IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA CA

BETWEEN	ATTORNEY-GENERAL
	Appellant
AND	STRATHBOSS KIWIFRUIT LIMITED
	First Respondent
AND	SEEKA LIMITED
	Second Respondent

NOTICE OF APPEAL

24 July 2018

CROWN LAW
TE TARI TURE O TE KARAUNA

PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person:
Jenny Catran / Polly Higbee
Jenny.Catran@crownlaw.govt.nz / Polly.Higbee@crownlaw.govt.nz

Counsel Acting:
Jack Hodder QC

NOTICE OF APPEAL

To the Registrar of the Court of Appeal

1. The Attorney-General, the appellant in the proceeding identified above, gives notice that he is appealing to the Court against those parts of the judgment in the High Court in *Strathboss Kiwifruit Limited v Attorney-General* [2018] NZHC 1559, dated 27 June 2018 (**Judgment**), which concluded that:

    1.1 a relevant duty of care was owed to the first (representative) plaintiff and those within the represented class who have suffered loss to their property;

    1.2 such duty was breached as alleged in the pleaded first cause of action;

    1.3 such breach caused Psa3 bacteria to enter New Zealand and infect the first plaintiff's kiwifruit vines; and

    1.4 the statutory protection under s 163 of the Biosecurity Act 1993 was not available in relation to the acts or omissions held to constitute such breach so as to avoid the appellant being vicariously liable under the Crown Proceedings Act 1950.

Grounds of appeal

2. The specific grounds of appeal are that the High Court erred in law and in fact insofar as it effectively concluded that the answer to each of the following questions was "Yes" rather than "No", those questions relevantly being:[1]

    2.1 When undertaking functions and responsibilities under the Biosecurity Act 1993, did relevant officers/agents/employees of MAF (**MAF personnel**) owe a private law duty of care (in negligence – **duty**), to any persons involved in the kiwifruit industry?

    2.2 Did any such duty extend to omissions as well as acts by MAF personnel?

---

[1] The trial had a limited scope, defined by two compound questions directed by Dobson J in Minutes of 27 April 2016 and 11 November 2016 and set out at [12] and [16] of the Judgment. These questions have been formulated by the appellant but are largely extracted from those compound questions.

2.3 If there was any such duty, did the relevant MAF personnel breach that duty by:

2.3.1 deciding to allow the importation of kiwifruit pollen by the issue of import permits (**Imports Decision**) from April 2007;

2.3.2 relying on the Plant Health and Environment Laboratory (**PHEL**) report in making the Imports Decision;

2.3.3 failing to undertake a formal risk analysis before making the Imports Decision; or

2.3.4 failing to consult with the kiwifruit industry or other relevant agencies (such as Plant and Food) before making the Imports Decision?

2.4 Have the plaintiffs proved that Psa3 entered New Zealand by means of the consignment labelled "KIWI POLLEN" imported under Import Permit 2009036858 and given clearance under the Biosecurity Act 1993 by MAF personnel on 30 June 2009 (**June 2009 consignment**)?

2.5 Have the plaintiffs proved that, if there was any relevant breach of duty, such breach caused the first plaintiff's kiwifruit vines to become infected by Psa3?

2.6 If there was any such duty and breach:

2.6.1 was the conduct of the relevant MAF personnel outside the scope of s 163 of the Act; and

2.6.2 is the defendant unable to avoid any related liability by reason of s 6 of the Crown Proceedings Act 1950?

3. The High Court's findings on those questions were contrary to the law and to the weight of evidence. The appellant says the correct answer to each of those questions was "No" and more particularly says:

3.1 On the question of a duty of care, there was a lack of relevant proximity as well as compelling policy reasons negating the imposition of any duty on any of the relevant MAF personnel. The Biosecurity Act 1993 imposes public law duties on MAF personnel for the benefit of New Zealand as a whole (public health, economic activity, the environment, international trading obligations), which involve the balancing of a range of interests which may not be aligned, and which are inconsistent with the imposition of private law duties owed to individuals or limited classes whose economic interests may be adversely affected by acts or omissions relating to the duties and powers under the Biosecurity Act 1993.

3.2 On the question of omissions, the usual caution in attaching a private duty and negligence liability in relation to omissions by a defendant, not least a statutory regulator, should have been applied to reject any duty involving the various omissions by MAF personnel found to have been in breach.

3.3 On the question of breach by any of the relevant MAF personnel:

3.3.1 The Imports Decision was a reflection of a change of MAF policy in relation to pollen imports. It was also an exercise of judgement based on a range of inputs and relevant considerations (not least the absence then of any scientific evidence that kiwifruit pollen collected from hand-picked, closed buds in China was likely to be a pathway for Psa).

3.3.2 The PHEL report was a significant review of the contemporary scientific literature, prepared using expert scientific judgment, which underwent peer review by a number of internal and external scientists, and contained a clear conclusion that kiwifruit pollen was not associated with, nor transmitted by, any pests or diseases. It did not suffer from any relevant omissions and/or misleading statements. It was relevantly relied on by overseas biosecurity agencies such as the European and

Mediterranean Plant Protection Organisation (**EPPO**) and Biosecurity Australia.

3.3.3 There was a risk analysis undertaken by MAF personnel (and no requirement for it to be "formal") which considered the collection process and end use, and which is reflected in the conditions applied to various imports of pollen (not limited to kiwifruit pollen).

3.3.4 In 2006-2007, there was no obligation or expectation that, before granting an import permit, any MAF personnel should consult persons other than the importer (nor any reason why the importer should not be considered knowledgeable and the information it provided considered reliable).

On each of these matters, the High Court was wrong to conclude otherwise on the evidence adduced at trial.

3.4 On the question of causation, the plaintiffs clearly failed to discharge their onus of proving that: (a) the June 2009 consignment contained Psa3; and/or (b) that the contents were in any way applied to, or permitted to escape and affect, any kiwifruit orchard so as to establish the infection. The High Court was wrong to conclude otherwise on the evidence adduced at trial.

3.5 On s 163 of the Biosecurity Act 1993, the relevant MAF personnel did not act in bad faith (not alleged) nor "without reasonable cause" (they had credible reasons for why they took or did not take relevant actions), and thus are within s 163. In respect of the conclusion in the Judgment that s 163 only applies to a narrow class of persons under the Biosecurity Act 1993 (not raised in pleadings or at trial, but on which the High Court sought further written submissions) the appellant says that such a reading of s 163 is wrong in law.

3.6 On the question of the Crown Proceedings Act 1950, the plain effect and intent of s 6 is that the appellant (the Crown) is only vicariously

liable for tortious acts or omissions by its agents or employees. There is no direct Crown liability in tort for "systemic" or "institutional" (or "operational") negligence. Section 6 was and (as amended) remains clear that the Crown may rely on an enactment such as s 163 of the Biosecurity Act 1993 to the same extent as the relevant officer of the Crown could so rely.

3.7 Prior to the allocation of a hearing date under rule 38 of the Court of Appeal (Civil) Rules 2005, and by way of elaboration and/or amendment to this notice (pursuant to rule 34), the appellant will provide a particularised list of factual findings in the Judgment which are contended to be erroneous.

Judgment Sought

4. The appellant seeks the following judgment from the Court of Appeal:

4.1 an order allowing the appeal;

4.2 a declaration that the High Court erred in answering the questions at [2.1]-[2.6] with "Yes" rather than "No"; and

4.3 an award of costs in this Court, and in the High Court.

24 July 2018

Jack Hodder QC/ Polly Higbee
Counsel for the respondents

TO: The Registrar of the Court of Appeal of New Zealand.

AND TO: The respondents

This document is filed by Aaron Martin, solicitor for the appellant, of Crown Law.

The address for service of the appellant is Crown Law, Level 3, Justice Centre, 19 Aitken Street, Wellington 6011. Documents for service on the appellant may be left at this address for service or may be:

(a) posted to the solicitor at PO Box 2858, Wellington 6140; or

(b) left for the solicitor at a document exchange for direction to DX SP20208, Wellington Central; or

(c) transmitted to the solicitor by facsimile to 04 473 3482; or

(d) emailed to the solicitor at aaron.martin@crownlaw.govt.nz or at jenny.catran@crownlaw.gov.nz or at polly.higbee@crownlaw.govt.nz