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

On papers

Minute: 11 November 2016

MINUTE OF DOBSON J

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[1] I thank counsel for their memoranda in response to my minute of 26 October 2016, received on behalf of the Crown on 2 November 2016 and on behalf of the plaintiffs on 9 November 2016.

[2] Whilst the Crown indicates that it will abide my decision on any further definition of the questions for determination at the first stage of the trial, its 2 November 2016 memorandum reiterates concerns at the prospect of a stage one trial determining issues on the elements of a cause of action in tort generally treated as the first two (namely, existence of a duty of care and relevant breach), without also determining the third element, namely the existence of recoverable loss suffered by the plaintiffs as a result of the defendant's breach of any duty, however it is defined.

[3] Conceptually at least, there may be circumstances in which challenges to the existence of a duty of care on matters such as the reasonableness of reliance on the defendant, and the foreseeability of harm caused by a lack of requisite care, could be

reflected in contested claims for loss flowing from a breach. The Crown has cited the decision in *Home Office v Dorset Yacht Co Ltd* as an instance of a measure of circularity in consideration of the inter-dependent elements of the cause of action in tort.[1]

[4] I appreciate the concern raised on behalf of the Crown but am not persuaded that it amounts to material prejudice if the third element of loss is not addressed in the questions in stage one of the trial. My view is obviously subject to the provision that the parties and the Court remain conscious of the division of issues that might well be an artificial one in other contexts. A consequence may be some measure of overlap in that evidence challenging the circumstances that might go to the existence of a duty of care might (if a duty of care and breach is made out) also become relevant on the extent, if any, of recoverable loss when obligations to mitigate loss are taken into account.

[5] To avoid parts of the analysis on loss being addressed twice, I consider the preferable course is to delete the questions addressing whether the plaintiffs have suffered "some loss" as a result of breaches of any duty of care. The consequence is that the terms of the questions as ultimately settled in the parties' consent memorandum of 26 April 2016 are to be amended by deleting questions 2(c) and (d). In that event, the parties were agreed that a new 2(c) should be substituted in the following terms:

> Did any breach of the duty of care cause Strathboss's kiwifruit vines to become infected by Psa-V?

[6] I direct that stage one of the trial is to proceed on those amended questions.

Discovery by Seeka

[7] The memoranda reflect on-going differences between the parties as to the scope of Seeka's full discovery obligations.

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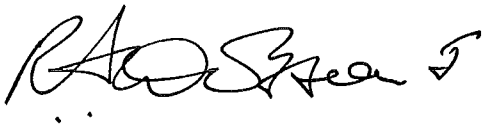
1 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1052.

[8] I urge counsel to discuss those, in light of my previous indications that Seeka's discovery obligation for stage one is the full extent of what is discoverable by it on all aspects of the claim, including all components of its anticipated damages claim.



Dobson J

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