I Te Kōti Mana Nui | In the Supreme Court of New Zealand

SC

between

STRATHBOSS KIWIFRUIT LIMITED
First Applicant

and

SEEKA LIMITED
Second Applicant

and

ATTORNEY-GENERAL
Respondent

APPLICATION FOR LEAVE FOR CIVIL APPEAL

8 May 2020

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APPLICATION FOR LEAVE FOR CIVIL APPEAL

TO: The Registrar of the Supreme Court

Strathboss Kiwifruit Limited and Seeka Limited, the applicants in the proceeding identified above, give you notice that they apply for the leave of the Supreme Court to appeal to the Court against the decision of the Court of Appeal in *Attorney-General v Strathboss Kiwifruit Limited* [2020] NZCA 98 (CA420/2018) dated 9 April 2020 (Kós P, Brown and Courtney JJ) (**Judgment**) allowing the respondent's appeal, and dismissing the applicants' cross appeals, from a decision of the High Court at Wellington in *Strathboss Kiwifruit Limited v Attorney-General* [2018] NZHC 1559 (CIV 2014-485-11493) dated 27 June 2018 (Mallon J).

Grounds of appeal

Direct liability

1. The Court of Appeal erred in finding that the Crown cannot be liable directly in tort in the circumstances of this case, and that its liability must instead be vicarious, meaning that direct liability on the part of individual Crown servants or agents must first be identified before the Crown can be liable in tort (paragraphs [83] to [111]).

Immunity

2. The Court of Appeal erred in holding that s 163 of the Biosecurity Act 1993 applied to the acts or omissions of MAF personnel at the pre-border stage (paragraphs [124] to [141]).

3. The Court of Appeal erred in holding that s 163 of the Biosecurity Act 1993 applied to the acts or omissions of MAF personnel at the border clearance stage (paragraph [142]).

4. The Court of Appealed erred in holding that the Crown could take the benefit of the immunity under s 163 of the Biosecurity Act 1993 (to the extent it applied to the acts or omissions of any MAF personnel) pursuant to s 6 of the Crown Proceedings Act 1950 (paragraphs [143] to [147]).

Duty of care

5. The Court of Appeal erred, having found a sufficiently proximate relationship, in holding that policy factors meant the imposition of a duty of care in respect of pre-border negligence would not be fair, just or reasonable (paragraphs [242] to [269] and [273] to [275]), and specifically in holding that the imposition of a duty of care would result in:

   (a) indeterminate and disproportionate liability; and

   (b) conflicting interests and regulatory decisions;

   such that a duty should not be recognised.

6. The Court of Appeal erred, having found a proximate relationship, in holding that policy factors meant the imposition of a duty of care in respect

of negligence at the border would not be fair, just or reasonable (paragraphs [411] to [417]), and specifically in holding that the imposition a duty of care would result in:

(a) indeterminate and disproportionate liability; and

(b) conflicting interests and regulatory decisions;

such that a duty should not be recognised.

Breach and causation

7. The Court of Appeal erred in holding that:

(a) the failure to inspect the June 2009 consignment of kiwifruit anthers; and

(b) the failure to issue a non-compliance report in respect of the discrepancies between the phytosanitary certificate accompanying the June 2009 consignment and the relevant import permit issued to Kiwi Pollen Limited;

had no causative effect because kiwifruit anthers were allowed to be imported under that import permit, because it stated that the "pollen may be milled prior to import" (paragraphs [446] to [453]).

8. Alternatively, the Court of Appeal erred in holding that the change to the wording of the import permits issued to Kiwi Pollen Limited from November 2008 onwards to state that the "pollen may be milled prior to import" had no causative effect (paragraphs [371] to [376]).

Relevance of property rights

9. The Court of Appeal erred in declining to find that a duty of care was owed to all five categories of plaintiffs described at paragraph [548] of the Judgment (paragraphs [548] to [556]).

Claim by Seeka Limited as post-harvest operator

10. The Court of Appeal erred in declining to find that a duty of care was owed to Seeka Limited in its capacity as a post-harvest operator (paragraphs [557]-[558]).

Criteria for leave to appeal

11. It is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal because the appeal involves matters of general or public importance, and matters of general commercial significance, including:

(a) the nature and effect of s 6 of the Crown Proceeding Act 1950, and the ability of the Crown to be directly liable in tort (including in light of s 27(3) of the New Zealand Bill of Rights Act 1990);

(b) the proper approach to the interpretation of statutory immunity clauses, and the scope and effect of those clauses (including the effect and continued application of the decision of a majority of this Court in *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149, and the extent to which Parliament's subsequent amendments to the State Sector Act 1988 and Crown Proceedings Act were intended to negative the reading of the Crown Proceedings Act adopted by the majority in *Couch*);

(c) the circumstances in which policy factors can properly negative a duty of care where foreseeability of loss and a sufficiently proximate relationship have been established;

(d) the scope of liability for economic losses arising from negligence, and the need (or otherwise) for those losses to be connected to damage to property;

(e) generally, the circumstances in which the government can be liable for causative negligence in the performance of public functions; and

(f) who bears liability for the losses associated with a significant biosecurity incursion that devastated a major New Zealand export industry, causing the plaintiff group losses estimated to be in the region of $450 million.

Judgment sought

12. The applicants seek a judgment allowing the appeal and finding that the respondent is liable to both applicants and to all of the represented plaintiffs in negligence.

Dated 8 May 2020

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Alan Galbraith QC / Davey Salmon / Michael Heard
Counsel for the applicants