IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11493

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

On papers

Minute: 29 June 2016

MINUTE OF DOBSON J
(Privilege claim for questionnaires)

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[1] In my minute of 8 June 2016, I indicated a provisional view that claims to privilege could not be sustained in respect of responses provided to the plaintiffs' solicitors to certain questionnaires intended to provide details of the circumstances of claimants who had joined, or who intended to join, the plaintiffs' claims.

[2] I have subsequently considered memoranda filed by counsel for the plaintiffs dated 15 and 22 June 2016, and a memorandum of counsel for the defendant also dated 22 June 2016.

[3] I acknowledge that the provisional views I expressed in my minute of 8 June 2016 reflected an inaccurate appreciation of the timing and circumstances in which the questionnaires were circulated, and responses received.

[4] For some of the claimants (presumably those who joined the claim at earlier stages, prior to my directing the plaintiffs to provide certain particulars), the questionnaires have been answered after those claimants committed to the terms of

the participation agreement which meant that a solicitor/client relationship already existed. For others of the present claimants, it appears that the questionnaires were presented to them at the same time as the initial communication that included a participation agreement.

[5] The information conveyed in answers to the questionnaires provides details relevant to that claimant's qualifications to be a member of the represented class. Arguably, from the defendant's perspective, the information might also provide details of circumstances that could distinguish between subsets within the claimants which might arguably be relevant to the existence or scope of any duties of care owed.

[6] The plaintiffs accept that the information conveyed in the response to the questionnaires has been used to compile a spreadsheet of information provided to the defendant in response to the requirement for particulars that I directed were to be conveyed. However, the plaintiffs resist the defendant's argument that it should be entitled to undertake its own audit of the accuracy of the information in the spreadsheet, from the source documents relied on to compile it.

[7] The plaintiffs rely both on litigation privilege as provided for in s 56 of the Evidence Act 2006, and legal advice privilege as provided for in s 54 of that Act. In proceedings where self-funded plaintiffs are pursuing their own claims, other than on a representative action basis, both forms of privilege would presumptively apply.

[8] However, the distinguishing feature here is that this information has been gathered by solicitors engaged by those initiating and managing a funded class action. As matters presently stand, the details in the answers to the questionnaires represent relevant information about additional claimants whose detailed circumstances and individual claims will not be before the Court in the stage one trial. Instead, those claimants will seek to take advantage of any rulings on matters of principle that could potentially be resolved at stage one.

[9] Those then acting for the plaintiffs implicitly conceded, by the terms of their application at the outset for consent to bring the proceeding as a funded

representative one, that a consequence of pursuing claims by this means is the prospect of greater disclosure of the terms of communications between those acting for the funded group, and individual claimants who elect to join it. I am satisfied that this consideration justifies an exception to the scope of litigation privilege provided for in s 56.

[10] So far as legal advice privilege is concerned, it extends to communications that are "intended to be confidential".[1] Given the requirement for the details of claimants joining the proceeding to be provided by way of particulars, I am not satisfied that the process of issuing the questionnaires and compiling the responses was in fact intended to be confidential.

[11] I note that some of the responses have been stamped "legally privileged". That cannot be determinative. Even if solicitors now acting take the view that the relevant communications should have been treated as confidential, I am not persuaded that this characterisation is sufficient to clothe the responses with a s 54 privilege.

[12] Even if privilege was to be maintained, the defendant argues that the privilege had been waived in one of two ways. First, the defendant says the solicitors then acting waived privilege by providing to Crown Law the first 66 responses received. Secondly, the defendant argues that privilege has been waived by the provision of particulars, the contents of which are based on the questionnaire responses.

[13] Section 65(2) of the Evidence Act provides:

> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.

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1 Evidence Act 2006, s 54(1)(a).

[14] Section 65 was drafted with the intention of codifying the common law of waiver, which is captured by the Court of Appeal in *Ophthalmological Society of New Zealand Inc v Commerce Commission*, when it concluded that:[2]

> ... whether legal professional privilege has been waived by the conduct of the holder in the course of litigation turns on whether, in all the circumstances, that conduct is inconsistent with maintaining the confidentiality of the privileged material in a way that could lead to injustice if the privilege is upheld.

[15] I am not willing to conclude, without having heard full argument on the matter, that the disclosure by the first group of class members of their questionnaire responses would constitute a waiver on behalf of the entire class. I am also not convinced that the entirety of questionnaire responses can be treated as a single "privileged communication, information, opinion or document", such that disclosure of some questionnaire responses amounts to "a significant part" of that privileged material.

[16] However, I am willing to accept that in these circumstances the references to privileged information in the table of particulars would amount to a waiver of privilege. It would be inconsistent for the plaintiffs to maintain confidentiality in the questionnaire responses when that information was relied on to confirm certain claimants' entitlement to be included as members of the class.

[17] Accordingly, the responses should be discovered, subject to separate claims to privilege in respect of any additional content, as recognised in [2] and [6] of my minute of 8 June 2016.

Dobson J

Solicitors:
Lee Salmon Long, Auckland for plaintiffs
Crown Law, Wellington for defendant

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2 *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [38]. See also the discussion in *McGuire v Wellington Standards Committee (No 1)* [2014] NZHC 1159 at [26]–[27].