

Court grants the Kiwifruit Claim leave to proceed with representative action with a litigation funder

Parker & Associates acts for the kiwifruit growers and the post-harvest operator, Seeka Kiwifruit Industries Limited, in their claim against the Attorney-General (on behalf of the Ministry for Primary Industries), which alleges that employees of MAF (now MPI) were negligent in carrying out biosecurity functions leading to the outbreak of the virulent form of the bacteria *Pseudomonas syringae pv actinidiae* (known as Psa-V) into New Zealand in 2010 and resulting losses.

The named plaintiffs, Strathboss Kiwifruit Limited and Seeka Kiwifruit Industries Limited applied to the Court for leave to bring this claim as a representative proceeding and for approval of the litigation funder and litigation funding agreement. The Crown opposed the orders sought.

Following a two day hearing in the Wellington High Court, Dobson J issued his reserved judgment granting the plaintiffs' application to bring a representative action and approving the litigation funder and funding agreement (*Strathboss v Attorney-General* [2015] NZHC 1596)

Representative Actions

Rule 4.24 of the High Court Rules provides that parties may bring a representative action if the persons in question have the "same interest in the subject matter of the proceeding". The threshold for identifying a sufficient common interest is relatively low. Where a litigation funder is involved the Court's approval is required of the funder and funding arrangement. A provisional appraisal of the merits is undertaken (without making any definitive factual findings). The plaintiffs must show they have an

arguable or tenable case in order to be allowed to proceed.

The Crown's opposition

The Crown opposed the plaintiffs' application for a representative order. The Crown argued that no duty of care was owed and the plaintiffs did not have an arguable case in negligence. The Crown argued that the legislation precluded the claims. Further the Crown argued that the case was not suitable for a representative action as the differences between claimants may prevent appropriate defences being raised.

Arguable case

Dobson J decided that for the purposes of the provisional assessment undertaken at this stage of the proceedings he was satisfied that there were sufficient prospects of making out a duty of care for the claims to proceed within the context of a funded representative action.

Dobson J noted that the fact the PHO claimants suffered "pure economic loss" (as opposed to physical damage, such as the growers suffered when their kiwifruit contracted Psa-V) was not a reason to exclude a duty of care at this stage. Rather, it will be a factor relevant to the proximity and policy considerations.

Regarding the Crown's argument that the diverse circumstances of the grower claimants made this proceeding inappropriate for representative orders, Dobson J recognised that as a legitimate concern to ensure claimants with materially different circumstances cannot hide behind the representative claimant. However, His Honour also noted that the representation order can be limited to one initial issue, and any determination of individual liability and

quantum can be ascertained separately. He noted that the key differences the Crown identified between grower claimants related to assessment of quantum, rather than the existence of the duty of care.

The representative order was therefore granted, with some particulars to be provided by the grower claimants, and the parties to consider formulation of the initial common inquiry for the first stage of the proceeding.

Litigation Funding

The Crown did not object to LPF as the funder but argued that some of the terms in the funding agreement gave LPF too much power and control over the litigation

Dobson J was not persuaded that the terms of the deed with the funder in this case are necessarily inappropriate for a representative action of this type. He approved LPF as the funder and the terms of the litigation funding agreement.

Opt-in Period

Dobson J granted a three month opt-in period ending on **9 October 2015** for additional claimants to confirm that they are opting into the proceedings.

Security for Costs

Dobson J directed that security of \$250,000 be provided by bank guarantee to cover steps (including any appeals) up to the preparation and service of lists of documents on discovery with further security be provided to cover inspection and review after inspection. It is usual in claims involving a litigation funder for the funder to post security for costs.