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: 26 October 2016

Counsel: D M Salmon and M Heard for plaintiffs
J E Hodder QC, J C Catran and J E Dick for defendant

Minute: 27 October 2016

MINUTE OF DOBSON J

---

[1] At the request of the parties, I convened a further case management conference in this proceeding on 26 October 2016. Counsel for both parties wished to address matters of concern that are impeding preparation for trial.

Scope of stage one trial questions

[2] Over a period of months up to April 2016, I heard argument and provided a provisional view on the terms of questions for stage one of the trial. Eventually, amendments to my proposed terms of the questions were agreed between the parties and were confirmed in a consent memorandum dated 26 April 2016.

[3] The intent of the questions was to address whether the plaintiffs could make out the elements of their causes of action in negligence. The questions therefore ask whether the defendant owed a duty of care to either named plaintiff or members of the class represented by the first plaintiff to exercise reasonable care in its actions or

omissions prior to the incursion of Psa-V into New Zealand. Secondly, the questions address whether the plaintiffs can make out the alleged mode by which Psa-V entered New Zealand, as alleged in their statement of claim.

[4] On the third element of the cause of action in negligence, namely the requirement for a plaintiff to prove that breach of a duty of care owed to it caused loss, the agreed terms of questions were as follows:

> [2] ..
>
> (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 post-harvest operator, suffer some loss as a result?

[5] On 29 August 2016, the defendant filed an amended statement of defence, which included the following:

> *No loss*
>
> 125.12 Further, any kiwifruit orchard affected by the actual or perceived impact of Psa3 was further enabled to avoid economic loss by the making available of the more tolerant G3 gold kiwifruit cultivar, the increase in market price, and the improved orchard management practices, and the production and profitability of any such orchard has been (or ought to have been if reasonably operated) such that, over the relevant period (2010 to date), the immediate impact of any production loss and plant replacement costs has been outweighed by improved production and profitability and no such orchard has (or would have, if reasonably operated) suffered any such loss.

[6] That pleading gave notice of the defendant's intention to argue that initiatives available to affected kiwifruit growers in response to an incursion of Psa-V could reasonably be expected to compensate the operators of affected orchards by greater profitability in subsequent years. Arguably, that improved profitability would cancel out any more immediate losses that were established.

[7] Among the potential arguments this pleading could lead to is a comparison of heads of loss claimed by the operators of orchards, the quantified extent of which would be offset against the potential improved outcomes, if the recommended alternative strategies once Psa-V struck were, or had been, followed. In that event,

quantified comparisons of the consequences of the harm and the improvement in position from post-incursion initiatives would need to be netted off against one another to determine whether each grower could make out a net loss.

[8] Mr Hodder QC's position was therefore that any consideration of whether a claimant could make out some loss would require quantum determinations on all heads of loss and reasonably expected steps in mitigation of them.

[9] Mr Salmon reminded me that the plaintiffs' initial position had been that there ought to be finite determination of quantum, if the first two components of the cause of action in negligence were made out, within the first stage trial. However, as dialogue on the appropriate division of issues progressed, the plaintiffs accepted the sense in deferring the substantial additional work required to prove quantum. The inclusion of questions asking whether "some loss" was suffered as a result of breach of any duty of care was retained to acknowledge the need for that as the third element of the cause of action. From the plaintiffs' perspective, their trial preparation is progressing on the confined scope they understood was involved in this question. Mr Salmon protested it was too late for a broadening of the scope of that question to require full-blown trial on quantum. On the plaintiffs' estimate, that would require extensive additional preparation, and a materially longer trial than has been allowed for.

[10] For the defendant, Mr Hodder was concerned that a partial foray into any approximate assessment of the plaintiffs' ability to subsequently make out recoverable loss, conducted at the first stage on some unquantified basis, would risk compromising the full extent of the defendant's ability to challenge claims that recoverable loss had been suffered. It would also involve duplication with some preliminary inquiry into loss in stage one, followed by a more detailed contest on quantifiable loss at a later stage if a relevant duty of care was found to exist, and that it had been breached.

[11] My provisional view of the preferable solution to this difference is to remove questions about the existence of relevant loss suffered by plaintiffs entirely from the stage one trial. This would involve removing questions [2](c) and (d) cited at [4]

above. Mr Hodder had not anticipated that outcome and reasonably requested time to take instructions on the consequence for the defendant if the issues for trial in stage one are reduced in this respect.

[12] Mr Hodder suggested that in claims involving alleged novel duties of care, the three elements of existence of duty, relevant breach and loss caused by the breach are often assessed in the round, with a measure of inter-dependence between them, and that the evidence and arguments on each provides context for the others.

[13] In the present case, I incline to the view that perceived prejudice to the defendant from exclusion of all issues about loss is conceptual rather than practical. The duty of care is alleged in broad terms to be owed to a wide class, and in respect of actions or omissions by the defendant prior to Psa-V entering New Zealand. A deferral of the contested issue of whether any breach of a duty found to exist caused relevant loss to one or more claimants seems unlikely to compromise, in any material way, the defendant's ability to raise the widest range of arguments against the existence of a duty, and a breach of any such duty.

[14] However, I retain an open mind on that concern and have therefore granted Mr Hodder the time he reasonably requested in which to take instructions.

[15] A memorandum of counsel for the defendant is to be filed by ***5 pm*** on ***2 November 2016***. If it opposes the removal of questions [2](c) and (d), then counsel for the plaintiffs will have until ***5 pm on 9 November 2016*** to file a reply. If considered necessary by virtue of the inclusion of unanticipated comments, the defendant will have a further two days until ***5 pm*** on ***Friday, 11 November 2016*** to file a reply memorandum.

[16] I contemplate resolving this issue on the basis of those documents to be filed. If substantial new differences arise, then I will consider the appropriateness of convening a telephone conference.

Seeka's discovery obligations

[17] In a minute issued on 8 August 2016, I directed that Seeka was to provide full discovery on all aspects of its damages claim as if the finite extent of quantum was in issue at stage one. Discovery has been provided, but there is a healthy difference between counsel as to its adequacy. If the question of loss is deferred from the first trial, one of Mr Salmon's points was that the proportionate scope of discovery by Seeka ought to be reduced.

[18] In any event, Mr Salmon criticised the defendant's expectations that documents such as primary source documents used in the preparation of accounts (for example, invoices for sprays) comprised a disproportionate obligation on Seeka.

[19] I was not invited to rule on individual categories of documents. However, the discovery order made in August 2016 implicitly recognised that the extensive burden (especially for the stage one trial) was justified because overall the class action claimants have been able to defer other discovery obligations by virtue of the way issues have been structured.

[20] That remains my view. To the extent that the defendant can justify the relevance of further categories of documents needed to critique Seeka's quantum, and to construct an alternative analysis on the presence of any recoverable loss, then such categories of documents should be provided.

Defendant's discovery obligations

[21] The plaintiffs are also unhappy with the defendant's performance in complying with another direction made in my 8 August 2016 minute, to conduct additional word searches of electronic databases. At that time, the parties disagreed on the utility of three additional word searches the plaintiffs had requested for documents containing the words "pollen" or "bacteria", and a selection of other words perceived as triggering relevance of documents to the issues in the proceeding. I directed a sampling process to be undertaken, but the plaintiffs are critical of the way in which that has been conducted.

[22] In short, the sample produced for consideration on behalf of the plaintiffs was drawn not only from single documents that had content triggered by the word searches, but also "families" of documents that were linked in terms of the circumstances of their creation or origin where the component document identified by the word search had not been separated from the remainder of that family of documents. This led Mr Salmon to complain that the size of the sample was materially less than the 200 documents I had directed because of the inclusion of numerous documents comprised in families of documents that had not individually been triggered by the word searches.

[23] Ms Catran presented argument in defence of the adequacy of the defendant's compliance with this direction. Crown Law had carried out the process to comply with my order without conceding any prospect of additional relevant documents being discovered. From Crown Law's own assessment of relevance, Ms Catran provided me with the three documents that it was considered came closest to assuming relevance in the proceeding. With an inevitably superficial understanding of potential evidentiary issues, I am inclined to agree that the references that triggered the word searches in those documents are in respects that are incidental to the topics that are likely to be the subject of evidentiary contest.

[24] Because of the number of families of documents included, the random sample amounted to some 650 documents, rather than the 200 I directed. Crown Law is prepared to deconstruct the families of documents so as to reduce the sample to documents which have all individually triggered the word search, but Ms Catran's assessment is that there would still be more documents than the 200 I directed. Crown Law's resistance to doing any more is that no relevant documents have been found among the random sample. I had directed such a sample on the expectation that it would reveal the proportion of relevant documents discovered in a random sample. Crown Law's view is that there are none, and the plaintiffs cannot reasonably challenge that view.

[25] Further, it is Crown Law's understanding from the technical litigation support personnel involved that they have exhausted the opportunities for conducting any further levels of electronic interrogation of the content of the documents, so that the

plaintiffs should accept the lack of utility in requiring Crown Law to do anything more.

[26] Mr Heard, who responded on this point for the plaintiffs, was disinclined to accept Ms Catran's assurance and sought a direction from me requiring the parties to have the technical litigation support personnel involved on each side talk directly. I am not prepared to direct that but, via counsel, I urge Crown Law to be receptive to suggestions for additional electronic interrogation that can be undertaken without significant additional cost.

[27] Mr Heard also complained about the adequacy of Crown Law's response to a request for additional discovery on the topic of fire blight. The parties are still apart on what might reasonably be expected, but my provisional view was that the scope of inquiries that Crown Law has made of relevant MPI personnel appear sufficient. If more specific concerns can be raised by the plaintiffs, then they ought to be reasonably considered on behalf of the defendant.

[28] The defendant has sought orders that it not be required to undertake further substantive searches, and that there be confirmation of the sufficiency of the discharge of its discovery obligations. Once that point is reached, the defendant proposed that it would settle an exhaustive list of further documents within a period of two weeks.

[29] It is not appropriate to confirm that discovery tasks are at an end. In the negative sense, I am not persuaded by the plaintiffs' criticism that any further orders for discovery on behalf of the defendant are warranted. That is not to prevent dialogue and indeed I urge counsel to discuss constructively the scope of any additional realistic concerns for discovery.

Adequacy of plaintiffs' application to amend the identity of the represented claimants

[30] There has not been compliance with the directions in my 8 August 2016 minute for a single affidavit to identify the extent of the differences from the list of claimants advised as at the close of the opt-in period, and the identity presently

proposed for all of the claimants. The issue does not require determination but it is important that the plaintiffs be committed to a precise and exhaustive explanation of the extent of all changes that are proposed. No further orders will be made but the parties should liaise on the form in which all those matters are comprehensively and clearly recorded.

[31] A further case management conference may well be warranted before the summer vacation. Given the extent of other commitments, I invite counsel to liaise with the Registry as to a mutually suitable date to be allocated in case it is needed.

Dobson J

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