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	THE ATTORNEY-GENERAL Defendant	

Hearing: 5 August 2016

Counsel: D M Salmon and M Heard for plaintiffs
J E Hodder QC, S McKechnie and M Nicholson for defendant

Minute: 8 August 2016

MINUTE OF DOBSON J

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[1] I heard argument on various interlocutory differences that have arisen in these proceedings. The argument was delayed by a week because of my indisposition in the week of 25 July 2016.

Defendant's proposal for additional plaintiffs

[2] I have previously ruled that a single grower representative plaintiff would be sufficient to determine the stage one questions as are now agreed. Since then, the plaintiffs have filed an amended statement of claim on 9 June 2016, including, as schedule 3, the identity of the class and summary of the features of grower plaintiffs. That schedule lists five categories of growers as follows:

- growers who were owners and operators of kiwifruit orchards;
- growers who were owners and lessors of kiwifruit orchards;

- growers who were operators and lessees of kiwifruit orchards;
- growers who sold kiwifruit orchards after they tested positive for Psa-V;
- growers who sold kiwifruit orchards before they tested positive for Psa-V.

[3] Mr Hodder QC was concerned that these five categories constituted subsets of growers going beyond what had originally been contemplated when representative orders were made, with the specified differences precluding growers in all the categories being represented by Strathboss. The defendant (MPI) accordingly proposed that the plaintiffs be required to file a further amended statement of claim which identified a representative claimant in each of the five subcategories. The prospect of material distinctions relevant to the existence and scope of any duty of care as between these categories cannot be ruled out. However, I remain of the view that the nature of the duty of care alleged to be owed is in sufficiently generic terms for it to be tested without the individual circumstances of one of each of the subcategories having their claims determined as to liability at stage one.

[4] As I have previously observed, distinctions considered arguably relevant by MPI can be introduced into argument in a conceptual way. The need for an efficient confining of the stage one issues counts against any requirement for the number of identified plaintiffs whose circumstances are in issue to be expanded as sought.

Additions/changes to the represented claimants

[5] On 8 June 2016, solicitors for the plaintiffs advised MPI that they wished to change the details of 24 of the represented plaintiffs, ostensibly to clarify or regularise previous mistakes in the identities of grower claimants who had opted in before the cut-off date.

[6] MPI would not concede to the plaintiffs' entitlement to make such changes informally, and proposed that the plaintiffs be required to make a formal application for consent to altering the represented class, when it ought to have been closed since the opt-in deadline.

[7] There were some differences in factual understanding between counsel, for example as to whether the June 2016 proposed changes included properties in respect of which the KPINs had not previously been in issue.

[8] MPI's concerns include a prospect that, if a duty is found to be owed, then the evidence might establish it was breached in 2009. In that event, claimants who were only joined to the class in June 2016 might arguably have the advantage of their claims being backdated to the commencement of these proceedings, instead of having to commence their own proceedings (arguably out of time) once the class was closed.

[9] Mr Salmon was at pains to characterise the changes as resulting only from innocuous slips, for example where an incorrect entity such as a partnership needed to be substituted with a family trust under the practical control of the same people.

[10] However, MPI's concern is valid. I direct that the plaintiffs are to file an application for approval of each of the changes to the identity of the represented grower interests proposed in June 2016. It is to be supported by a generic affidavit describing the circumstances in which each error was made and the reasons for the change. Mr Salmon resisted the need to obtain separate affidavits from each of the claimants to whom this relates, claiming that it is extremely difficult to have distracted kiwifruit farmers focus on legal documentation. I am not entirely sympathetic to that concern. These are proceedings brought on a substantial scale and if claimants are serious about participation in the proceedings, they ought to appreciate the importance of responding so as to have such matters properly and formally attended to.

[11] However, in the first instance, I direct that the plaintiffs' solicitors can address these matters in a single affidavit, which is to be filed in support of the application by ***9 September 2016***. Once MPI's advisers have had an opportunity to consider the adequacy of the details provided, they may indicate a requirement for further reasonable detail. In the event of differences, I will hear counsel further.

[12] I do not anticipate at this stage that the application needs to be argued. It is important to formally record the position, but its resolution need not be a priority in the meantime.

Seeka's loss – adequacy of pleading, and scope of discovery

[13] The nature of Seeka's loss has thus far been pleaded in very general terms,[1] which is presently "... forecast to total approximately $53 million". MPI has pressed for greater particularity of this pleading and also sought a wider scope of discovery from Seeka.

[14] Exchanges on these requests revealed a difference in understanding as to what will be involved in the stage one trial on the plaintiffs' ability to prove recoverable loss. The relevant question is cast in terms:

> Did Seeka, in its capacity as post-harvest operator, suffer some loss as a result?

[15] Mr Hodder contemplated that, for the representative plaintiffs whose claims will be in issue at the stage one trial, this would extend to the finite determination of quantum for Seeka. In contrast, Mr Salmon contemplated that the issue would be confined to a high level assessment of whether Seeka can make out, in unquantified terms, some recoverable loss so as to make out the necessary element of the cause of action in tort that the plaintiff has suffered loss as a result of the breach of any relevant duty of care found to exist.

[16] My intention is that the issue of loss be confined as Mr Salmon contemplated. Such a division is not entirely novel, and can arise in any proceeding where making out some form of loss is an element of the cause of action, but split trials are directed on liability, with a subsequent hearing to determine quantum, if required.

[17] Notwithstanding that limited scope of the stage one issue on damages, I am persuaded that Seeka ought to provide full discovery on all aspects of its damages claim, as if the finite extent of quantum was in issue at stage one. Substantial efficiencies have been achieved by confining the number of plaintiffs whose cases

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1 Amended statement of claim, schedule 2 at (b)1.

are to be heard at stage one, and Seeka has a prominent position in the litigation, with the extent of its interests being of potential relevance to a wide range of the aspects on whether recoverable loss was incurred. Mr Salmon accepted my assessment of it as a substantial and relatively sophisticated commercial organisation that can be expected to have well-ordered records.

[18] I cannot discount the prospect that MPI will have legitimate interests in challenging the existence of loss that render relevant the documents demonstrating the claimed nature and extent of Seeka's losses. Further, Seeka's involvement in the industry is not confined to that of a PHO, given that it has a variety of interests, apparently extending to lessors, lessees and operators of kiwifruit orchards.

[19] That additional discovery task is likely to be substantial. I direct that the additional list for Seeka is to be completed and served by ***2 September 2016***.

[20] Mr Salmon accepted that the plaintiffs would plead the nature of Seeka's loss with greater particularity, but prefers to do so by way of a notice of particulars, at least in the first instance. I direct that such a notice is to be served by ***19 August 2016***. I reserve MPI's entitlement to request that the further particulars be formalised in a subsequent pleading, should such additional formality be justified.

Claimants' particulars

[21] Counsel have had differences of view as to the scope of information that I directed should be provided in relation to claimants in [28](c) of my 18 February 2016 judgment. I confirm that lease documents should be provided and (to the extent the full version of the Excel spreadsheet provided by the plaintiffs' solicitors does not make it clear) the individuals beneficially entitled in various capacities – such as the beneficiaries of a family trust and shareholders beneficially entitled in a closely held company.

[22] Particulars have not been provided for three of the claimants originally listed as opting in growers. Mr Salmon confirmed that one of those claimants is not proceeding, and their name has been removed. His memorandum conceded the justification for "unless" orders in respect of the other two claimants, in the event

that the information about them is not provided in short order. Orally, Mr Salmon asked to be relieved of such draconian consequences, but did not proffer specific excuses as to why the information has not been provided in accordance with my earlier direction.

[23] I direct that the particulars for 3D Kiwi Limited and I J Scown & Sons Partnership are to be provided by ***19 August 2016***, failing which the plaintiffs will have to make separate application for leave to have those claimants continue as part of the represented class.

Scope of MPI's discovery

[24] Differences have arisen as to the scope of electronic searches reasonably expected of various groups within MPI. A legal assistant at MPI has now completed two affidavits describing the scale of the discovery task, and the costs being incurred both internally, and with a third party litigation support provider. MPI has resisted proceeding with additional word searches of the following:

- "Pollen" AND ("bacteria" OR "pathway" OR "vector" OR "transmission" OR "association" OR "import" OR "standard" OR "permit" OR "risk");
- "Pollen" AND ("Actinidia" OR "kiwifruit");
- "Bacteria" AND ("Actinidia" OR "kiwifruit").

[25] The initial stage to identify documents triggered by these words reveal some 85,300, 16,600 and 19,000 results for the respective categories. Proceeding with the discovery process for them would therefore involve a further 121,400 documents. The next stage would be for the documents to be transferred into the litigation support system, and then de-duplicated. It is anticipated that process would substantially reduce the number of documents to be considered. Thereafter, if a sampling justified potential relevance among a sufficient proportion of the documents, then all of the remainder might need to be assessed for any issues of

privilege or irrelevant confidential material, before being provided to the plaintiffs' solicitors for inspection.

[26] Ms McKechnie, who presented argument opposing this additional discovery request, argued that the work and expense involved would be disproportionate, and as this comes after numerous other word searches, any peripheral relevance could not justify the extent of the commitment involved.

[27] Mr Heard for the plaintiffs argued that documents triggered by these word searches have potential relevance. An issue in the proceeding will be the extent of MPI's knowledge of the prospect that pollen products had the capacity to be a carrier of bacteria. On the plaintiffs' case, there will be a focus at trial on what various offices within MPI knew about the status of pollen in the period prior to discovery of the incursion of Psa-V.

[28] Mr Heard argued that the additional task would not be disproportionately onerous. His office has volunteered to assess a sample of documents once the de-duplication process has occurred, and (by whatever process is acceptable to MPI) to sit down with counsel for MPI and debate either the relevance of some subsets of the documents, or additional constraints that might be imposed to lessen the scale of the task involved.

[29] If the plaintiffs' request for these further word searches was to be assessed under the classic scope of discovery obligations in relation to hard copy documents, it would be vulnerable to criticism as fishing. However, given the process of word searches of records stored electronically, I accept that the requirement to demonstrate relevance is made out. In what can only be an intuitive assessment, I am not persuaded that word searching these further categories, and then proceeding with the steps Mr Heard proposed, would be disproportionate.

[30] I accordingly direct that the next stage of potential discovery is for the electronic documents identified in the search to be de-duplicated. Thereafter a random sample of 200 documents is to be vetted on behalf of MPI and, subject to redacting any content that is claimed either to be confidential and irrelevant or

privileged, counsel for the parties are to confer on relevance as revealed by that sample. If that process does not lead to agreement on how discovery is to be approached for the balance of the de-duplicated documents in these categories, then the parties can refer the matter back to me. Provision of the sample is to occur by ***2 September 2016***.

Increased security for costs

[31] I have previously ordered the plaintiffs to provide security for costs in two tranches, totalling $350,000 to cover steps including inspection of discovered documents. MPI has applied for an increase on that amount, by a further $150,000.

[32] In funded representative actions, the Court starts from a presumption that relatively generous security will be provided as part of keeping the interests of the respective parties more or less in balance, given the different dynamic that is at play. In some cases, that is influenced by the named plaintiffs being obviously of inadequate resources to fund an adverse costs order themselves, and in some cases because the funder is not within the jurisdiction.

[33] Mr Hodder's concern was that the scope of discovery and inspection tasks are materially larger than was described to the Court when the initial orders for security for costs were made.

[34] On the other hand, Mr Salmon disputed that a revisiting of the extent of the order was warranted, given that an allowance was made for the prospect of appeals, and also that quantum was assessed on the basis that there might be up to 45 claimants whose claims would be before the Court. Mr Salmon also sought to distinguish this case from the Feltex litigation, in which the litigation funder had no assets in New Zealand.

[35] I accept that costs on the discovery and inspection stage of this proceeding are unlikely to be resolved by reference to the scale. I also accept that the substantial third party costs incurred with the litigation support provider will likely be a recoverable disbursement.

[36] Despite those considerations, I am not persuaded on the present state of work between and by the parties that a revisiting of the security for costs on discovery and inspection is warranted. I anticipate that I will be asked to revisit the extent of security for costs at a later pre-trial point in the proceedings.

Further timetabling orders

[37] Counsel are agreed on the need for timetabling orders for the steps in preparing the proceeding for the stage one trial. That is scheduled to start in August 2017, and it is timely for the parties to address timetabling. A little more time is required for them to do so, and I invite a joint memorandum to be filed by ***17 August 2016*** reflecting progress in that regard. If necessary, I will receive separate memoranda.

Statement of defence

[38] Mr Salmon argued that the plaintiffs are hampered by the absence of a pleading to the amended statement of defence which was filed in early June 2016. Mr Hodder argued that pleading to it would have been premature until his concerns about the scope of the plaintiffs' amended pleading had been resolved. Given the sequence in which other matters are to occur, it is appropriate to require a statement of defence to the amended statement of claim, and I direct that that is to occur promptly after provision of the particulars required of the plaintiffs by 19 August 2016. The defence to the amended statement of claim is to be filed and served by ***26 August 2016***.

Publication of minutes

[39] Progress with the proceedings is being made available by both parties on their respective websites. Mr Hodder sought confirmation of the Court's approval to upload minutes issued by me in relation to the proceeding on those websites. His caution is appropriate, given that minutes are generally issued to the parties and their advisers only, and are not for publication. However, it is appropriate in this case that the minutes be made available on the websites and I so authorise.

Summary of orders

[40] A joint memorandum in relation to further timetabling is to be filed by ***17 August 2016***.

[41] The plaintiffs are to provide particulars in respect of 3D Kiwi Limited and I J Scown & Sons Partnership by ***19 August 2016***.

[42] The plaintiffs are to file and serve the notice of particulars in relation to Seeka's loss by ***19 August 2016***.

[43] The defendant is to file and serve its statement of defence to the amended statement of claim by ***26 August 2016***.

[44] The plaintiffs are to file and serve the additional list of discoverable documents on behalf of Seeka by ***2 September 2016***.

[45] The defendant is to provide the sample of the electronic documents relating to its additional discovery by ***2 September 2016***.

[46] The plaintiffs are to file and serve an application in relation to the proposed changes to the represented claimants, together with the affidavit in support, by ***9 September 2016***.

Dobson J

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