IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11493
[2016] NZHC 206

BETWEEN		STRATHBOSS KIWIFRUIT LIMITED First Plaintiff
		SEEKA KIWIFRUIT INDUSTRIES LIMITED Second Plaintiff
AND		ATTORNEY-GENERAL Defendant

Hearing:	3 February 2016
Counsel:	M N Dunning QC, D M Salmon and M Heard for plaintiffs M T Scholtens QC, S V McKechnie and J C Catran for defendant
Judgment:	18 February 2016

RESERVED JUDGMENT OF DOBSON J

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[1] On 8 July 2015, I issued a judgment in these proceedings which authorised the plaintiffs to proceed with a funded representative action.[1] The claims were brought on behalf of entities with interests in growing and selling kiwifruit, and post-harvest operators. The claims are that the Ministry for Primary Industries (MPI) (at previous relevant times the Ministry of Agriculture and Forestry) owed a duty of care to those involved in the New Zealand kiwifruit industry to prevent the incursion into New Zealand of harmful biological substances. The plaintiffs claim that MPI breached that duty in its conduct and omissions leading to the importation of plant material containing the virus Psa-V.

[2] I set 9 October 2015 as the end of the period in which additional claimants could opt in to the representative proceedings. A significant number of grower

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1 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596.

claimants did opt in by that date. MPI does have unresolved concerns that there may be some measure of overlap in the notified claimant interests. Those concerns arise particularly in relation to grower interests for both lessors and lessees of various kiwifruit blocks. Further, in relation to the second plaintiff (Seeka) in its capacity as a lessee, for various terms, of numerous kiwifruit blocks.

[3] No other post-harvest operators except Seeka had opted in to the proceedings by 9 October 2015. The proceedings therefore continue as a representative claim for the grower interests that opted in by 9 October 2015 and whose identity has been advised to the defendant. Distinctly, Seeka continues as a claimant for its post-harvest operator claims solely on its own behalf. As requested for MPI, I confirm that the proceedings are no longer a representative action in relation to potential claims that might have been pursued on behalf of other post-harvest operators.

Matters dealt with in this judgment

[4] My July 2015 judgment contemplated that there ought to be staged trials of the issues raised by the proceedings. The parties were invited to confer on the scope of issues most conveniently tried at the first stage. Given substantial differences between the parties, I received memoranda on the competing contentions and heard argument on the definition of issues most fairly and appropriately determined at a first stage trial.

[5] A number of other issues, such as the scope of discovery obligations, provision of particulars and the adequacy of pleadings were also addressed. The appropriate scope of requirements for the provision of information and clarification of pleadings depend largely on the scale of the issues that are to be determined at the first stage of trial. I accordingly address the remaining directions that were sought by the parties after settling the scope of issues to be determined at a first stage trial.

Stage one issues

[6] I characterised the plaintiffs' claims in my July 2015 judgment in the following terms:

> [22] The plaintiffs have pleaded two causes of action in negligence, both based on the exercise of powers under the Act (or failure to do so competently), and discharge of obligations imposed by it. The first cause of action is pleaded, in relatively general terms, that MPI, by its officers, agents and employees, owed the plaintiffs a duty to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand, including their functions under the Act. That duty is alleged to extend to the regulation of importing "risk goods" into New Zealand. The plaintiffs allege that MPI was on notice of the risk of Psa-V being imported, and failed to take reasonable care to prevent it happening.
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> [23] The second cause of action pleads more specifically that MPI personnel owed the plaintiffs a duty to exercise reasonable care and skill when carrying out functions in respect of the border processes for pollen imports. This duty is alleged to extend to managing and controlling the importation of risk goods, considering and approving import permits and undertaking functions covered by internal policies of MPI.

[7] Mr Dunning QC accepted, on the present argument, that I had accurately summarised what the plaintiffs intend as the scope of the duty of care alleged against MPI. Significantly, any such duty would be confined to conduct or omissions on behalf of MPI prior to the time of the importation of plant material allegedly containing Psa-V. Consequently it focuses on MPI's system for monitoring potentially harmful imports before they arrive in New Zealand, and extends to specific deficiencies alleged in respect of the consignment of anthers that the plaintiffs claim was allowed into New Zealand containing Psa-V. It is important in defining the appropriate stage one issues that the scope and nature of any duty of care contended for should remain confined in that way. Mr Dunning accepted that the definition of issues for a stage one trial would need to be reconsidered if there was any amendment to the pleading that alleged a duty in any different terms.

[8] The allegations of an inadequate system for preventing the importation of harmful organisms appear to commence chronologically with a MAF review undertaken in 2003. The factual allegations then appear to focus on changes and/or inadequacies thereafter in the procedures for monitoring applications to import material. These include one from China in June 2009 that is alleged to have been the source of Psa-V, with symptoms of it being noticed from October 2010.

[9] The plaintiffs' criticisms of MPI all relate to the circumstances in which the plant material allegedly containing Psa-V was permitted into New Zealand. In

contrast, there is no allegation of any duty of care owed by MPI as to how the incursion of Psa-V ought to have been dealt with, once its presence in New Zealand was identified.

[10] The context of the alleged duty of care and the lack of any pleaded distinctions between Strathboss as the named grower claimant, and all other growers in New Zealand, means that any relevant duty would need to be owed to kiwifruit growers generally, or more broadly to those involved in the kiwifruit industry who would foreseeably be adversely affected by the incursion of an adverse condition on kiwifruit vines such as Psa-V. This means that there is nothing distinctive about the claimants. They form a subset of grower interests that are distinguished from others who may also have suffered losses only by their elections to opt in to these proceedings.

[11] MPI denies the existence of any duty of care. Ms Scholtens QC has foreshadowed, both in the June 2015 hearing and on the present argument, a range of arguments against the imposition of any duty on MPI to take care to avoid harm to kiwifruit growers as a class. MPI also disputes that the plaintiffs can establish the introduction of Psa-V in the consignment as alleged. There are therefore two significant threshold issues that would assume prominence in determining whether the pleaded liability can be made out. First, whether a duty of care existed for MPI to do more than it did to prevent the importation of material bearing Psa-V, and secondly whether the circumstances of importation pleaded by the plaintiffs as involving a requisite lack of care can be made out.

[12] MPI's preference was for a much wider range of issues to be argued at the first stage of trial. It proposed that the plaintiffs first provide a range of characteristics for all the claimants, and that MPI then nominate a group of up to 30 claimants as a representative sample whose claims would all be argued at the stage one trial. Those characteristics would include:

- the locations of orchards;

- the range of other infections affecting the vines on the orchards;

- a range of sizes of the claims made;

- the relative extent of involvement that the operators of the orchards had in biosecurity matters;

- the fruit varieties grown; and

- potentially relevant practices adopted in the orchards that might give rise to an intervening act, or impact on the utility of mitigating initiatives.

[13] The plaintiffs resisted a first stage trial involving numerous claimants. They argued that if they failed to make out a relevant duty of care and the specifically pleaded cause of the Psa-V being present in New Zealand orchards, then the substantially larger tasks for both sides in preparing, presenting and testing the claims of numerous other claimants would have been wasted.

[14] One reason for MPI wanting a broad sample of the circumstances of claimants' orchards was to enable MPI to cite the range of those circumstances in arguing against the imposition of a novel duty of care. MPI might tenably argue a range of policy factors against the imposition of a duty of care, including the indeterminacy of the class to which a duty of care would be owed and the fluctuations in the level of reliance that given growers should reasonably have placed on MPI's systems for keeping out such organisms. Ms Scholtens submitted that these matters could not be fully argued without the full circumstances of such a broad sample being before the Court. She referred to cautionary observations from the Supreme Court, when declining to strike out claims for novel duties of care, that novel circumstances will usually be intensely fact-specific when considering whether, as a matter of proximity and policy, it is right to recognise a duty of care.[2] In addition, the assessment of proximity requires a consideration of all the salient

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2 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [53].

features of a relationship between the parties, where these are likely to include, for example, the plaintiff's relative vulnerability and the ability to insure against such risks.[3]

[15] Theoretically at least, MPI might be more constrained in arguing various indicia against the existence of a duty of care if only the circumstances of the representative grower chosen by the plaintiffs' group are before the Court, rather than a wide sample of growers whose circumstances could demonstrate a range of relative vulnerabilities, remoteness from the immediate consequences of any want of care by MPI, and with various orchards having suffered different forms of harm.

[16] There are certainly examples of the Court's reluctance to deny the possible existence of any duty of care on a strike out application, when all the circumstances of an individual plaintiff's claim have not been tested in evidence. That is because it would involve the Court being asked to find against the existence of a duty of care partially on hypothetical propositions.

[17] The present situation is somewhat different in that all of Strathboss's relevant circumstances will be tested. Strathboss could have pursued an individual claim only in relation to its own claimed losses. In that case, MPI would have had to advance its own case on a range of policy considerations against the imposition of a duty of care, including the indeterminacy of the class to whom such a duty would be owed.

[18] Given the decision I have come to on the more confined scope of a stage one trial, I am prepared to direct that the plaintiffs must accept the prospect of a measure of hypothetical propositions advanced for MPI, particularly in relation to the scale and likely range of circumstances of other growers to whom the same duty of care would necessarily be owed.

[19] There is one further possible argument against the imposition of a duty of care on which Ms Scholtens suggested MPI would be assisted by evidence of the

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[3] *North Shore City Council v Attorney-General [The Grange]* [2012] NZSC 49, [2012] 3 NZLR 341 at [177].

circumstances of a broad range of grower claimants. That is, in understanding the balance of considerations affecting the relative stringency with which MPI limits or excludes the importation of plant material. Put more crudely than it is likely to be for MPI, the scope of obligations reasonably imputed to MPI must take into account countervailing considerations and interests. MPI cannot realistically commit to excluding from New Zealand all plant material which has any level of risk of carrying adverse organisms. MPI might aim for, but cannot assume, perfection in its border control. Policy considerations influence how tightly the controlled exclusion of plant material should be when MPI has also to take into account the interests of those applying to import plant material where their legitimate aspirations would be frustrated by a policy that sets the requirements for importing plant material at too high a level.

[20] In setting the bar for importing plant material, MPI may arguably be influenced in part by the perceived effectiveness of mitigating the adverse consequences of harmful organisms once they have slipped through the net maintained at the border. Arguably, a less stringent regime for monitoring the content of imported plant matter may be justified if the systems in place to mitigate the adverse effects of harmful organisms after their importation provide a level of assurance that such adverse consequences would be manageable.

[21] Ms Scholtens submitted that it may be relevant to whether a duty of care should be imposed in the first place for the Court to consider the range of resources available to growers in various circumstances to contribute to steps to minimise the adverse effects of harmful organisms such as Psa-V. This is, in part, because responsibilities for protecting horticultural interests from adverse effects of imported organisms are shared between central and local government and industry bodies.

[22] Many of these factors that Ms Scholtens alluded to would in any event be the subject of evidence on behalf of MPI, and are of a type that a defendant could not rely on to be evidenced by the circumstances of a range of individual growers.

[23] Given the breadth of the alleged pre-importation duty of care owed generally to kiwifruit growers, the diverse circumstances of the entire range of all growers may

be relevant to whether a duty of care should be imputed to MPI. I am therefore satisfied that most matters likely to be relevant to MPI's arguments can adequately be placed before the Court by evidence on behalf of MPI.

Conclusion on issues for determination at stage one trial

[24] I accordingly propose the following sequence of issues for determination. Ms Scholtens asked that I indicate the scope and terms of such issues on a provisional basis to afford the parties an opportunity for dialogue and, if necessary, to revert to the Court for refinement. That is sensible and I invite any memoranda on refining the scope or terms of these questions within 15 working days of delivery of this judgment.

Question 1: Did MPI owe a duty to exercise reasonable skill and care in any one or more of the respects identified in paras 122, 123, 124 and 128 of the statement of claim, to avoid:

(a) physical damage to property; and/or

(b) economic loss resulting from damage to property; and/or

(c) economic loss which did not result from damage to the property of:

(i) Strathboss;

(ii) Seeka; and/or

(iii) members of the class represented by Strathboss?

Question 2: If a relevant duty of care is held to exist, what standard of care is to be attributed to MPI in the period between January 2007 and June 2010? In particular:

(a) did Psa-V enter New Zealand as pleaded in paras 110 to 121 of the statement of claim; and if so

(b) did MPI breach the duty of care by act or omissions in the manner identified in paras 125 and 129 of the statement of claim; and if so

(c) did Strathboss suffer some loss as a result of that breach of the duty of care; and/or

(d) did Seeka, in its capacity as a post-harvest operator, suffer some loss as a result?

Question 3: What impact, if any, does the:

(a) passing of the Biosecurity Law Reform Act 2012;

(b) implementation of the KVH Compensation Scheme; and

(c) Psa-V National Pest Management Plan issued in May 2011;

have on the existence and/or scope of any duty of care?

Further information relating to the claimants

[25] MPI sought an extensive list of further information in relation to each of the claimants. One reason for that was to inform the choices MPI contemplated making to select a sample of claimants reflecting the range of growers' different circumstances. That purpose for the provision of further information is not needed given the confined scope of the questions for determination in the stage one trial.

[26] There are at least two additional reasons for MPI to have some further details of the characteristics and circumstances of each claimant. First, although the questions of law and fact relevant to the stage one trial are to reflect only the circumstances of the named plaintiffs, the representative status of Strathboss is likely to give rise to considerations as to the circumstances of other claimants purporting to be in the same class. MPI continues to deny that there is any sufficient commonality for the grower claimants to constitute a class. In preparing its opposition to the claim of a duty of care being owed to kiwifruit growers, MPI should know at least

indicatively the extent of the differences in characteristics of all the grower claimants to which it may want to attribute relevance.

[27] A separate consideration is that it is appropriate for MPI to be sufficiently informed to undertake a scoping exercise on its own approach to the potential worst-case scenario on the quantum of damages, should it be held liable in any defined set of circumstances. Concerns raised by Ms Scholtens suggest MPI is not yet sufficiently informed to be able to do so. For example, it appears that more than one claim is made in respect of some kiwifruit orchards. First, there are claims by lessors of a block whose return was adversely affected by the lack of production, plus their potential liability to meet or contribute to the costs of re-planting. Secondly, claims have been made for the lessees of such blocks whose returns were allegedly affected adversely by an absence of production caused by Psa-V, plus the costs of various remedial measures and of re-planting.

[28] Reflecting the reasonable interests of the parties at this stage of the litigation, I direct that the plaintiffs are to provide the following information in respect of each grower claimant:

(a) To the extent not already provided, the name, location and size of the orchard to which each claim relates.

(b) Formal ownership structure:

(i) If a partnership, the full names of the partners.

(ii) If a trust, the names of the trustees and an outline of the relationship between the trustees, the principal beneficiaries, and the operators.

(iii) If a company, the identity of the directors and principal shareholders. If trusts are among the shareholders, then details are to be provided of the principal beneficiaries.

(c) Where claims are not made by an entity that is both owner and operator, and where separate claims are made by more than one entity (for example, lessor and lessee), then the nature of the claim and the basis on which it is proposed to quantify losses should be specified. An outline should also be provided of the relationship between lessor and lessee, including any extent to which there are common beneficial interests.

(d) The date on which Psa-V was first discovered in the orchard, and the date the claimant acquired the interest in the orchard giving rise to its claim. If there has been any disposition, then its date should also be specified.

[29] The claimants should not be niggardly in confining the information provided pursuant to this direction. I urge a liberal approach on their behalves that reflects the legitimate reasons for additional disclosure noted in [26] and [27] above.

[30] To address part of MPI's request for additional information, the plaintiffs have volunteered to promptly amend information provided in schedule 2A to their statement of claim to identify the nature of losses claimed by claimants who are lessors, lessees or who had sold the orchards without identifying symptoms of Psa-V. The plaintiffs have volunteered to complete that amended statement of claim by 19 February 2016, so the work will be underway and may of course be completed. If the amended schedule is provided as proposed, then its content may provide partial compliance with the direction for further disclosure made in [28] above.

[31] MPI was also concerned at:

- a perceived inadequacy in details provided thus far of the circumstances in which Psa-V had been discovered on particular claimants' orchards; and

- the lack of detail of steps taken to prevent its entry into each orchard, and thereafter to minimise its adverse effects.

[32] The detail of this concern was not explained. The gist is that numerous responses to MPI's enquiries as to these details were endorsed with a qualifier that they were "from memory" without distinguishing between the details for which records existed and those that were a matter of recollection. MPI sought a direction that such information should be reconsidered and provided with the further detail that distinguishes between those two categories.

[33] Given the more confined scope of the issues to be determined at the stage one trial, and given also the range of further information I have directed is to be provided, I do not consider it necessary for the re-working of information previously provided to distinguish that available only "from memory". The adequacy of the information available to MPI after provision of the information now directed can be reviewed in due course.

Particulars of defence

[34] The statement of claim (paras 110 to 121) makes specific allegations as to the circumstances of clearance by MPI for import into New Zealand of a consignment of some 4.5 kilograms of anthers from China in June 2009, and that the introduction and spread of Psa-V derived from that consignment.

[35] Responses in the statement of defence admit numerous factual circumstances, but deny that the particular consignment of anthers from China did cause the introduction of Psa-V. The plaintiffs argued that they are entitled to further particulars of the defence on the premise that if their hypothesis is rejected by MPI, then an alternative hypothesis ought to be advanced.

[36] Ms Scholtens firmly resisted any obligation to do this. Thus far, MPI may go to trial on the basis that it does not have an alternative theory as to how the importation occurred, but denies that the plaintiffs can discharge the onus of establishing that it occurred in the manner that they plead. If and when a specific alternative hypothesis is to be advanced, then that will be notified.

[37] MPI's stance is somewhat unsatisfactory for the plaintiffs in preparing evidence for trial. If an alternative hypothesis is raised, for example after the

plaintiffs' expert briefs have been served, then MPI would have to expect to make some accommodation for that, and ultimately it may have a bearing on costs.

[38] As matters stand at the moment, however, I am not satisfied that any direction requiring further particulars of paras 110 to 121 of MPI's statement of defence is justified. The plaintiffs should prepare on the basis of being required to prove, on the balance of probabilities, that the cause of entry of the virus they allege was indeed how Psa-V got to New Zealand.

Further discovery by MPI

[39] The plaintiffs sought further tailored discovery of the following categories of documents from MPI:

(a) all documents provided to Sapere Research Group by MPI;

(b) all documents reviewed by Sapere Research Group in preparing its reports on Psa (including any recordings or other records of interviews);

(c) all correspondence between MPI or any other Crown agency and Sapere relating to the scope or content of its report;

(d) all documents relating to MPI's Pathway Tracing Report of 5 December 2011, including:

(i) all drafts and internal correspondence in relation to that report;

(ii) all documents that were reviewed or relied on in preparing the report; and

(iii) transcripts and original audio recordings of all interviews conducted by MPI for the purposes of that report; and

(e) all documents that have been provided to MAF/MPI by Kiwi Pollen, and all correspondence and records of correspondence with Kiwi Pollen in relation to Psa.

[40] MPI accepts the relevance of documents of these types for the stage one trial, but there was a difference between the parties as to the timeframe reasonably required to provide discovery. Mr Dunning urged that MPI should be ordered to do so by 1 March 2016, but Ms Scholtens argued that that was unrealistic. She advised that, from Crown Law's perspective, all documents thus far identified in relation to the work by the Sapere Group have been discovered, but a renewed request has been made, with responses needing to be checked from numerous sources. She advised that in the period relevant to the proceedings, MPI had undergone four restructurings and that those working on the identification of documents have encountered substantial problems in tracking down potentially relevant documents. Ms Scholtens' proposal was for MPI to commit to monthly tranches of documents as they were identified, considered and provided, with a potential end date by 31 May 2016.

[41] The proceedings have been on foot for well more than a year, and the further categories requested ought to have been at the heart of MPI's own factual analysis. In balancing the parties' interests, I consider that MPI should be required to respond more promptly than Ms Scholtens proposed. The further tailored discovery in the categories specified above is to be provided by ***Friday, 8 April 2016***. I would urge MPI to provide discovery in tranches before that date, as becomes appropriate.

Further MPI applications

[42] Turning to the summary of orders sought on behalf of MPI, I have already dealt with the scope of questions to be determined at the stage one trial, and that dictates the scope of further information that is appropriately required from the plaintiffs to prepare for that trial. Because the claims of a range of other claimants are not to be determined, categories of information going beyond those I have directed to be produced cannot be justified for stage one.

[43] MPI sought further pleading on behalf of Seeka to specify the nature of claims advanced by Seeka in its various capacities as an orchard owner, or lessor or lessee of orchards, and as a post-harvest operator. I anticipate that the various forms of claim advanced on behalf of Seeka ought to become apparent from the categories of information directed in [28] above. For the avoidance of doubt, the information in relation to each component of Seeka's claim should be specified as sought in this regard by MPI. I am not persuaded that it is required to be formalised in an amended pleading at this stage, but if the plaintiffs are minded to, they should do so.

[44] MPI also sought an order for the exclusion from the class of grower claimants those who are claiming pure economic loss. I am not persuaded that an order of that type is either necessary or appropriate at this stage.

[45] In the process for claimants to opt in to the proceedings, they were required to complete "grower participation documents". MPI complains that not all such documents have been disclosed thus far. In a funded representative action, they ought to be available to the defendant and, after discussion during the hearing, I did not understand Mr Dunning to resist that. The remainder of such grower participation documents should be disclosed as soon as reasonably possible.

[46] Standard communications between those acting for the claimants and each of them include claimant questionnaires. MPI has sought all of them, together with what it understood to be a set of example or model answers to the questions in the questionnaire. There is a prospect that such responses may include privileged information, but subject to the prospect of redacting any content that is the subject of a genuine claim for legal professional or litigation privilege, the responses should be discovered promptly.

[47] As to what MPI understood to be an example or model answer, Mr Dunning clarified that other claimants were provided with the answers that Strathboss had set out in its response. I understood that MPI already have that, so it is the document to be treated as an example or model set of answers to the questionnaire.

Fixture

[48] The plaintiffs sought a 12 week fixture to be allocated for the first or second quarter of 2017. MPI sought a 16 week fixture in the second and/or third quarter of 2017. MPI's longer projection of time required for a first stage trial is explained by its proposal that a significant number of claims should be determined at the first stage.

[49] Given the narrowing of the issues to be determined at the first stage, I am certainly not prepared to commit the Court to a 16 week fixture. I am prepared to direct the Registry to allocate a 12 week fixture, but that is provisional only and it is to be hoped that, with co-operation between counsel, a first stage trial of the scope presently ordered should not take anywhere near that length of time. I will direct the Registry to allocate a fixture for the stage one trial to start not before 1 June 2017.

Costs

[50] There will be no order as to costs on the issues addressed in this judgment.

Summary

[51] A brief summary of the outcomes is as follows:

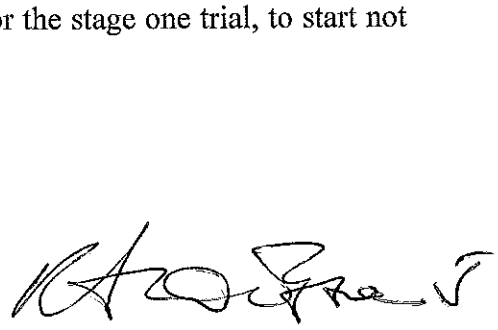
(a) The issues for determination at the stage one trial are set out in [24] above, with memoranda to be filed within 15 working days if any variation or refinement is sought.

(b) The plaintiffs are to provide the further information in respect of grower claimants set out in [28] above.

(c) MPI is to provide the further tailored discovery specified in [39] above by ***Friday, 8 April 2016***, with the provision in tranches before that date if possible.

(d) Grower participation documents are to be disclosed by the plaintiffs as soon as possible.

(e) A 12 week fixture is to be allocated for the stage one trial, to start not before 1 June 2017.



Dobson J

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