
• disinfestation costs	11,327.74
• carriage expenses	<u>6,733.22</u>
<b>T O T A L . . . .</b>	<b><u>\$326,935.70</u></b>

[189] I have not allowed a claim by Pagnan for overhead and administration costs based on 200 Lira per quintal, without evidence to support these costs and

having considered that some time and effort would be required to administer the sale of the grain in any event, regardless of its quality.

[190] In respect of Albionex's claim for expenses set out in its pleadings, all such costs would have been incurred regardless of the quality of the wheat and do not constitute compensable damages.

[191] Both Pagnan and Albionex claim for loss of anticipated profits on the sale of the wheat. Albionex's loss of profit claim is based on its liability to compensate Pagnan for its loss of profit, founded on the principles applicable to "string contracts". Pagnan claims a loss of profit based on an anticipated selling price of \$282.91 U.S. per metric ton.

[192] What is the appropriate valuation of Wheat Special Bin for resale in Italy in the summer of 1983, compared to the value of other graded wheat at the time? Pietro stated that he had expected to make a profit of \$20 to \$30 per metric ton. I accept that \$30 per metric ton is reasonable. In determining profit, I have considered the expenses actually incurred by Pagnan for marine insurance (\$8,788.98), duty/levy (\$1,680,504.89), the cost of discharging the shipment from the ship (\$99,610.19), the shipping/forwarding agent's fees (\$9,670.92 and \$4,934.54), the broker's commission (\$5,104.22), and transport charges (\$65,866). These total \$1,874,479.74. Adding the purchase price paid to Albionex of \$2,544,182.36 plus one-half of its outstanding debt to Albionex ( $\frac{1}{2}$  x balance of \$1,034,182.36) of \$517,091.18, the total of Pagnan's reasonable expenses amount to \$4,935,753.28. That sum divided by 24,799.7 metric tons,

equals a cost to Pagnan of \$199.03 U.S. per metric ton. Adding \$30 per metric ton as profit, as suggested by Pietro, would result in a sale price by Pagnan on the Italian market of \$229.03 U.S. per metric ton. Therefore, Pagnan's total receipts from sales should have amounted to 24,799.7 x \$229.03 U.S. = \$5,679,875.29 U.S. Deducting Pagnan's gross proceeds of sale which amounted to \$4,380,290.43 U.S., Pagnan incurred a loss of profit representing the difference of \$1,299,584.86 U.S.

### **THE SALE OF GOODS ACT**

[193] The plaintiffs also rely on s. 16 of *The Sale of Goods Act*.

[194] They submit that the effect of this provision is to import into every contract for the sale of goods, implied conditions as to fitness for the purpose and that the goods shall be of merchantable quality. Section 16 provides:

#### **Implied conditions as to quality or fitness**

16 Subject to the provisions of this Act and of any statute in that behalf, there is **no implied warranty** or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, **except** as follows,

- (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for the purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose,
- (b) where goods are **bought by description** from the seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: Provided that if the buyer has examined

the goods, there shall be no implied condition as regards defects which the examination ought to have revealed,

- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade,
- (d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[Emphasis supplied]

[195] Despite the plaintiffs' pleadings, there is no evidence to substantiate allegations that Pagnan made known to Conagra the purpose for which the wheat would be used. I accept that Pagnan intended to sell the wheat in Italy to millers. In its marketing approach, Pagnan intended to advise buyers that this wheat could improve the quality of European wheat and flours, thereby resulting in a blended flour suitable for baking into commercially acceptable bread products in the Italian marketplace. However, there is no evidence that this purpose was communicated to Conagra at the time of negotiations or at the time that the parties entered into the contracts of purchase and sale.

[196] Subparagraphs 16(a) and 16(c) are not applicable. Although subpara. 16(b) is applicable, Wheat Special Bin was of merchantable quality. ***Black's Law Dictionary***, 8<sup>th</sup> ed., defines "merchantable", as follows:

**merchantable** ..., *adj.* ... Fit for sale in the usual course of trade at the usual selling prices; MARKETABLE. — Also termed *salable*. See *implied warranty of merchantability* under WARRANTY (2). ...

The grain was fit for sale. If blended with other wheat, it could produce a baked product fit for human consumption. The issue in these proceedings relates to

the quality of the wheat described in the agreements, and not to its merchantability.

[197] In *McAllister v. Eastwood Jeep Eagle (1986) Ltd.* (1998), 124 Man.R. (2d) 104, [1998] M.J. No. 9 (QL), Monnin J. (as he then was) referred, at para. 26, to the following statement of Dixon J. in *Australian Knitting Mills Ltd. v. Grant* (1933), 50 C.L.R. 387 at 418 (H.C. of A.):

The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms. [Emphasis supplied]

[198] In the *McAllister* case, the court found that the defendant was in breach of an implied warranty of merchantability as it related to the rusted condition of a used vehicle purchased by the plaintiff. The rusted condition was present at the time of purchase, but covered by a coat of paint. The court found that the plaintiffs would not have agreed to purchase for the price requested had they known of the extent of the rusted condition of the vehicle.

[199] In the case at bar, the plaintiffs agreed to purchase wheat which they knew was frost-damaged and of lesser quality than the wheat they had previously imported from Canada. This wheat was of merchantable quality, depending on the purpose(s) for which the plaintiffs intended to use it. The plaintiffs did not make the intended purpose known to the defendants.

## Collateral Contract

[200] The plaintiffs also claim against both defendants based on collateral contract. The plaintiffs plead that it was a term of the collateral contract that the wheat purchased would be fit for the purpose of blending with lower quality wheat typically available in Europe, to improve the quality of the flour produced from such wheats, so as to obtain a flour suitable for baking into commercially acceptable bread products in the Italian marketplace. The plaintiffs submit that the representations of the CWB contained in the information letter that the wheat was of "fair milling quality and quite suitable for milling purposes" amounted to a warranty, as "milling" refers to both milling and baking purposes.

[201] Collateral contract imposes liability for an untrue or misleading statement in circumstances where the misrepresentation is made by a party in respect of whom there is no privity of contract. Therefore, although the plaintiffs' pleadings claim against both defendants, the claim based on collateral contract can only relate to the misrepresentations of the CWB which induced the plaintiffs to enter into contracts with Conagra. Counsel for the plaintiffs rely on the following statement of S.M. Waddams, *The Law of Contracts*, 5<sup>th</sup> ed. (Toronto: Canada Law Book Inc., 2005) at p. 307:

The technique of collateral contract has been employed to impose liability for misrepresentation by suppliers of products even in the absence of any apparent contractual relationship between the supplier and the person injured. The technique used is that of unilateral contract: the supplier states that the product has certain qualities; in reliance the customer buys it from, say, an independent retailer. The supplier has been held thereby to warrant the qualities of the product in consideration for the customer's entering into a separate contract with the retailer – an act that indirectly benefits the supplier. ...

[202] Counsel rely on the decision in *Murray v. Sperry Rand Corporation et al.* (1979), 96 D.L.R. (3d) 113 (Ont. High Ct. of Jus.), where the court rejected the defendant manufacturer's argument that a brochure of farm equipment which it had published and which included quality representations, was not intended to induce sales. The court noted that the brochure was strongly promotional in tone, went far beyond a simple intention to furnish specifications, and was used as a sales tool. As such, the court held that the representations in the brochure were properly characterized as collateral warranties given by the manufacturer. At pp. 122-23, the court found that a party may be liable for breach of warranty, notwithstanding that he has no contractual relationship with the person to whom the warranty is given. The court also found that there could be an enforceable cause of action on the warranty, although the warrantor was not a party to the main contract in which the warranty had been given.

[203] The plaintiffs also rely on a decision of the Supreme Court of Canada in *Traders Finance Corp. Ltd. v. Haley; Haley v. Ford Motor Co. of Canada Ltd.* (1966), 57 D.L.R. (2d) 15; aff'd. [1967] S.C.R. 437, wherein the court found that certain representations about three of its trucks made by a representative of Ford constituted warranties. Although not given by a person who was a party to the agreement, the court held that they were nonetheless binding on him.

[204] The plaintiffs submit that the information letter distributed by the CWB and forwarded by Conagra was prepared for promotional marketing purposes

and intended as a sales tool. They submit that these representations as to "fair milling quality and quite suitable for milling purposes" are binding on the CWB, although it is not privy to the contract between the plaintiffs and Conagra.

[205] Counsel for the CWB submit that due to the circumstances of the dealings between Conagra and the plaintiffs, a finding of liability against the CWB, based on collateral contract, cannot be established. The CWB relies on the case of *Total Petroleum (N.A.) Ltd. v. AMF Tuboscope Inc.* (1987), 54 Alta. L.R. (2d) 13, [1987] A.J. No. 702 (QL). At p. 28, O'Leary J. refers to Fridman's discussion of the concept of collateral contracts or warranties in the *Sale of Goods in Canada*, 2<sup>nd</sup> ed. (1979), p. 177, in the following terms:

... a statement, on the strength of which a buyer . . . enters into a contract of sale of goods, may not be a term of the eventual contract of sale, but may be treated as more than a "mere" representation. It will then give rise to an entirely separate contract, the breach of which, for example, the failure of the goods to come up to the standard expressed in the statement, can give rise to liability on the part of the one making the statement, *e.g.*, the seller, even as will be seen, if the main contract purports to exclude his liability. The statement in such cases is being treated as a variety of contractual promise, and not as a representation. The test of whether the statement is binding in this way would seem to be the intention and understanding of the parties in the light of all the surrounding circumstances.

[206] Counsel for the CWB relies on O'Leary J.'s decision (p. 29):

A party seeking to establish a collateral contract must prove **strictly** the essential elements of an agreement separate and distinct from the main contract. The terms of the separate contract must be certain and clear in the minds of both parties. Consideration for the seller's promise will usually be found in the buyer's agreement to enter into the main contract on the strength of that promise. Most important, the totality of the evidence surrounding the transaction must clearly show an intention by both parties to create a contractual relationship. That intention is to be determined objectively from the words used and the conduct of the parties. [Emphasis supplied]

[207] The circumstances of this case do not support a finding of collateral contract between the plaintiffs and the CWB. The particular terms of the contract between Conagra and the plaintiffs, whereby Conagra agreed to select the best possible lots and to provide the best quality of Wheat Special Bin, excluding Feed Wheat, were not known to the CWB which sold to Conagra based solely on the set specifications. Nor was the CWB aware of the purpose for which the plaintiffs were purchasing this wheat. There is no evidence of an intention on the part of the CWB to create a contractual relationship with the plaintiffs on the basis of these particular terms. Pagnan would not have concluded the agreement with Conagra based on the "type sample" and the CWB's representations only. It insisted on a quality description which was incorporated in the agreement, not limited to the CWB's specifications, and on Conagra's agreement to select the best possible lots. There is also no evidence of an intention on the part of Pagnan to create a contractual relationship with the CWB. The contract was concluded based on representations made by Conagra to Pagnan. The description of the wheat to be sold to Pagnan, negotiated between Conagra and Pagnan, was a contractual term not known or consented to by the CWB.

### String Contract

[208] The plaintiffs rely on the principles applicable to "string contracts" as the basis for a claim by Albionex against Conagra for Pagnan's loss of profit. Counsel

for the plaintiffs submit that Albionex is entitled to recover from Conagra, reasonable damages which it may be required to pay to its sub-buyer, Pagnan, as a result of Conagra's breach of contract which has led to Albionex's breach of its contract relating to the quality of the wheat with Pagnan.

[209] Counsel for the plaintiffs refer to *Chitty on Contract*, 29<sup>th</sup> ed., Vol. II: Specific Contracts (London: Sweet & Maxwell, 2004), at pp. 1509-10 at para. 43-460, which discusses "string contracts":

**Compensation paid to sub-buyers in a series of "string contracts."** This paragraph is concerned with the situation where the seller was in breach of his contractual undertaking as to the description or condition of the goods, and it was within the reasonable contemplation of the parties, at the time of making the contract, that:

- (a) the buyer intended to resell, or probably would do so, and that his sub-buyer would probably resell, and so on, so that there would be a series of sub-sales or "string contracts" of the same goods; and
- (b) that each contract in the series would, or probably would, contain the same, or a similar, contractual undertaking as to the description or condition of the goods; and
- (c) that it was not unlikely that a breach of the seller's undertaking would cause the buyer and each sub-buyer in the series to be in breach of his undertaking to his own buyer; and
- (d) that it was not unlikely that, in the case of such a breach, the ultimate buyers would recover damages from their sellers, so that liability would in turn be passed up the chain of sellers and buyers.

In these circumstances, the buyer who has paid to his sub-buyer damages and costs for breach of the undertaking in the first contract of sub-sale (which the sub-buyer claimed from the buyer, as the result of similar payments of compensation between successive sub-buyers down the chain) may recover the amount paid by him to the sub-buyer, together with his own reasonable costs in reasonably defending the sub-buyer's claim against him; the damages and costs paid or incurred by the buyer are taken as the measure of damages for the seller's breach of the original contract.

[210] *Benjamin's Sale of Goods*, 5<sup>th</sup> ed. (London: Sweet & Maxwell, 1997), at p. 957, para. 17-074:

... The buyer need not defend the sub-buyer's claim to the point of a judgment against him. If he reasonably settled the sub-buyer's claim out of court, he may recover as damages from the seller a reasonable amount paid under such settlement. ...

[211] I have concluded that all of the requirements to prove a string contract have been established on a balance of probabilities by the plaintiffs. Pagnan has claimed that Albionex is liable to it for loss of profit by virtue of Albionex's failure to deliver the quality of wheat which it obligated itself to deliver. Conagra was aware that Albionex intended to resell to Pagnan and that the description of the grain would likely be the same.

[212] In view of my findings with respect to the plaintiffs' claims against the CWB, the principles applicable to string contracts are only relevant with respect to Conagra. Conagra and Pagnan had been trading partners over a lengthy period of time. Conagra knew that Pagnan traded in grain in Italy and intended to resell the wheat. Conagra had no discussions or negotiations with Albionex. Conagra considered that the transaction was a Pagnan deal. It agreed, at Pagnan's request, to substitute Albionex as the purchaser, based in part on Pagnan's guarantee. The terms of the contract negotiated with Pagnan remained the same.

[213] Counsel for the plaintiffs argue that the settlement between Albionex and Pagnan amounts to an acknowledgment by Albionex of its failure to deliver the

wheat described in the contract to Pagnan and that Albionex is, therefore, entitled to pursue a claim for recovery of Pagnan's lost profit, if the court finds that Pagnan is entitled to recover lost profit from Albionex as a consequence of the breach of contract. If Albionex is liable for Pagnan's loss of profit, then it is entitled to recover same from Conagra on the basis that the breach of contract by Conagra caused the breach of contract by Albionex.

[214] As Conagra was aware that Albionex was substituted as purchaser, but that this was essentially a Pagnan transaction, and as Conagra was aware that Pagnan traded and sold wheat in the Italian marketplace, I have concluded that Conagra knew that the wheat would be transferred by Albionex to Pagnan for resale on the same terms and that any breach of its undertakings as to description would cause Albionex to be in breach. As Pagnan is entitled to claim damages against Albionex, Albionex is entitled to recover from Conagra, damages for Pagnan's loss of profit, which is payable by Albionex to Conagra.

#### Cross-Claim by Conagra Against the CWB

[215] As I have found that the CWB is liable for negligent misrepresentation, Conagra's cross-claim against the CWB is granted. The CWB provided the newsletter, Table of Data, and "type samples" to Conagra knowing that they would be provided by Conagra to potential purchasers and relied upon by Conagra and such purchasers. Conagra relied upon the accuracy of the information provided by the CWB, the Commission, and the Laboratory in providing this information to potential purchasers. The CWB owed a duty of care

to its accredited exporter, Conagra, to provide accurate information for further distribution.

[216] Although Conagra has relied upon the principles relating to string contracts in respect of its contract with the CWB, I have concluded that they do not apply with respect to the purchase of Wheat Special Bin by Conagra from the CWB, as the terms of this contract significantly differed from the terms of the contract between the plaintiffs and Conagra.

### Prejudgment Interest

[217] The rate of interest for damages, if incurred, was not specified in the contract. The plaintiffs claim prejudgment interest based on the rate of interest charged by Conagra to Albionex in respect of late payment for the wheat, i.e., 13% per annum. In the alternative, the plaintiffs seek prejudgment interest based on the Court of Queen's Bench Prejudgment Interest Table for a claim filed on September 10, 1985, i.e., 9% per annum.

[218] I agree with counsel for the CWB that this is an exceptional case where the delay of 25 years in bringing the matter to trial should result in a diminished award of interest. I have determined that the rate of interest specified in the Court of Queen's Bench Prejudgment Interest Table of 9% per annum should apply for the period from September 10, 1985 to October 1, 1997 (mid-point in time). Thereafter, the rate of interest specified in the Court of Queen's Bench Prejudgment Interest Table of 4% per annum will apply for the period October 1, 1997 to the date of judgment.

### Exchange Rate and Date of Conversion

[219] The statement of claim seeks damages in U.S. funds. Section 12 of the ***Currency Act***, R.S., 1985, c. C-52, requires that any money referenced in a legal proceeding must be stated in Canadian currency. What then is the appropriate date of conversion for exchange rate purposes?

[220] Counsel for the plaintiffs submit that the general rule advances the application of the date of the breach, i.e., May 12, 1983, the date of the wheat's rejection by Albionex. They note that in Manitoba, the court has a discretion, as expressed by the Manitoba Court of Appeal in ***Kellogg Brown & Root Inc. v. Aerotech Herman Nelson Inc.***, 2004 MBCA 63, 184 Man.R. (2d) 188, where the court held:

103 ... However, for the reasons stated in the previous paragraphs, we are of the opinion that the breach date rule is not binding and unequivocal in all situations. Certainly, it is not binding in tort. See *Stevenson Estate v. Siewert* (2001), 202 D.L.R. (4<sup>th</sup>) 295, 2001 ABCA 180. We also conclude that in matters of breach of contract, Canadian courts have flexibility in their choice of conversion date, the underlying objective being to achieve equity in the particular circumstances of the case. ...

[221] Counsel for the CWB refer to S.M. Waddams, ***The Law of Damages***, where, at p. 7-4, the author states that possible dates for conversion include the date of the wrong, the date of the institution of the action, the date of judgment and the date of actual payment. The CWB argues that the appropriate date of conversion is the date of judgment. They submit that if the date of conversion is held to be the date of the breach, then the plaintiffs would receive a significant windfall. They rely on the decision of Beard J. of this court in ***Dino Music AG v.***

*Quality Dino Entertainment Ltd.* (1994), 96 Man.R. (2d) 46, and the case of *Banque Indosuez v. Canadian Overseas Airlines Ltd.* (1990), 40 C.P.C. (2d) 33 (B.C.S.C.); aff'd on appeal, where the issue of the rise and fall of the Canadian dollar between the date of the breach and the date of judgment were considered.

[222] The rationale expressed in *Banque Indosuez, supra*, in favour of the date of judgment is persuasive. The court held that the successful litigant should be provided with sufficient Canadian funds to purchase the amount awarded in foreign currency at the time of judgment. The court stated at p. 35 of the decision that:

... The constant is the amount of the debt expressed in the foreign currency used in the transaction. The variable is the value of the Canadian dollar in relation to that currency. When the date of judgment is used as the time for conversion, sufficient Canadian funds are awarded to satisfy the debt. If the conversion date varies, then the successful claimant may receive more or less Canadian money than is needed to match the judgment debt. ... The Court's task in converting the judgment to Canadian funds requires only that the obligation [of the contract] be fulfilled. Using the date of judgment accomplishes that objective.

[223] I have concluded that selecting the date of judgment as the conversion date would be fair and equitable.

[224] If the parties are unable to agree, counsel may arrange a hearing to speak to costs.

\_\_\_\_\_ J.