

In the High Court of New Zealand
Wellington Registry
CIV-2014-485-11493

between

STRATHBOSS KIWIFRUIT LIMITED
First Plaintiff

and

SEEKA KIWIFRUIT INDUSTRIES LIMITED
Second Plaintiff

and

THE ATTORNEY-GENERAL
Defendant

REPLY TO AMENDED STATEMENT OF DEFENCE

7 October 2016

ASSIGNED JUDICIAL OFFICER:
Dobson J

NEXT EVENT DATE:

LeeSalmonLong

Barristers and Solicitors

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REPLY TO AMENDED STATEMENT OF DEFENCE

In reply to the amended statement of defence dated 29 August 2016 the plaintiffs say:

4. They admit the affirmative allegation in paragraph 4.
7. In relation to paragraph 7:
 - 7.1 They admit the affirmative allegation in paragraph 7.1.
 - 7.2 They admit that some isolates of Psa (including Psa-V) cause canker but otherwise deny the affirmative allegation in paragraph 7.2 and say further that widely distributed strains such as Psa4 do not cause canker.
 - 7.3 They admit that Psa-V causes red ooze and canker but otherwise deny paragraph 7.3 and repeat the reply to paragraph 7.2 and say further that it is Psa-V that is the strain that was introduced into New Zealand through the defendant's negligence, and is the relevant strain.
 - 7.4 They deny the affirmative allegation in paragraph 7.4.
8. In relation to paragraph 8:
 - 8.1 They admit the affirmative allegation in paragraph 8.1.
 - 8.2 In relation to paragraph 8.2:
 - 8.2.1 They admit that a scientific paper in May 2010 compared isolates collected in Italy in 2008 and 2009 with earlier isolates of Psa from Japan and Italy and concluded that the 2008 and 2009 isolates were of a new type.
 - 8.2.2 They say further that the paper did not use the terms "Psa-V", "Italian strain", "Psa-LV" and "Asian strain".
 - 8.2.3 They otherwise deny the affirmative allegations in paragraph 8.2 and say further that it is Psa-V that is the strain that was introduced into New Zealand through the defendant's negligence, and is the relevant strain.
 - 8.3 They deny the affirmative allegations in paragraph 8.3 and its sub-paragraphs and say further that:
 - 8.3.1 It is Psa-V that is the strain that was introduced into New Zealand through the defendant's negligence, and is the relevant strain.
 - 8.3.2 The terms "Italian strain", "Asian strain" and "Asian-like" are not used other than by a small group of New Zealand researchers.

- 8.3.3 The term Psa4 is used as a catch-all for a wide range of different varieties of Psa that are found on kiwifruit but which do not cause bacterial canker and do not form part of a closely related group. The symptoms of infection of those strains are not similar to Psa-V, including because they do not cause canker, do not cause vine die-back, do not cause systemic infection, do not cause the death of plants, and they have no significant effect on kiwifruit production.
10. They deny the affirmative allegation in paragraph 10 and say further that the internationally scientifically accepted terminology is Psa3 rather than “Psa biovar 3”. The term Psa-V is widely used in New Zealand public discussion to refer to Psa3.
11. In relation to paragraph 11 they deny that Psa3 / Psa-V is properly characterised as “the virulent Italian strain”, and:
- 11.1 They admit that Psa3 was first characterised in the scientific literature in 2012 from isolates collected in Italy in 2008, 2009 and 2010, in New Zealand, Chile and China in 2010 but otherwise deny the affirmative allegation in paragraph 11.1.
- 11.2 They admit the affirmative allegation in paragraph 11.2.
- 11.3 They admit the affirmative allegation in paragraph 11.3 and say further that the Psa2 haplotype was characterised using only three isolates and that there is considerable diversity in the haplotypes of Psa present within Korea.
- 11.4 In relation to paragraph 11.4:
- 11.4.1 They admit the affirmative allegation in paragraph 11.4.1.
- 11.4.2 They admit the affirmative allegation in paragraph 11.4.2.
- 11.4.3 They deny the affirmative allegation in paragraph 11.4.3 and repeat paragraphs 8.2.1 and 8.2.2 above.
- 11.5 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 11.5.
- 11.6 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 11.6.
- 11.7 They deny the affirmative allegation in paragraph 11.7.
14. In relation to paragraph 14:
- 14.1 They admit the affirmative allegation in paragraph 14.1.
- 14.2 They admit the affirmative allegation in paragraph 14.2.

- 14.3 They admit the text of the November 2009 Alert but otherwise deny the affirmative allegation in paragraph 14.3 and say further that the November 2009 Alert noted that “comparison studies between Korean and Japanese strains showed that they have different phylogenic origins”.
- 14.4 They admit the affirmative allegation in paragraph 14.4.
- 15. They admit the affirmative allegations in paragraph 15.
- 17. In relation to paragraph 17:
 - 17.1 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 17.1.
 - 17.2 They admit the affirmative allegation in paragraph 17.2
- 18. In relation to paragraph 18
 - 18.1 They admit the affirmative allegation in paragraph 18.1, save for the allegations that the bacterial strains referred to in the pleaded article were later characterised as Psa1, 2 or 3 as alleged.
 - 18.2 They admit the affirmative allegation in paragraph 18.2
- 19. They admit the affirmative allegation in paragraph 19.4
- 21. In relation to paragraph 21:
 - 21.1 In relation to paragraph 21.1:
 - 21.1.1 They admit the affirmative allegation in paragraph 21.1.1
 - 21.1.2 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 22.1.2.
 - 21.1.3 Save that they have insufficient knowledge of whether PHEL carried out the testing, they admit the affirmative allegation in paragraph 22.1.3.
 - 21.2 In relation to paragraph 21.2 they have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 21.1 and its sub-paragraphs.
 - 21.3 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 21.3.
 - 21.4 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 21.4]
 - 21.5 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 21.5.
- 22. In response to paragraph 22, they admit that the incubation period of Psa-V can vary but otherwise deny the affirmative allegation in paragraph 22.

The economic impact of Psa in New Zealand

24. In relation to paragraph 24:
- 24.1 In relation to paragraph 24.1 they admit the agreement pleaded was entered into and its terms but otherwise have insufficient knowledge of and deny paragraph 24.1.
 - 24.2 They admit that Zespri commercially released a new cultivar G3 and sold G3 licenses to affected growers on a one-for-one basis to replace Hort16A, and that G3 at that time showed more tolerance to Psa-V than Hort 16A, but they otherwise deny the affirmative allegation in paragraph 24.2. They say further that Zespri was marketing G3 for release to growers before the outbreak of Psa-V.
 - 24.3 They admit that G3 has to date shown higher yields than Hort 16A in some circumstances. They otherwise deny the affirmative allegation in paragraph 24.3.
 - 24.4 They admit that G3 licenses have increased in value since June 2012, and that some orchard prices have also risen since June 2012. They otherwise deny the affirmative allegation in paragraph 24.4
 - 24.5 They admit that as a result of the Psa-V incursion growers have made significant changes to orchard hygiene. They also admit that growers have made improvements in orchard management practices that have led to increased yields. They otherwise deny the affirmative allegation in paragraph 24.5 and say further that:
 - 24.5.1 Prior to the incursion of Psa-V orchard hygiene practices were appropriate to the risk of disease;
 - 24.5.2 Orchard hygiene has not led to any increase in yields or profits; and
 - 24.5.3 Orchard management practices are constantly developing and would have improved regardless of the Psa-V incursion.
 - 24.6 They admit that after the Psa-V incursion in New Zealand prices for G3 and Hort 16A fruit increased for a period due to a lack of supply and otherwise deny the affirmative allegation in paragraph 24.6.
 - 24.7 They admit the affirmative allegation in paragraph 24.7.
 - 24.8 They deny the affirmative allegation in paragraph 24.8 and say further that individual growers and participants in the kiwifruit industry are in a range of circumstances.
26. They admit the affirmative allegation in paragraph 26.
34. In relation to paragraph 34:

- 34.1 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 34.1.
- 34.2 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 34.2.
- 34.3 Paragraph 34.3 addresses matters of law they are not required to plead to.
- 35. They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 35.
- 38. They admit the affirmative allegation in paragraph 38.
- 40. They admit the affirmative allegation in paragraph 40.
- 41. They admit the affirmative allegation in paragraph 41.
- 42. In relation to paragraph 42:
 - 42.1 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 42.1.
 - 42.2 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 42.2.
 - 42.3 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 42.3.
- 43. In relation to paragraph 43:
 - 43.1 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 43.1.
 - 43.2 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 43.2.
- 45. They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 45.
- 46. In relation to paragraph 46:
 - 46.1 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 46.1.
 - 46.2 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 46.2.
 - 46.3 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 46.3.
 - 46.4 They admit the affirmative allegation in paragraph 46.4 but say further that whether or not a declaration ought to be relied upon depends upon the circumstances of the declaration and the IHS under which the risk goods are being imported;

- 46.5 They admit the affirmative allegation in paragraph 46.5 but say further that whether or not a certificate ought to be relied upon depends upon the circumstances of the certificate and the IHS under which the risk goods are being imported.
49. They admit the affirmative allegation in paragraph 49 that the specific entry requirements for nursery stock vary depending on the requirements under the IHS schedule and that a prior import permit must be obtained for pollen imports but otherwise deny the affirmative allegation in paragraph 49.
50. In relation to paragraph 50 and its sub-paragraphs they admit that the standards pleaded exist and otherwise deny the affirmative allegations.
51. They admit the affirmative allegations paragraph 51 and its sub-paragraphs.
52. In relation to paragraph 52:
- 52.2 They deny the affirmative allegations in paragraph 52.3 and repeat paragraph 8.3.
- 52.3 They admit the affirmative allegation in paragraph 52.3.
53. In relation to paragraph 53.1 they admit the detailed requirements for imports of tissue culture set out in the amended Actinidia (Kiwifruit) schedule, deny the affirmative allegation in paragraph 53.6, and say further that the IHS and MPI's obligations under the Biosecurity Act 1993 determine the import requirements for Pollen.
54. In relation to paragraph 54:
- 54.1 They admit the affirmative allegation in paragraph 54.1.
- 54.2 They admit that under the 2004 amendment, each plant must be observed under transmission electron microscopy for viruses, but otherwise have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 54.2.
- 54.3 They admit the affirmative allegation in paragraph 54.3 and repeat paragraph 53 above.
55. They admit that the 9 August 2006 amendment removed the option of using OCTF/OCTR primers but otherwise have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 55.
56. They admit the affirmative allegations in paragraph 56.
57. They admit the affirmative allegations in paragraph 57 and its subparagraphs.
58. In relation to paragraph 58 they admit that the standards pleaded in paragraph 58 exist and are to the general effect pleaded.
59. They have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 59.

61. In relation to paragraph 61:
- 61.1 They admit that Kiwi Pollen imported 6 consignments under pollen import permits, 4 being from Chile and 2 from China, in the period between 2008 and 2010 but otherwise have insufficient knowledge of and deny the affirmative allegation in paragraph 61.1.
- 61.2 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 61.2.
62. They have insufficient knowledge of, and therefore deny the affirmative allegations in paragraph 62.
64. With respect to paragraph 64, they admit the affirmative allegation in paragraph 64.2.
65. They admit that Plant & Food Research imported kiwifruit pollen from Italy in 2010, which was after the November 2009 Alert was issued, but otherwise have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 65.
67. In relation to paragraph 67:
- 67.1 They admit the affirmative allegation in paragraph 67 and say further that the quotation in paragraph 95 of the Sapere Report was in a draft of the Card Report circulated on 23 November 2006.
- 67.2 They have insufficient knowledge of, and therefore deny, paragraph 67.2.
- 67.3 They have insufficient knowledge of, and therefore deny, paragraph 67.3.
- 67.4 They have insufficient knowledge of, and therefore deny, paragraph 67.4.
68. They admit that the published version of the Card paper stated that the review “seeks to assist countries develop appropriate phytosanitary measures by considering the pests that are transmitted by pollen”, but otherwise have insufficient knowledge of, and therefore deny, paragraph 68.
69. They deny the affirmative allegation in paragraph 69 and say further that the Sapere Report was referring to an initial draft of what MPI describes as the “PHEL Report”.
70. They deny the affirmative allegations in paragraph 70 and say further that at the time of the PHEL and Card reports:
- 70.1 The risk of transmission of bacterial infections between plants by pollen was a known risk.
- 70.2 The risk of transmission of bacterial infections between plants through use of milled pollen was a known or obvious risk:

- 70.2.1 Milled pollen inevitably contains some plant material; and
 - 70.2.2 Milled pollen is applied as a dust or a solution to the whole plant (including stems and leaves) and to a large number of plants within an orchard.
- 71. They admit the affirmative allegations in paragraph 71 and say further that pollen transmitted plant pathogens were the subject matter of both the PHEL report and Card Paper.
- 72. In relation to paragraph 72:
 - 72.1 They deny the affirmative allegation in paragraph 72.1.
 - 72.2 They deny the affirmative allegation in paragraph 72.2 and say further that the 1980 Phatak article concluded that “A number of viruses, as well as a few bacteria and fungi, are pollen transmitted.” (as referred to in the Sapere Report at paragraph 101).
 - 72.3 They deny the affirmative allegation in paragraph 72.3 and repeat paragraph 70.
- 73. They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 73.
- 74. They admit the affirmative allegation in paragraph 74 and say further that the Psa Data Sheet recognised that infected plant material was a prime pathway for Psa transmission, and that also “The pathogen can be dispersed in aerosols and can be carried between trees and adjacent orchards in wind-driven rain.”
- 75. In relation to paragraph 75:
 - 75.1 They admit paragraph 75.1 and say further that the allegation is not that a full risk assessment was a mandatory pre-condition to issuing an import permit;
 - 75.2 They deny paragraph 75.2;
 - 75.3 They admit import conditions were imposed on permits granted to Kiwi Pollen as alleged but otherwise deny paragraph 75.3.
 - 75.4 They deny paragraph 75.4.
 - 75.5 They have insufficient knowledge of, and therefore deny, paragraph 75.5.
 - 75.6 They admit that conditions were imposed upon Plant & Food import permits and otherwise deny paragraph 75.6.
- 77. They deny the affirmative allegation in paragraph 77 and say further that MAF made public commitment to “consult whenever its proposed actions are likely to have a significant effect on people or organisations outside MAF. This may include consultation on standards, risk analyses, pest

management strategies, policy statements (excluding policies dealing only with internal administration) and legislation.”

78. In relation to paragraph 78:

78.1 They deny the affirmative allegation in paragraph 78.1 and say further that Kiwi Pollen imported pollen for experimental purposes, including the June 2009 shipment.

78.2 They admit the affirmative allegation in paragraph 78.2 but deny that it has any relevance to the defendant's obligations under the Biosecurity Act 1993 and say further that in 2012 the Commerce Commission found that Kiwi Pollen had failed to comply with the Fair Trading Act, by selling kiwifruit pollen of foreign origin without disclosure of that fact and simultaneously promoting the pollen as “Kiwi Pollen”

MAF's knowledge of and inadequate response to the Italian Psu-V outbreak

80. They admit the affirmative allegation in paragraph 80.

81. They have insufficient knowledge of and therefore deny, the affirmative allegations in paragraph 81 and its sub-paragraphs except for the affirmative allegation in paragraph 81.5, which is admitted.

82. They deny the affirmative allegations in paragraph 82, except for the affirmative allegation in paragraph 82.8, which is admitted. They say further in relation to paragraph 82.6 that the SPS allows a country to impose temporary restrictions while it obtains additional information in cases where “relevant scientific evidence is insufficient”.

83. In relation to paragraph 83:

83.4 They deny the affirmative allegation in paragraph 83.2.

83.5 They admit the affirmative allegation in paragraph 83.2.

85. In relation to paragraph 85:

85.1 They deny the affirmative allegation in paragraph 85.1 and repeat the affirmative allegation in paragraph 82 above.

85.2 They deny the affirmative allegation in paragraph 85.2.

85.3 They admit the affirmative allegation in paragraph 85.3.

85.4 They admit the affirmative allegation in paragraph 85.4 and say further that members of the industry were unconcerned about risk from pollen imports because they were generally unaware of them.

85.5 They have insufficient knowledge of and therefore deny, the affirmative allegation in paragraph 85.5.

87. They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 87.
90. In relation to paragraph 90:
- 90.1 They rely on the wording of the emails pleaded and otherwise have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 90.1 – 90.4.
- 90.5 They admit the affirmative allegation in paragraph 90.5.
- 90.6 They deny the affirmative allegation in paragraph 90.6.
93. They deny the affirmative allegation in paragraph 93.
94. In relation to paragraph 94 they:
- 94.1 Admit the wording of the documents and communications pleaded but otherwise have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 94.1-94.7.
- 94.8 Admit paragraph 94.8.
- 94.9 Deny paragraph 94.9.
95. In relation to paragraph 95:
- 95.1 They admit paragraph 95.1 and repeat paragraphs 70 and 94.8.
- 95.2 They deny the affirmative allegation in paragraph 95.2.
96. In relation to paragraph 96:
- 96.1 They have insufficient knowledge of, and therefore deny, paragraph 96.1.
- 96.2 They admit that the IHS was amended in August 2012 but otherwise have insufficient knowledge of, and therefore deny, paragraph 96.2.
- 96.3 They admit paragraph 96.3.
- 96.4 They have insufficient knowledge of, and therefore deny, paragraph 96.4.
- 96.5 They admit the affirmative allegation in paragraph 96.5.
- 96.6 They deny the affirmative allegation in paragraph 96.6.
97. They deny the affirmative allegation in paragraph 97.
98. They deny the affirmative allegations in paragraph 98.
99. In relation to paragraph 99:

- 99.1 They deny the affirmative allegation in paragraph 99.1 and repeat paragraph 95 above.
- 99.2 They have insufficient knowledge of, and therefore deny, paragraph 99.2.
- 99.3 They have insufficient knowledge of, and therefore deny, paragraph 99.3. They say further that the association between pollen and Psa should have triggered an immediate response at that point just as it was deemed by MAF to be sufficient evidence to cancel all import permits for kiwifruit pollen following the New Zealand outbreak in 2011 (as referenced in the Sapere Report at paragraph 254).
- 99.4 They admit the affirmative allegation in paragraph 99.4.
- 100. They deny the affirmative allegations in paragraph 100.
- 102. In relation to paragraph 102:
 - 102.1 They admit the content of the emails pleaded and otherwise deny paragraphs 102.1 and 102.2.
 - 102.2 They admit the affirmative allegation in paragraph 102.3.
- 104. They admit the affirmative allegation in paragraph 104.
- 105. In relation to paragraph 105:
 - 105.1 They admit that scientific knowledge of Psa was developing rapidly in 2010 and otherwise deny paragraph 105.1;
 - 105.2 They deny paragraph 105.2;
 - 105.3 They have insufficient knowledge of, and therefore deny, the allegations in paragraph 105.3;
 - 105.4 They admit that MPI commenced a risk assessment for fruit and otherwise deny paragraph 105.4;
 - 105.5 They deny the affirmative allegation in paragraph 105.5.

Import permits and changes to the wording

- 108. They deny the affirmative allegations in paragraph 108.3.

Import of anthers

- 109. In relation to paragraph 109:
 - 109.3 In relation to paragraph 109.3:
 - 109.3.1 They admit the affirmative allegation in paragraph 109.3:1.
 - 109.3.2 They admit the affirmative allegation in paragraph 109.3:2.

109.3.3 They admit the affirmative allegation in paragraph 109.3.3.

109.3.4 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 109.3.4.

109.3.5 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 109.3.4;

109.3.6 They have insufficient knowledge of and deny the affirmative allegation in paragraph 109.3.6;

109.3.7 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 109.3.7;

109.3.8 They have insufficient knowledge of, and therefore deny, paragraph 109.3.8.

109.3.9 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 109.3.9.

109.3.10 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 109.3.10.

116. In relation to paragraph 116:

116.3 In relation to paragraph 116.3:

116.3.1 On the basis the affirmative allegation in paragraph 116.3.1 are a reference to the correspondence pleaded by the plaintiffs, they admit that the allegation.

116.3.2 They deny the affirmative allegation in paragraph 116.3.2.

117. In relation to paragraphs 117.3.1 – 117.3.5 they admit that by November 2010, 64 Kiwifruit orchards had been issued with RP notices, but otherwise have insufficient knowledge of, and therefore deny, those paragraphs.

118. They have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 118 and its sub-paragraphs.

119. They deny the affirmative allegations in paragraph 119 and its sub-paragraphs and say further that:

119.1 There is scientific consensus that the New Zealand outbreak originated from China;

119.2 The Otago University study completed a complete genetic sequence of the DNA of a Psa-V sample for New Zealand, compared that to the M7 sample from Shanxi, China, and found that they differed at only 23 sites of a total of more than 6,555,571 sites;

- 119.3 While there is evidence of a wide range of Psa-V strains in China, the Shanxi strain is in practical terms identical to the New Zealand Psa-V strain in the Otago University Study;
- 119.4 The genetic sequence completed for the Otago University study has been checked and confirmed as accurate by McCann et al;
- 119.5 There is scientific consensus that all Psa-V infections in New Zealand have a single point of origin.
120. In relation to paragraph 120, they admit the affirmative allegation in subparagraph 120.4.

First cause of action – Negligence

Duty

121. In relation to paragraph 121:
- 121.1 They admit in paragraph 121.1 that in performing national biosecurity functions, a number of public policy considerations are relevant, but they otherwise deny the affirmative allegations in paragraph 121.1 and says further that:
- 121.1.1 . Under the Act the Director-General has broad powers to raise funds to properly carry out the duties owed under the Act.
- 121.1.2 The Director-General and any chief executive are required by the Act to take reasonable steps to ensure that they recover (on a reasonable, efficient and equitable basis) the costs of properly carrying out the duties under the Act, to the extent that those costs are not met by allocation by Parliament (S 135).
- 121.1.3 The available methods of cost recovery are not limited but can include fixed charges, hourly or unit based charges, recovery of actual and reasonable costs, and charges imposed on users of services (S 135).
- 121.1.4 The Director-General also has the power to impose levies to wholly or partially funding a service provided or function performed by MPI for the purposes of the Act (S137).
- 121.1.5 Imposition of a levy is possible where either (i) the persons paying the levy will benefit from the provision or performance of the particular function or service or (ii) the persons levied create risks that require the provision of the particular service or function.
- 121.1.6 MPI does impose charges for inspecting pollen imported under the Nursery Stock IHS.

- 121.1.7 In the circumstances there is no reasonable cost-based justification for diluting the duties and obligations owed by the defendant, including under the Act.
- 121.2 They admit that the biosecurity regime benefits the country as a whole but otherwise deny the affirmative allegation in paragraph 121.2.
- 121.3 They have insufficient knowledge of, and therefore deny, paragraph 121.3.
- 121.4 They deny the affirmative allegation in paragraph 121.4 and say further that:
- 121.4.1 They repeat paragraphs 121.1.1 – 121.1.7 above and say further that the regime under the Act recognises that some persons benefit from (and so are more reliant on) the proper exercise of powers under the Act than others.
- 121.4.2 The Kiwifruit industry is a significant contributor to the New Zealand economy;
- 121.4.3 Prior to the introduction of Psa-V as a result of the defendant's negligence the Kiwifruit industry did not suffer from any significant pests;
- 121.4.4 The risks associated with Psa were well known to the defendant;
- 121.4.5 Prior to the introduction of Psa-V participants in the Kiwifruit industry had a significant market advantage being situated on isolated island with no land connection to regions affected by Psa-V;
- 121.4.6 Because the defendant did not consult with industry prior to allowing the importation of Kiwifruit pollen the plaintiffs were entirely reliant on the defendant to guard them against biosecurity risks arising from pollen; and
- 121.4.7 The defendant failed to take reasonable care in protecting them from that risk.
- 121.5 They deny the affirmative allegation in paragraph 121.5.
- 121.6 Paragraph 121.6 does not contain an allegation.
- 121.7 They admit the affirmative allegation in paragraph 121.7 and say further that the defendant did not take reasonable care to ensure that an appropriate level of acceptable risk was maintained and / or set that level of risk at an inappropriately low level.
- 121.8 They deny the affirmative allegation in paragraph 121.8.
- 121.9 They deny the affirmative allegation in paragraph 121.9.

- 121.10 They have insufficient knowledge of and therefore deny, the affirmative allegation in paragraph 121.10, and say further that MPI's functions, powers and duties in relation to biosecurity in New Zealand under the Biosecurity Act 1993 cannot be undertaken by the plaintiffs, or anyone else, and MPI cannot seek to delegate responsibility for monitoring risk to industry.
- 121.11 They admit that the kiwifruit industry was involved in the NPMP for the Psa incursion, but otherwise deny paragraph 121.11.
- 121.12 They admit that the matters listed in the sub-paragraphs to paragraph 121.12 are elements of the international biosecurity system. They otherwise deny paragraph 121.12.
- 121.13 They admit that the entities listed at times have interactions with the biosecurity system. They otherwise deny the affirmative allegation in paragraph 121.3.
- 121.14 They deny the affirmative allegation in paragraph 121.14 and say further that MPI's functions include to test the accuracy of documents and information provided by importers, including under s27(b) of the Act.
- 121.15 They deny the affirmative allegation in paragraph 121.15 and say further that MPI's functions include to test the accuracy of documents and information provided by passengers and accompanied goods, including under s27(b) of the Act.
- 121.16 They admit the statutory obligations in Part 4 of the Act but otherwise deny the affirmative allegation in paragraph 121.16.
- 121.17 They deny the affirmative allegation in paragraph 121.17.

Breach of duty

124. They deny the affirmative allegation in paragraph 124.

Causation of loss

125. In relation to paragraph 125:
- 125.1 They deny the affirmative allegation in paragraph 125.1.
- 125.2 They admit theoretical pathways for the introduction of Psa-V into New Zealand exist, but otherwise deny the affirmative allegations in paragraph 125.2.
- 125.1 They admit the affirmative allegation in paragraph 125.1 (second paragraph 125.1).
- 125.2 In relation to paragraph 125.2 (second paragraph 125.2) they:
- 125.2.1 Admit that after Psa-V was introduced to New Zealand it spread through a number of pathways;

- 125.2.2 Say further that such pathways included wind and rain, bees and cicadas, and that the spread of Psa-V by a number of pathways was inevitable given the nature of the organism, the geography and climate in New Zealand's kiwifruit growing regions, and the fact that the industry was free of any similar pest prior to the introduction.
- 125.3 They deny the affirmative allegation in paragraph 125.3 and say further that:
- 125.3.1 Orchard hygiene practices are to be assessed against the known risks to the orchard;
- 125.3.2 Psa-V was not a known risk to any orchard in New Zealand prior to its discovery;
- 125.3.3 MPI was slow to advise industry of what hygiene practices should be adopted in light of the Psa-V incursion.
- 125.4 They have insufficient knowledge of, and therefore deny, the affirmative allegation in paragraph 125.4.
- 125.5 They deny the affirmative allegation in paragraph 125.5.
- 125.6 They have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 125.6.
- 125.7 In relation to paragraph 125.7 they:
- 125.7.1 Admit that on 17 November 2010, Ministers with power to act approved the \$25 million in Crown funding in response to Psa;
- 125.7.2 Admit that Zespri also contributed \$25 million in response to Psa,
- 125.7.3 Admit that KVH administered financial assistance to growers through the AMAP;
- 125.7.4 Admit that one of KVH's stated objectives is to "contain Psa-V within regions where Psa-V has been identified";
- 125.8 And otherwise have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 125.7. They have insufficient knowledge of, and therefore deny, the affirmative allegations in paragraph 125.8.
- 125.9 They have insufficient knowledge of and deny the affirmative allegations in paragraph 125.9.
- 125.10 They admit that the outbreak of Psa-V was declared an "adverse event" but otherwise have insufficient knowledge of and deny the affirmative allegations in paragraph 125.10.
- 125.11 They deny the affirmative allegation in paragraph 125.11.

- 125.12 They deny the affirmative allegations in paragraph 125.12.
- 125.13 They are not required to plead to paragraph 125.13.
- 125.14 They are deny the affirmative allegation in paragraph 125.14.
- 125.15 They deny the affirmative allegations in paragraph 125.15.1 and are not required to plead to paragraph 125.15.2.
- 125.16 In relation to paragraph 125.16 they deny the affirmative allegations in paragraph 125.16.1 and are not required to plead to paragraphs 125.16.2 or 3.
- 125.17 They deny the affirmative allegations in paragraph 125.17.1 and are not required to plead to paragraph 125.17.2.
- 125.18 In relation to paragraph 125.18 they deny the affirmative allegations in paragraph 125.18.1 and are not required to plead to paragraphs 125.18.2 or 3.

128. In relation to paragraph 128:

- 128.1 They deny, paragraph 128.1;
- 128.2 They admit the affirmative allegation in paragraph 128.2 and say further that:
- 128.2.1 The June 2009 shipment was not of pollen, but anthers;
- 128.2.2 The difference between pollen and anthers is obvious to the naked eye.
- 128.3 They deny the affirmative allegations in paragraph 128.3.

Causation and loss

129. In relation to paragraph 129:

- 129.1 They admit that those events described in paragraph 129.1 occurred after the June 2009 consignment was cleared and released but otherwise deny the affirmative allegation in paragraph 129.1.
- 129.2 They admit the affirmative allegation in paragraph 129.2 but deny that any intervening event arises.

First Affirmative Defence statutory immunity

132. They are not required to plead to paragraph 132. They say further that:

- 132.1 The statutory immunity under s 163 of the Biosecurity Act does not apply where the inspector, authorised person, accredited person, or other person “has acted, or omitted to act, in bad faith or without reasonable cause”.

132.2 For the reasons pleaded in the amended statement of claim, defendant has acted, or omitted to act, without reasonable cause.

133. They are not required to plead to paragraph 133.

134. They are not required to plead to paragraph 134.

Second Affirmative Defence:

135. They deny the affirmative allegation in paragraph 135.

136. They admit that the Biosecurity (National Psa-V Pest Management Plan) Order 2013 and the Biosecurity (Psa-V—Kiwifruit Levy) Order 2013 were both promulgated on 13 May 2013, but otherwise have insufficient knowledge of, and therefore deny the affirmative allegation in paragraph 136.

137. They deny the affirmative allegation in paragraph 137.

Third Affirmative Defence

138. They admit a duty to mitigate but otherwise deny the affirmative allegations in paragraph 138.

139. They deny the affirmative allegation in paragraph 139.