IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11493
[2015] NZHC 1596

BETWEEN	STRATHBOSS KIWIFRUIT LIMITED First Plaintiff	
	SEEKA KIWIFRUIT INDUSTRIES LIMITED Second Plaintiff	
AND	ATTORNEY-GENERAL Defendant	

Hearing: 3-4 June 2015

Counsel: M N Dunning QC and D J S Parker for plaintiffs
M T Scholtens QC, A Boadita-Cormican and J Catran for defendant

Judgment: 8 July 2015

RESERVED JUDGMENT OF DOBSON J

Contents

[1] The claims in these proceedings relate to losses suffered as a result of a pathogenic bacterium known as Psa-V being introduced into New Zealand. Psa-V has had serious deleterious effects on some kiwifruit vines. The first plaintiff (Strathboss) sues for losses it claims to have suffered as a grower of kiwifruit. The

second plaintiff (Seeka) sues for losses it claims were caused to its business as a post-harvest operator (PHO) in the kiwifruit industry by the adverse consequences of the introduction of Psa-V.

[2] The claims are brought against the Attorney-General, sued on behalf of the Ministry for Primary Industries (MPI). At the time of the relevant events, the Ministry charged with administering the Biosecurity Act 1993 (the Act) was the Ministry of Agriculture and Forestry. Nothing turns on the change in identity of the Ministry claimed to be liable for the losses involved.

[3] Strathboss and Seeka wish to pursue the proceedings on behalf of other growers and PHOs, which are said to be classes whose losses can be claimed in a representative action. The claimants have contracted with a litigation funder to fund the claims.

[4] This judgment deals with a number of inter-related applications brought on behalf of the plaintiffs. They seek leave to bring the proceedings as a funded representative action, and approval of the terms on which the funding is to be provided. If entitled to those orders, the plaintiffs also ask the Court to set an end date for the opt-in period during which additional claimants can join the classes represented, either as growers or PHOs. In addition, if the initial orders are made, the plaintiffs accept that security should be provided for the defendant's costs, so orders in that respect also become appropriate.

Leave to bring a funded representative action

[5] Leave to bring a representative action is provided for in r 4.24 of the High Court Rules as follows:

> **4.24 Persons having same interest**
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> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
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> (a) with the consent of the other persons who have the same interest; or
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> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[6] The threshold for identifying a sufficient common interest is relatively low. In *Houghton v Saunders* (the Feltex litigation), the Court considered that the efficiency of a single determination of the same issue for claimants similarly affected generally encourages the Court to facilitate a representative action, rather than look for a reason not to allow it.[1]

[7] On an interlocutory appeal to the Supreme Court on these issues in the Feltex litigation, Elias CJ and Anderson J observed that representative actions will be appropriate: [2]

> … where some substantial question is common to a number of litigants or the claims of a number of potential litigants arise out of the same transaction or series of transactions.

[8] Their judgment rejected a submission that damages claims are not suitable for representative actions. It may be sufficient if there is a common interest in the determination of a substantial issue of law or fact.[3]

[9] As Mr Dunning QC accepted, whether claims are appropriately brought on a representative basis should not be a stand-alone consideration, where the proceedings are being pursued on a funded basis. That introduces a different dynamic in the balancing of interests between plaintiffs and defendants. The Court has assumed a responsibility to ensure that the ability for litigation funders with no personal claim to share in the recovery of losses in issue does not lead to abuse of the facility of representative actions. As the Court of Appeal observed in another decision arising in the Feltex litigation:[4]

> [38] … While the threshold for representation orders is low, when accompanied by an order admitting a funder it may prove desirable to view the total package of orders as a stool supported by four legs, each essential to its stability:
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> (a) the order for representation (considered along with its funding element);
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> (b) the court's approval of the funder and the funding arrangement;

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1 *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [100].
2 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37 [2014] 1 NZLR 541 at [8].
3 At [51].
4 *Saunders v Houghton (No 1)* [2009] NZCA 610, [2010] 3 NZLR 331.

(c) the application for security (which may include consideration of the final leg); and

(d) the provisional appraisal of the merits. An erroneous decision on any element may either wrongly exclude worthy plaintiffs from access to the court, or wrongly impose on defendants who have committed no fault such burden of costs and distraction from their other affairs so as to pressure them to yield to a baseless demand and settle.

[39] In some cases it may be appropriate to identify an initial issue, success or failure on which is likely in practice, if not in law, to determine the result of the case. The initial representation order may be limited to that element, reserving the question whether at a further stage the order will be extended or the parties left to continue their cases as individuals.

[10] A relevant concern for MPI is that a representative action ought not to be used in a way that prevents it from drawing relevant distinctions between claimants in a class. The concern is this could inhibit argument on the full scope of defences, or enable some within the class to avoid the rigours of individual testing of their claims and any defences to them.

[11] On the present arguments, counsel accepted that the considerations on various aspects were at least partially inter-dependent and presented submissions accordingly. In this case, it is appropriate to begin with the competing positions on the tenability of the causes of action.

The factual background

[12] The plaintiffs' case is that from at least 2004, MPI was aware of a potential threat from the importation of Psa. They plead that one of the controls on importing kiwifruit material was a quarantine period during which tests for Psa were to be conducted.

[13] In 2007 or 2008, an outbreak of Psa-V was identified in the Lazio region of Italy. By early 2009, that outbreak was becoming more widespread in Italy and the Italian kiwifruit industry was adversely affected to an extent not previously experienced, there or elsewhere. The plaintiffs would argue that MPI had, or should have had, a sufficient appreciation of the potential impact of Psa-V, such as was

being experienced in Italy, to take more precautions than it did to guard against its introduction into New Zealand.

[14] The plaintiffs' claim is that instead of taking more precautions, conditions for the import of material that might carry Psa-V were relaxed somewhat. In particular, import permits were issued for a consignment of kiwifruit pollen to be imported by a commercial enterprise based near Te Puke. Pursuant to a permit issued by MPI in June 2009, that firm imported a consignment described as 4.5 kilograms of anthers, being kiwifruit plant material, which the importer intended to mill to produce pollen. The anthers had been sourced from the Shaanxi region of China. Previously, import permits for kiwifruit pollen had been subject to a condition that plant material had to be milled outside New Zealand. The plaintiffs will argue that relaxing that condition to permit the milling of plant material in New Zealand was a relevant element of MPI's lack of care.

[15] The presence of Psa-V in New Zealand was first apparent in October 2010 in two orchards adjacent to the premises of the commercial importer of the consignment of anthers. A subsequent analysis of the Psa-V material now present in the Te Puke area by Associate Professor Poulter of Otago University, an expert retained by the plaintiffs, concludes that it shares the DNA characteristics of, and is entirely consistent with that present in Shaanxi in China. His research also distinguished the Psa-V here from that in Italy. Professor Poulter disagrees with a tracing report prepared by MPI as to the possible routes of entry of Psa-V into New Zealand.

[16] The plaintiffs plead that by June 2012, 1,226 kiwifruit orchards were identified as infected with Psa-V, comprising 37 per cent by number and 46 per cent by hectares of the total.

[17] MPI exercised powers under the Act to restrict movements from the two orchards initially infected with Psa-V (RP1 and RP2). This included issuing Restricted Place Notices and a Controlled Area Notice. The initial response was one of aggressive containment, by urging the removal of affected vines, plus a programme of appropriate spraying.

[18] In November 2010, collaboration between MPI and the industry resulted in the formation of Kiwifruit Vine Health (KVH), an incorporated society formed for the purpose of minimising the impact of Psa-V, and helping growers overcome the adverse consequences of infection. KVH was funded by the provision of $25 million each by Zespri and by MPI. KVH campaigned with growers to urge the prompt removal of affected vines, their replacement with Psa-V resilient cultivars, and a programme of spraying to reduce the on-going risks of Psa-V. Growers who removed affected vines and replaced them were entitled to apply to KVH for compensation for the costs of doing so.

[19] That first phase of KVH's involvement lasted until about March 2011. After that, growers were no longer urged to remove affected vines, and KVH ceased accepting applications for compensation for doing so.

[20] Many of the factual elements pleaded, which are reflected in factual evidence and expert opinions provided in affidavits in support of the current applications, are disputed on behalf of MPI. For instance, Ms Scholtens QC indicated that MPI would produce conflicting expert evidence that disputed the ability to trace the DNA present in Psa-V in New Zealand back to the Psa-V in Shaanxi, China. MPI would defend the claims on the basis that it is impossible to attribute a single source to the Psa-V that has affected New Zealand kiwifruit orchards. MPI would argue that there may well have been more than one importation of Psa-V. It has also raised the prospect that these may have been introduced earlier, and have been present on Psa-V resistant strains of green kiwifruit plants. In foreshadowing the range of likely factual contests, MPI does not go so far as to suggest that the factual analysis relied on by the plaintiffs is without foundation, or advanced irresponsibly.

[21] In a provisional appraisal of the merits, it is not appropriate to assess the tenability of the causes of action by making any definitive factual findings. Where the factual allegations in the statement of claim cannot be compellingly refuted, it is appropriate to undertake the assessment on the assumption that the plaintiffs have realistic prospects of making out the necessary factual allegations.

Basis for the causes of action and grounds for disputing their tenability

[22] The plaintiffs have pleaded two causes of action in negligence, both based on the exercise of powers under the Act (or failure to do so competently), and discharge of obligations imposed by it. The first cause of action is pleaded, in relatively general terms, that MPI, by its officers, agents and employees, owed the plaintiffs a duty to exercise reasonable care and skill when undertaking their functions and responsibilities in relation to biosecurity in New Zealand, including their functions under the Act. That duty is alleged to extend to the regulation of importing "risk goods"[5] into New Zealand. The plaintiffs allege that MPI was on notice of the risk of Psa-V being imported, and failed to take reasonable care to prevent it happening.

[23] The second cause of action pleads more specifically that MPI personnel owed the plaintiffs a duty to exercise reasonable care and skill when carrying out functions in respect of the border processes for pollen imports. This duty is alleged to extend to managing and controlling the importation of risk goods, considering and approving import permits and undertaking functions covered by internal policies of MPI.

[24] The statement of claim alleges that the Act created a relationship of sufficient proximity between those carrying out the functions under the Act and the plaintiffs, so as to give rise to a duty of care. It is further alleged that losses of the types that have been suffered were sufficiently foreseeable for a duty of care to arise.

[25] Mr Dunning foreshadowed a sequence of propositions that could justify the imputation of a duty of care to MPI, when all facts are known at trial. In terms of the process for assessing whether a duty of care should be imputed, the plaintiffs relied on the Supreme Court's re-statement of the considerations in *North Shore City Council v Attorney-General [The Grange]*.[6] The types of loss that have been suffered were arguably reasonably foreseeable as a consequence of a breach of duty

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5 "Risk goods" are defined in s 2 of the Act in terms that include any organic material that it is reasonable to suspect harbours or contains an organism that may cause unwanted harm to natural and physical resources or human health in New Zealand.

6 *North Shore City Council v Attorney-General [The Grange]* [2012] NZSC 49, [2012] 3 NZLR 341.

by MPI.[7] If foreseeability was established, then the nature and closeness of the connection between MPI and growers was sufficiently proximate to treat a duty of care as being owed to them.[8] Whilst policy considerations could not be determined before all the context was available at trial, the plaintiffs argued that there were no negative considerations that would count against attributing a duty of care.

[26] It was argued on behalf of MPI on a number of grounds that there was no tenable cause of action available to growers or PHOs in relation to losses alleged to have been caused by the Psa-V incursion. These included:

(a) that imposing a duty of care would be inconsistent with the scheme of the Act;

(b) that the Act codifies the exclusive circumstances in which compensation would be payable;

(c) that the duty of care would cut across contractual relationships with KVH;

(d) that a duty of care would impose indeterminate liability on the Crown;

(e) so far as PHOs are concerned, that it would be inappropriate to recognise a duty of care for causing solely economic loss; and

(f) overriding all of these arguments, policy considerations should tell against the imposition of a duty of care.

[27] MPI had been granted an extended period in which to consider whether it would seek to strike out the proceedings, and elected not to do so. Mr Dunning argued that, having adopted that course, MPI could not pursue what amounted to a strike out application with a reverse onus, by requiring the plaintiffs to justify the tenability of the causes of action in the absence of such an application.

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7 At [157].
8 At [158].

[28] Ms Scholtens' rejoinder to this was that a component of the plaintiffs' entitlement to pursue a funded representative action required them to satisfy the Court that such proceedings raised tenable causes of action. Arguably there should be no restriction on the defendant opposing that proposition, merely because it had elected not to pursue its own application to strike out the causes of action.

[29] The provisional assessment of merits contemplated by the Court of Appeal in *Saunders v Houghton (No 1)*[9] as one component of approval for a funded representative action may require differing levels of scrutiny, depending on the circumstances and the nature of the proposed representative claims. The purpose of the provisional scrutiny is different from that applying on a defendant's application to strike out. In the latter context, a plaintiff has to withstand a challenge advanced by a defendant who argues that the prospect of success in the case is so weak that the defendant ought to be relieved of the obligation of defending it through interlocutory steps and trial.

[30] In the present context, an appraisal of the tenability of the claims is one component of the Court's assessment of whether the claims are appropriately pursued on a representative basis. That involves the Court assessing whether the claims have sufficient tenability in the sense of bona fides that it should approve their pursuit in the different dynamic of aggregated claims that are funded by an outside entity which will generally have a financial interest in the outcome. If serious doubts arise as to the tenability of the claims, the Court may be more reluctant to approve funding arrangements for a representative action if that dynamic might be used improperly to pressure the defendant to settle what appear to be unmeritorious claims. In this regard, Ms Scholtens observed that whilst notionally the Crown might be seen as a litigant with unlimited resources, it should nonetheless not be treated as immune from improper pressure to settle.

[31] I am satisfied that MPI should not be precluded from advancing the arguments it has in opposing the various orders sought, merely because MPI has not pursued a discrete application to strike the proceedings out.

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9 Above n 4.

[32] In advancing the various grounds in opposition, Ms Scholtens acknowledged the observations of the Supreme Court as to the difficulties, and possibly undesirability, of attempting to determine whether novel duties of care in tort should be recognised in the absence of a full airing of the factual context at trial.[10] Despite this acknowledgement, Ms Scholtens argued that the cumulative indications against such a duty of care were sufficient to justify such a finding at the outset.

The Act

[33] In considering whether a duty of care is to be imputed to a public body, the starting point is a consideration of its functions and responsibilities under the relevant Act.[11] Counsel for MPI characterised the Act as establishing a multi-layered biosecurity system, with duties on the Crown, regional councils, territorial authorities, management agencies, industry and members of the public. Where the relevant responsibilities are shared, it would arguably be inappropriate to impose a private law duty of care on the Crown for the consequences of a breach of reasonable standards.

[34] Potentially relevant amendments were made to the Act by the Biosecurity Law Reform Act 2012, which came into force on 18 September 2012. MPI's approach is that it would be the version of the Act in force at the time all elements of individual claimants' causes of action arose that is to be considered. Because the elements of the causes of action would include causation of loss, those claims relating to losses arising after 18 September 2012 would arguably have to make out a cause of action relative to the provisions that then applied.

[35] The plaintiffs reject any such distinction and would argue that the cause of action for all claimants could be made out at the time the act of negligence occurred: if this was when Psa-V material was permitted into New Zealand, then that would be the appropriate time.

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10 For example, *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J, acknowledged in *The Grange*, above n 6, at [146]. See also Elias CJ in *Body Corporate 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297 at [5].

11 *The Grange*, above n 6, at [170].

[36] It is unnecessary to decide the point at this stage. For the purposes of my provisional analysis, I consider the terms of the Act that applied up to the 2012 amendment coming into force.

[37] Part 3 of the Act has its own purpose which is to provide for the effective management of risks associated with the importation of risk goods.[12] It provides the statutory basis for regulating the importation of all organisms or substances that might reasonably be suspected to contain organisms that may be harmful in New Zealand. It creates powers for the Crown to control such imports, although it does provide opportunities for interested organisations to contribute to systems for policing the border. It also imposes obligations on importers of any risk goods to maintain adequate records.

[38] Policing the border for risk goods, as with the entry of foreign nationals, is classically seen as a core function of the State. The powers are expressed in terms seeking the effective management of such risks, so it may be inferred that there is no statutory aspiration to completely avoid or eliminate such risks.

[39] Part 5 of the Act provides for pest management, with the purpose of that part being to provide for the effective management or eradication of pests and unwanted organisms.[13] That part does provide more powers that are shared with regional and local government, and with industry bodies. It provides, for example, for national and regional pest management strategies to respond to incursions, and has provisions defining the Crown's obligations in relation to such pest management strategies. There is a power to impose levies for particular strategies that are devised.

[40] The prospect of paying compensation is provided for in s 86(2) in the following terms:

> **86 Compensation**
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> …
>
> (2) A pest management strategy may provide for or permit the payment of compensation to a person who at the time an organism is declared

[12] Biosecurity Act 1993, s 16.
[13] Biosecurity Act 1993, s 54.

> to be a pest is deriving income from domesticated organisms of the species whose feral or wild population is a pest and whose organisms are necessarily destroyed in the course of implementing the strategy.

[41] The section also has specific exclusions from those who might be liable to receive compensation, for example those who have failed to comply with the relevant strategy or those whose loss was suffered before the time when an inspector or authorised person has established the presence of the pest on that person's premises.

[42] The extent of Crown obligations under Part 5 are also explicitly addressed in s 87:

> **87 Crown obligations**
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> (1) A national pest management strategy shall impose obligations and costs on the Crown according to its tenor.
>
> (2) The Governor-General may, by Order in Council, approve the application of a regional pest management strategy or any part of it to the Crown; and—
>
> (a) Except to the extent that such an order so provides, the strategy shall not have the effect of imposing costs or obligations on the Crown; and
>
> (b) Where a strategy has been amended, it shall not have the effect of imposing costs or obligations on the Crown in addition to those previously provided for except to the extent that a further such order so provides.

[43] Ms Scholtens characterised this provision as setting the limits on financial obligations of the Crown to compensate those who suffered loss as a result of the incursion of risk goods.

[44] Further, MPI would rely on the provisions in Part 9 of the Act that address the prospects for compensation and the Crown's liability in the following additional terms:

> **162A Compensation**
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> (1) This section applies when—

(a) powers under this Act are exercised for the purpose of eradicating or managing an organism; and

(b) the powers are not exercised to implement a pest management plan or pathway management plan; and

(c) the exercise of the powers causes loss to a person as a result of—

(i) damage to or destruction of the person's property; or

(ii) restrictions imposed under Part 6 or 7 on the movement or disposal of the person's goods; and

(d) there is no agreement under Part 5A that applies to the loss and whose provisions on compensation are expressed to take priority over this section.

(2) The person is entitled to compensation under this section for loss that—

(a) is verifiable; and

(b) is loss that the person has been unable to mitigate by taking every step that is reasonable in the circumstances.

(3) Compensation must not be paid if—

(a) the person's loss relates to unauthorised goods or uncleared goods; or

(b) the person suffered the loss before the time at which the exercise of the powers began; or

(c) the person failed to comply with biosecurity law—

(i) in a serious or significant way; or

(ii) in a way that contributed to the presence of the organism; or

(iii) in a way that contributed to the spread of the organism.

(4) The amount of compensation paid must put the person to whom it is paid in no better or worse position than a person whose property or goods are not directly affected by the exercise of the powers.

(5) The period for making a claim for compensation after the date on which the loss suffered by the person ought reasonably to have been verifiable is—

(a) within 1 year from the date; or

(b) after 1 year from the date, if the person was unable to make a claim within 1 year because of circumstances beyond the person's control.

(6) If there is a dispute about eligibility for, or the amount of, compensation,—

(a) the dispute must be submitted to arbitration; and

(b) the arbitration must be conducted under the Arbitration Act 1996.

(7) Compensation payable by a Minister or a chief executive is payable from money appropriated by Parliament for the purpose.

163 Protection of inspectors and others

An inspector, authorised person, accredited person, or other person who does any act or omits to do any act in pursuance of any of the functions, powers, or duties conferred on that person by or under this Act or a pest management plan or a pathway management plan shall not be under any civil or criminal liability in respect of that act or omission, unless the person has acted, or omitted to act, in bad faith or without reasonable cause.

164 Liability for goods

The Crown shall not be under any civil liability in respect of any loss or damage to any goods suffered—

(a) While those goods are in the custody of the Crown by reason of the exercise, in good faith and with reasonable care, of authority under this Act; or

(b) As a result of or in the course of any treatment, handling, or quarantine of those goods undertaken or required in good faith and with reasonable care by an inspector or any other person acting in the exercise of authority under this Act.

[45] MPI would rely on the extended definition of "authorised person" as including the Crown, where it appears in s 163. The combined effect of these provisions, and the context in which the other sections cited by Ms Scholtens appear in the scheme of the Act do raise tenable grounds for arguing that the terms of the Act do not contemplate that a private law duty of care exists.

[46] However, at this preliminary stage, and without determinations on all the relevant factual circumstances, the prospects that the plaintiffs can distinguish their circumstances from the provisions suggesting a limitation or exclusion of the Crown's liability cannot be dismissed. For instance, the limitation of liability under s 163 might not protect the Crown if the final expression "without reasonable cause"

is interpreted as meaning without negligence and the present claims are advanced on the basis that negligent acts or omissions can be made out.

[47] In the same way, it may be arguable that the provisions in s 162A only apply to losses caused by intervention under the Act once the need has been recognised to manage or eradicate an organism. Further, arguably s 164 may be confined to the circumstances in which the Crown asserts control over goods owned by others, in the course of enforcing the Act. Similar arguments may exist to exclude the prospect that s 86(2) prevents claims of the type alleged by the plaintiffs.

[48] In support of her challenge to the existence of any private law duty of care, Ms Scholtens argued that its scope would inevitably be indeterminate. That would make it unjust to impose such a duty of care where the burden on the Crown to take precautions against the risk, and the consequences of it being found in breach, would be out of all proportion to its fault. For instance, if a duty was imposed to take greater care than occurred in relation to the introduction of a harmful organism, how could the Crown reasonably appreciate the extent of those to whom the duty was owed? Ms Scholtens suggested substantial difficulties for the Crown as a tortfeasor in defining the boundaries of any such liabilities, and defining circumstances that might break the chain of causation for the types of loss claimed.

[49] These concerns were also said to contribute to the difficulty that would arise for the Crown in defending a representative action, when there may be an infinite variety of circumstances that influenced whether loss was suffered. Ultimately, the point for the Crown was that it is entirely antithetical to the statutory regime under the Act for the Crown to be imputed with a duty to take care, effectively for all the loss that a whole industry might suffer as a result of the importation of an organism such as Psa-V.

[50] Difficulties in defining the boundaries of a duty of care can be a relevant factor against imputing a duty of care in the first place.[14] As Ms Scholtens submitted, proportionality as between the fault and the extent of adverse

[14] See, for example, *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [60].

consequences may also have a bearing on whether a duty of care is imputed and, if so, the scope of it.

[51] These considerations can arise in the classic inquiry into the proximity between the defendant imputed with a duty to take care, and the class of claimants who can be identified as those to whom the duty is owed.

[52] The various components of these arguments against a duty of care are clearly arguable. However, a determination on them, as influenced by the ultimate evaluative consideration of policy matters, could not realistically be provided at this preliminary stage.

[53] Ms Scholtens raised additional objections to causes of action for the PHOs where their claims were solely for economic losses. There are situations in which claimants who have suffered purely economic loss face greater difficulties in making out their claims, but the current approach in New Zealand tends to treat that as a factor influencing proximity and policy considerations, rather than a basis for exclusion.[15]

[54] Accordingly, for the purposes of the provisional assessment undertaken on the present argument, I am satisfied that there are sufficient prospects of making out a duty of care for the claims to proceed within the context of a funded representative action.

Variations in claimants' circumstances render representative action inappropriate

[55] The Crown submitted that the range of circumstances of growers who are likely claimants is so diverse as to render representative action inappropriate. Ms Scholtens emphasised that a range of factors such as size, location, management practices, the types of cultivar being grown, as well as variations in the circumstances that pertained after vines were infected with Psa-V, would mean that determining the existence of any duty of care, and whether it was breached, could

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[15] See, for example, *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZSC 158, [2011] 2 NZLR 289 at [30]; *Spencer on Byron*, above n 10, at [12], [41].

not fairly be decided in a representative action. The legitimate concern for a defendant in such circumstances is that additional claimants whose circumstances differed materially from a representative plaintiff ought not to be able to hide behind a representative claimant if that prevents a defendant testing the potentially different circumstances of those others.

[56] Ms Scholtens was concerned that there may be relevant distinctions between growers even on the basic consideration of the proximity between MPI in the discharge of its functions, and the circumstances of individual growers. It was not immediately apparent to me that policy considerations might apply differently in determining whether a duty of care was owed, and had been breached, in respect of growers of different sizes, or in different locations.

[57] Certainly, representative actions can readily accommodate argument on an individual claimant basis if the stage of determining quantum is reached. The separation of a determination of liability from quantum is both sensible and efficient.

[58] However, it may also be unnecessary that all aspects of liability be capable of determination on the same footing for all those within a represented class. The Court of Appeal recognised in the Feltex litigation that an initial representation order may be limited to some identified initial issue, the success or failure of which is likely in practice to determine the result of the case.[16] The Supreme Court has recognised the prospect of using representative actions where there is a question in common among a number of litigants.[17]

[59] I consider the majority of the differences Ms Scholtens identified to have more meaningful impact in assessment of quantum, rather than in establishing whether a duty of care was owed and, if so, whether it was breached. Certainly on some basic propositions such as whether the Crown owed kiwifruit growers a duty to take greater care than it did to prevent the importation of Psa-V, there is a prospect of claimants crafting a duty of care that would be owed to kiwifruit growers as a group.

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16 *Saunders v Houghton (No 1)*, above n 4, at [39].
17 *Credit Suisse Private Equity LLC v Houghton*, above n 2.

Depending on the nature of the alleged failure by MPI, other formulations of a duty of care and its breach might apply to defined subsets of growers.

[60] I consider that the definition of the first stage of questions to be determined, and the provisions for possible subsets of claims thereafter, should be able to accommodate the range of differences between growers that MPI contends to be potentially relevant. Provided that is so, the existence of a range of subsets of growers is not sufficient to deny the claimants resort to a representative action procedure.

[61] MPI took a discrete point in relation to the representative action application so far as it related to the second plaintiff. There are some 12 PHOs, but thus far no indication of likely commitments from any others, apart from Seeka, that they intend to join as claimants. Ms Scholtens argued that until that point is reached, there is no basis for the Court to make a representative order in relation to claims brought on behalf of PHOs.

[62] Once the Court is satisfied that a representative order is appropriate for claims on behalf of growers, any doubt as to whether the order might also avail PHOs is of secondary importance. I contemplate an order that will apply in relation to claims by growers, and is contingently available in relation to PHOs if claimants in that category subsequently commit to joining the action.

Appropriate terms for funding the action

[63] A healthy expectation that litigation funders will disclose the contractual terms of their involvement with claimants has recently evolved.[18] In this case, W M Wilson QC as a director of the funding company has annexed to an affidavit the full terms of the contract that applies to the funding arrangements. He has also exhibited legal advice on the effect of those terms, and consequences of entering into them. It does not purport to advise on the reasonableness of those terms, apart from noting in general terms that the funding arrangement is similar to others of its sort.

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[18] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

[64] No objection has been taken to the identity of the funder, LPF Litigation Funding Limited, a New Zealand incorporated company having its registered office in Auckland. The terms of the funding deed provide for a committee representing claimants, as well as each plaintiff that has delivered a completed participation notice, and the funder, to be parties to the deed.

[65] Ms Boadita-Cormican, who presented argument on behalf of the Crown on this issue, submitted that the contractual terms left too much power with the funder. The Court's concern with this aspect of the arrangements derives from traditional concerns to prevent champertous pursuit of claims. Now that legitimate funding arrangements are a more or less settled feature of the conduct of civil litigation, concern remains to ensure that funders do not have control over claimants' causes of action so as to pursue and determine them in their own interests, rather than facilitating pursuit by those who are entitled to assert the causes of action.

[66] Such concerns have to be tempered by the reality that these are, after all, commercial arrangements. It would be somewhat naïve to expect that he who pays the piper will not have some ability to call the tune.

[67] In this case, it was argued that too much control vested with the funder because of its entitlement to terminate the funding agreement, without offering any reason for doing so, on five days' notice. If that occurred, the funder would remain liable for the costs incurred on behalf of the plaintiffs up to the date of termination, and any adverse costs order that arises thereafter from discontinuance, if the discontinuance was caused directly and solely by the funder's termination of its obligations under the deed. If the funder does terminate in such circumstances, then the plaintiffs are obliged to provide replacement security for any security for costs that had been provided by the funder, and the plaintiffs are to procure release to the funder of all the security for costs it had provided.

[68] The Crown was also concerned at the funder's effective power of veto in relation to settlement of the proceedings. The plaintiffs are not to make or accept an offer of settlement, or discontinue, without prior notification to the funder and without its prior written consent. The deed includes a mechanism for resolving

differences on this point, and Mr Dunning urged me to treat it as reasonable given what he characterised as the remote prospect that the claimants' and the funder's interests would not continue to coincide regarding the preferable outcome, if and when discontinuance or settlement became a prospect.

[69] Ms Boadita-Cormican invited comparison with the January 2014 terms of a Code of Conduct for Litigation Funders adopted by the Association of Litigation Funders of England and Wales. Those terms provided that a funding agreement was to state whether a funder could terminate a funding agreement if it reasonably ceased to be satisfied about the merits of the dispute, reasonably believed the dispute was no longer viable, or reasonably believed that there had been a material breach of the funding agreement by the funded party. Those terms prevent members of that association from including a discretionary right to terminate in the absence of the three circumstances I have just described. Ms Boadita-Cormican argued that the terms of the deed in this case left an effective measure of control over settlement with the funder to a greater extent than would be the case in litigation in England and Wales.

[70] I am not persuaded that the terms of the deed with the funder in this case are necessarily inappropriate for a representative action of this type. There is likely to be a range of views as to what would constitute an acceptable settlement, or the circumstances in which the plaintiffs may be better advised to explore alternatives for bringing the claims to an end. As between the claimants, the committee representing them will have to strive for consensus, and on major issues will no doubt be cognisant of the attitude of the funder. In most scenarios, I accept Mr Dunning's point that the claimants and the funder should continue to have aligned interests.

[71] Unlike representative actions for, say, failed investments, here the action will likely require positive input from all of the claimants. The funder will therefore need to maintain their goodwill to carry on with the action. That goodwill would be in jeopardy if the funder wanted to continue when the claimants considered an acceptable settlement was available. In the converse situation, the defendant can hardly complain if the funder is the party wanting to discontinue.

[72] One benefit of the transparency of the terms on which the funder is participating is that the perceived reasonableness or otherwise of the funder's stance is likely to be apparent to the Crown in the case of a major schism between the funder and the claimants.

[73] More importantly, the mechanisms for resolving major disputes contemplate the involvement of independent third parties with appropriate expertise. Reputationally, if in no other respect, that will provide a fetter on the funder's ability to act unreasonably.

[74] No issue was taken with the terms on which the funder would be remunerated, depending on outcome.

Opt-in procedure

[75] Assuming that leave was granted to commence the proceedings on a funded representative basis, the plaintiffs also requested the Court to set an opt-in period during which additional claimants could commit to joining the proceedings. Mr Dunning sought a period of six months from the date of this decision. He argued that, until the other orders sought were made, there was in fact no representative action formally in existence, and it was reasonable to anticipate that potential litigants would await this decision. He further argued that six months did not give rise to any limitation issues as none would arise before October 2016.

[76] The Crown considered that six months was too long, and if approval was granted, submitted that the opt-in period should be substantially shorter than six months so that the Crown would be informed, within a reasonable period, of the scale of the claims being pursued against it.

[77] The claimant group has been proactive in making information available in relation to the proceedings via their own website. On 23 January 2015, I approved the terms on which the nature of the proceedings and their proposed progress were to be described on that website. I accept that claimants should be afforded a reasonable opportunity to consider their position and take their own legal advice once the terms on which a funded representative action is to proceed are settled.

[78] However, given the history of the matter thus far, I consider that a period of three months from the date of this decision is sufficient for those purposes. I accordingly set the date by which any additional claimants must opt in at Friday, 9 October 2015.

Security for costs

[79] The evolving practice is for funders of funded representative actions to provide security for costs which tend to be quantified on a relatively generous basis in favour of defendants.[19]

[80] In this case, the funder has acknowledged the appropriateness of it providing security for costs from the outset, in a form readily enforceable in New Zealand. That is appropriate, and the issue is therefore settling on the appropriate quantum of security for costs on a staged basis, and ideally providing a formula for the quantum to be increased as the amount at stake grows with the progress of the proceedings towards trial.

[81] There was a healthy divergence between the parties as to the appropriate quantum for initial interlocutory stages, including appeals on interlocutory decisions, up to provision of discovery and inspection. Both parties worked on the assumption that costs would be on a 3C basis, with the Crown proposing that an allowance should be added for a 50 per cent uplift from those numbers. The calculation for the Crown also included additional steps that might reasonably be required. In addition, the projections for the Crown included preparation of briefs. Both sides factored in the costs of appeals, as far as pursuing leave to the Supreme Court, and argument in that Court.

[82] A significant component of the difference between the competing calculations is the Crown's projection that it would need to separately inspect the documents of 60 represented plaintiffs, for each of which it would claim six days. Although that number may be an overstatement, Ms Scholtens' arguments on other

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19 *Saunders v Houghton (No 1)*, above n 4, at [36].

points illustrated that substantial analysis of individual claimants' records may well be necessary.

[83] The differences in their approaches resulted in the plaintiffs quantifying this first stage at some $171,000 and the Crown's response being $514,000. On the basis of their own calculations, the plaintiffs had offered security for these initial stages of $200,000 on the basis that it exceeded the scale cost allowances on a 3C basis. This proposition was coupled with a request that the Court exempt named plaintiffs from any obligation to post security, and to exempt them from liability for adverse costs awards.

[84] Dealing with the last aspect, I am not persuaded that relieving named plaintiffs of their usual liability for costs is appropriate. It is for the plaintiffs to obtain indemnity as a matter of contract, and for them to be satisfied with the creditworthiness of those standing behind indemnities.

[85] I am not persuaded that a set percentage uplift is appropriate. Given the likely scale of the work involved, I consider the plaintiffs' calculation of $171,000, and their offer to round that up to $200,000, are both less than fairly reflects a substantial contribution to the work required for MPI. I order security for costs in the mode volunteered on behalf of the funder in the sum of $250,000 for steps (including interlocutory appeals) up to the preparation and service of lists of documents on discovery. Thereafter, the quantum is to be increased by a further $100,000 to cover inspection, if there are 45 or less represented plaintiffs. Leave is reserved to the Crown to seek a larger increment for inspection if there are more than that number of plaintiffs.

[86] I contemplate that the Court will revisit the quantum of security for costs for steps thereafter, once inspection has been completed. However, in the first instance, the parties will be invited to apply the indication reflected in this order on the first stages.

Summary of orders and directions

[87] I grant the plaintiffs' application for leave to bring these proceedings as a representative action pursuant to r 4.24 of the High Court Rules, and approve the terms for the litigation funder to fund the proceedings on the terms disclosed as an exhibit to the affidavit of William McLeod Wilson dated 27 November 2014.

[88] I direct that the period during which any additional claimants are to confirm that they are opting in to the proceedings will end on 9 October 2015.

[89] The litigation funder is to provide security for costs in relation to these initial steps and interlocutory steps up to the completion of the listing of documents (including appeals in relation to such steps) of $250,000. At that point, additional security of a further $100,000 is to be provided in relation to the costs of inspection, subject to the proviso noted in [85] above. The quantum of any additional security for costs thereafter may be reviewed by the Court once inspection of documents has been completed.

[90] The mode of security is to be by way of bank guarantee enforceable directly by MPI. I reserve leave for MPI to apply if unresolved differences arise as to the form of the guarantee.

[91] The scope of common issues to be determined as a first stage of the representative proceeding is to be the subject of subsequent definition. The Court will be concerned to confine those issues to those that are common to all plaintiffs, or defined subsets of the plaintiffs. This protects the Crown's entitlement to challenge any component of the claims brought where it reasonably asserts material differences in the position of different claimants may arise. Counsel are invited in the first instance to attempt a definition of common issues that might appropriately be determined in a first stage of the proceedings.

[92] To facilitate analysis of potentially material differences between claimants, within 20 working days of the delivery of this judgment, existing grower claimants are to provide Crown Law with particulars as to their orchard or orchards, and each of the details as to causation, as proposed in appendix D to the submissions for the

Crown and which are set out in the first part of the schedule to this judgment. For all additional grower claimants joining the action after the delivery of this judgment, within 20 working days of their joinder being advised by solicitors for the plaintiffs to Crown Law, the same details for each are to be provided.

[93] Further, the details sought as to mitigation as listed in the second part of the schedule under the heading "Loss" are to be provided in respect of all grower claimants by 4 December 2015.

[94] In respect of this order for provision of particulars, I reserve leave to the plaintiffs to apply if the extent of them is considered oppressive in any individual cases. I also reserve leave to the defendant to request equivalent particulars for Seeka and any additional PHOs that join, which are reasonably required to consider whether there are material differences in their circumstances.

Costs

[95] My provisional view is that I should settle the quantum of costs on these applications, and make them costs in the cause, so that they are payable to the party that is successful in the substantive action. I invite counsel to confer on that issue, and to file memoranda if they would urge a different course, and in any event as to quantum.

Dobson J

Solicitors:
Parker & Associates, Wellington for plaintiffs
Crown Law, Wellington for defendant

Appendix

Particulars to be pleaded	Particulars which may be provided by discovery and interrogatories
Causation	
Date when Psa symptoms (primary and secondary symptoms) first appeared on orchard.	Whether the orchardist or anyone working on the orchard visited a kiwifruit orchard in Italy, China, Chile, France, Switzerland or Portugal, or any other infected country, between April 2008 and the date of infection.
Identification of person/entity that discovered Psa symptoms.	Details of any *Actinidia* risk goods imported and brought on to the orchard between April 2008 and the date of infection.
Date when Psa symptoms were reported and to whom.	Details of any grafting done on the orchard between April 2008 and the date of infection.
Date when orchard tested positive for Psa-3 infection and identity of person/entity that carried out the testing.	Details of post-harvest operator(s) they supplied between April 2008 and the date of infection.
Manner in which it is alleged the orchard became infected.	Details of persons/entities that harvested kiwifruit between April 2008 and the date of infection.
What percentage of vines (and which cultivars) on the orchard are alleged to have become infected?	Details of persons/entities that did their pruning and thinning between April 2008 and the date of infection.
If the orchard contained different cultivars, the date on which it is alleged each of those cultivars became infected.	Whether their neighbours tested positive for Psa-3 and if so, when.
Loss ***Mitigation***	
Identification of steps that were taken to manage the infection and when and by whom those steps were taken.	Whether they supply Zespri or Turners & Growers, or another retailer.
Whether they are eligible for compensation from KVH during the AMAP.	Whether they have access to Zespri cultivars, or Turners & Growers cultivars.
Whether they were/are eligible for other KVH subsidies.	Whether, and if so when did they purchase a G3 licence.
If eligible, whether they received compensation or subsidies, if so how much.	Whether, and if so when did they purchase a licence of any other new cultivars (including eg Green 14 of Kiwiberry) after 5 November 2010.