

In the Court of Appeal of New Zealand

**CA420/2018**

between

**THE ATTORNEY-GENERAL**

Appellant

and

**STRATHBOSS KIWIFRUIT LIMITED**

First Respondent

and

**SEEKA LIMITED**

Second Respondent

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**NOTICE OF CROSS-APPEAL AND INTENTION TO  
SUPPORT DECISION ON OTHER GROUNDS**

6 August 2018

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## NOTICE OF CROSS-APPEAL AND INTENTION TO SUPPORT DECISION ON OTHER GROUNDS

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### To the registrar of the Court of Appeal

#### Cross-appeal

1. The respondents give notice that they are cross-appealing to the Court against the parts of judgment under appeal (**Judgment**) concluding that:
  - (a) The second cause of action (alleging negligence in the border clearance processes for the shipment of plant parts at issue (**Shipment**)) was not established;
  - (b) The appellant and / or its servants and agents do not owe a duty of care other than to “[those who can]... show they had property rights in the vines and crops or that their interest in the vines and crops is sufficiently direct or closely associated with those rights that they should be treated as though they have suffered loss to their property.” ([28]).

#### Grounds of cross-appeal

2. The Court erred in fact and law in the following respects.

*Conclusion that the second cause of action was not established*

3. All of the appellant’s witnesses, including the inspector who cleared the Shipment at the border, admitted that the Shipment ought to have been inspected.
4. Sections 26(1) and 27(c) of the Biosecurity Act 1993 stipulate that inspectors must not give clearance to goods covered by an Import Health Standard (**IHS**) unless they meet the requirements for clearance in the IHS.
5. Section 103(1) of the Biosecurity Act 1993 requires inspectors to use best endeavours to comply with and give effect to any relevant performance or technical standards.
6. The IHS for Nursery Stock required all imports under it to be physically inspected (individually or on a “sampling” basis), eg section 2.3 stated:

On arrival in New Zealand all documentation associated with the importation will be inspected by an inspector to ensure compliance. The nursery stock will be inspected using a randomly selected minimum 600 unit sample, to ensure that it complies with the entry conditions.
7. MAF’s internal standard for “Clearance of Plants and Plant Products” (**Process Procedure**) required all nursery stock to be inspected, eg cl 7.4.3.1 stated:

All nursery stock must be inspected at the port of entry or at specifically approved transitional facilities designed for nursery stock inspections. ...

8. In addition to the mandatory requirement in the Process Procedure to inspect all nursery stock (in section 7.4), section 7.3 required physical inspection where:
  - (a) The description of goods was in doubt; or
  - (b) The inspector was unfamiliar with the goods and the description was inadequate to assess the risk.
9. Further, if inspection was not mandatory, it was required in this case:
  - (a) Section s 27(b) of the Biosecurity Act requires inspectors to be satisfied that there were no discrepancies in the documentation accompanying the goods (or between that documentation and those goods) that suggested it might be unwise to rely on that documentation;
  - (b) The Process Procedures specifically mandated inspection where the description of the good was in doubt (section 7.3);
  - (c) The appellant's senior inspection witnesses all agreed that there were discrepancies in the documentation for the Shipment that ought to have led to a decision to hold the goods at the border and generate a "Non Compliance Report" (**NCR**); and
  - (d) The discrepancies were such that the NCR would (as admitted by three of the appellant's witnesses, and contrary to the finding in paragraph [980] of the Judgment) have led a reasonably competent inspector acting reasonably to inspect the Shipment.

*Conclusion that duty of care not owed except to the first respondent and represented claimants who had a sufficient interest in vines and crops*

10. As a matter of law and policy the appellant owed duties of care to all of the categories of claimants set out in paragraph [221(b)] of the Judgment.

**Notice of intention to support on other grounds**

11. The respondents further give notice that they intend to support the Judgment on the following grounds additional to those upon which it was based:
  - (a) If the import permit for the Shipment had included a condition requiring microscopic inspection of the Shipment prior to export, then the Shipment would not have been imported (contrary to paragraph [827] of the Judgment);
  - (b) The appellant's and / or its servants' and agents' responses to the outbreak of Psa in Italy were negligent and caused the outbreak of Psa in New Zealand (contrary to paragraph [842] of the Judgment);
  - (c) The appellant failed to lead sufficient (or, in most cases any) evidence from which to conclude that its relevant servants and agents who were border inspectors were entitled to seek to rely on s 163 of the Biosecurity Act 1993 (which provides an immunity to

specified persons for acts specified acts and omissions except where they acted (or omitted to act) without reasonable cause (which in context encompasses reasonable care)); and

- (d) As a matter of law and policy the appellant is directly liable in tort for the collective acts and omissions of its servants and agents, that is it has “institutional” as well as vicarious liability.

Dated 6 August 2018



Davey Salmon / Michael Heard / Jack Cundy / Miriam Chew  
Counsel for the respondents