IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV 2014-485-11493

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

Hearing:	Began on 7 August 2017 and continues
Counsel:	D Salmon, M Heard, J Cundy and M Chew for the Plaintiffs J Hodder QC, S McKechnie, J Catran and P Higbee for the Defendant
Ruling:	11 October 2017

RULING OF MALLON J
(Insurance)

Introduction

[1] This trial is in its tenth week of a scheduled 12 weeks. It is a claim alleging negligence by the defendant in its biosecurity functions. What is described in the case law as a "novel duty of care" is pleaded. Whether the duty of care exists is a key issue in the trial. Within this issue a key sub-issue is whether it is appropriate to recognise the alleged duty of care on policy grounds. In relation to this sub-issue, the plaintiffs seek discovery of the defendant's insurance arrangements as they relate to this claim.

Background

[2] During the discovery process prior to trial the defendant sought discovery of the plaintiffs' insurance arrangements. Initially the plaintiffs objected to this on the

basis that the information was not relevant and the request was too broad. The defendant responded on 23 May 2016 that the arrangements were "[r]elevant to duty – the vulnerability or not" of the plaintiffs. The defendant confirmed this in a letter dated 14 June 2016 which said:

> To clarify our request, we consider insurance arrangements in relation to claimants' kiwifruit vines and/or fruit, including for events such as a biosecurity incursion, are relevant to this claim. Any comparable insurance held by Seeka in its capacity as a PHO would also be relevant.

[3] At this time, the plaintiffs' claim pleaded that policy factors that went to the fairness and justice of a duty of care included that the plaintiffs, and members of the plaintiff classes, "were particularly vulnerable to serious consequences if MAF and officers, agents and/or employees of MAF failed in their biosecurity responsibilities".[1] The plaintiffs agreed to provide discovery of any relevant insurance arrangements. However the plaintiffs did not hold any relevant insurance and so had no documents to disclose.

[4] The plaintiffs did not ask the defendant to discover any relevant insurance arrangements at this time. The defendant's insurance arrangements were first raised in the plaintiffs' opening. The relevant exchange was as follows:

> THE COURT:
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> … obviously there is the orchardists themselves so they have to bear the cost through insurance. …
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> MR SALMON:
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> … More particularly, the costs of that insurance will be massively affected by whether MPI is careful in its job or not. So effectively, it will be asking those usually small importers, [the] middle persons, to somehow insure against MPI's competence or incompetence and that raises another gloss that the cases have dealt with –
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> …
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> MR SALMON:
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> … so I do just want to correct one point that I was given a rev up about, by some of my client team over the break, which is [I] might have left you with the impression that it is possible to get insurance against events like this for growers. It may well be different for the Crown who's able to approach an

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1 MAF refers to the Ministry of Agriculture and Forestry, now the Ministry of Primary Industries.

insurer about discernible acts and risk that they control, but my instructions are it is not possible to insure against these sort of risks for growers just, the cover is not there and it's not economic even if it was. So lest I left Your Honour with the impression, because insurance sometimes comes up and debates about duties, that risk allocation could work in that way. It could not. If there's a party that could insure it's MPI.

THE COURT:

Is there going to be any evidence about that?

MR SALMON:

No, not in the briefs, Your Honour, but there can be evidence about that. It may be the subject of questioning and the same may happen when Crown witnesses get in the box.

[5] During the plaintiffs' case no questions were put to any witness by either party about the insurance arrangements of the plaintiffs or others in a similar position. Nor did the plaintiffs adduce any evidence as to the availability of insurance for biosecurity incursions whether for the plaintiffs or those in similar positions, or for the defendant.

[6] In opening the case for the defendant, counsel submitted:

MR HODDER QC:

...

The result of the claim duty of care if the plaintiffs were successful would be that the Crown would act as the insurer in the event of biosecurity incursion could be found to have been the result of some error or insufficient effort on the part of a government official involved in biosecurity and no doubt the plaintiff said, and that's what should happen and that's really one of the major points which Your Honour is going to have to determine. ...

...

THE COURT:

Just on that insurer point, I mean, that's always the case though with a duty of care. You are, you caused it, I mean another way of putting that is you compensate for the harm caused.

MR HODDER:

It's certainly the consequence of a finding of negligence in that you are involuntarily propelled into being the insurer.

THE COURT:

Yes.

MR HODDER:

That's the consequence of it. In terms of getting to that consequence, the consequences of being an insurer are relevant considerations and that's the point I'm coming to.

[7] Counsel also said that if the plaintiffs' losses "are [a result of] a failure to meet the standard of reasonable care [t]he Crown, that is, taxpayers, must bear the burden of liability." The opening submissions went on to describe other potential kinds of loss arising from other Crown activities if carried out negligently for which the Crown would be liable if a duty of care was recognised in this case.

[8] The first witness for the defendant was Murray Sherwin, the Director General of MAF at the relevant time. In cross examination of Mr Sherwin the following exchange took place:

Q. … The first is, that of course raises the question of insurance generally and MPI MAF did and does have some insurance for biosecurity errors does it not?

A. Not that I'm aware of.

Q. Not that you are aware of, okay, might that be something I should ask other people or would you expect to have known this?

A. I would've expected to know. Do you mean commercial insurance to cover risk of a…

Q. Of liabilities of this sort?

A. I don't think we ever acknowledged liabilities and wouldn't have carried insurance for it, that I'm aware of. I can't think of a…

Q. No DNO policies?

A. Not that I'm aware of.

…

Q. … Firstly, is there any, to your knowledge, insurance that might cover incursion management responses and the like?

A. No, no. Not to my knowledge. And I can't think of – I mean, there's a liability in the Biosecurity Act which relates to compensation to be

> payable to people who suffer a loss as a consequence of the exercise of the powers of the Act. … So there's that element of compensation, and the Crown covers its own risk on that. We, in the public sector, don't normally cover directors-type insurance or anything of that.
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> Q. … What about in relation to the other part of Her Honour's clarification of my question, which is any liabilities that might arise? To your knowledge, is there anything?
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> A. No. The Crown either self-insures or doesn't accept them.

[9] This evidence was tested in cross examination with reference to a Court of Appeal judgment indicating that MAF had professional indemnity insurance at least until June 2002.[2] There was no objection to this line of questioning.

[10] Another early witness for the defendant was Dr Butcher, the Manager of the Plants Imports and Exports Group at MAF. Mr Salmon, for the plaintiffs, asked Dr Butcher if MAF had insurance relating to the claim. At this point Mr Hodder QC, for the defendant, objected to the line of questioning on the ground it was irrelevant. Mr Salmon was permitted to ask Dr Butcher the question with its admissibility to be determined later. Dr Butcher did not know whether the defendant held insurance relating to this litigation nor whether insurance lawyers had been briefed and had been present in court.

[11] At this time Mr Salmon and Mr Hodder made initial submissions about the relevance of this evidence. The position was left on the basis that further inquiries would be made and the parties would endeavour to resolve the matter themselves. Failing resolution the matter would come back for further argument before me. Mr Salmon also reserved the possibility of recalling Dr Butcher on the insurance issue should that be necessary.

[12] As it transpired the matter was not resolved by the parties This led to the request for discovery of the defendant's insurance arrangements. The request is opposed by the defendant. In its opposition the defendant has advised as follows:

> … there is limited liability insurance cover relating to this claim. (By "limited" it is meant that the maximum sum available is a modest fraction of

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2 *Aon New Zealand Ltd v Attorney-General* [2008] NZCA 524.

the sums claimed by the plaintiffs. For the large balance the Crown is self insured.)

Submissions

[13] The defendant resists discovery on the basis that its insurance arrangements are not relevant to any issue in the proceeding. It acknowledges the availability of insurance can be a relevant factor in the assessment of the policy factors that support or detract from the existence of a duty of care.[3] This can be either a question of judicial notice (for example, because it is notorious in professional indemnity claims) or a matter of evidence, as to availability and price.[4] It says, however, that the actual insurance arrangements are not relevant.[5] Moreover, in this case the plaintiffs have not pleaded the availability of insurance as a relevant policy factor.

[14] The plaintiffs say it is not necessary to plead all policy matters that may point for or against a duty of care. They say relevant policy matters are questions of law, and New Zealand appellate courts have considered policy matters without there having been any pleading about or evidence on such matters at the first instance hearing. In any event they say the defendant's insurance arrangements are relevant in a discovery sense on the basis of its current pleading. They say the defendant's actual insurance arrangements will be evidence that such insurance is available especially as the New Zealand insurance market for a border agency's liability consists of one potential insured, that being MAF.

My assessment

[15] Current New Zealand appellate authority accepts the availability of insurance is potentially relevant to whether a duty of care should be recognised. In *North*

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

4 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [20] per Elias CJ and [255] per William Young J; *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398.

5 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555; *Dobson v Dobson* [1999] 2 SCR 753 at [74]-[75]; *Body Corporate No 187242 v Auckland City Council* HC Auckland CIV-2005-404-1597, 20 July 2006 at [24]-[25]; Michael Jones (ed) *Clerk and Lindsell on Torts* (21st ed, Sweet & Maxwell, London, 2014) at [4-35]; Lord Jackson (ed) *Civil Procedure: the White Book Service* (Sweet & Maxwell, London, 2017) at [31.6.4]; Desmond Derrington *The Law of Liability Insurance* (3rd ed, Lexis Nexis Australia, Sydney, 2013) at [13-131].

Shore City Council v Attorney-General in a case involving a defective building, Blanchard J said:[6]

> [160] In a relatively small number of cases, at the final stage of the inquiry the court will find no duty of care exists notwithstanding that the loss was foreseeable and the relationship sufficiently proximate. It will do so because a factor or factors external to that relationship (perhaps indeterminate liability) would make it not fair, just and reasonable to impose the claimed duty of care on the defendant. At this last stage of the inquiry the court looks beyond the parties and assesses any wider effects of its decision on society and on the law generally. Issues such as the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally may arise.

[16] Similarly, in another defective building case, *Body Corporate v North Shore City Council (Spencer on Byron)*, Tipping J explained how insurance is relevant as follows:[7]

> It is a respectable function of tort law, in appropriate circumstances, to facilitate loss-spreading. If a council through its negligence causes a building owner loss, the economic consequences for the council can surely be managed at least in part through fees and insurance.

[17] Recognising a duty of care as a loss allocation mechanism, and the potential relevance of insurance to that, is also referred to in earlier New Zealand appellate authority outside the defective building cases. For example, in *Gartside v Sheffield, Young and Ellis,* which concerned whether a solicitor instructed by a client to prepare a will, ought to owe a duty of care to a beneficiary under the proposed will, Richardson J (as he then was) stated:[8]

> ... Beneficiaries designated under a proposed will are not ordinarily able to protect their own interests and in the absence of a right of action have to absorb the costs to them of the negligence of the solicitor. In so far as an action in negligence may be viewed in social terms as a loss allocation mechanism there is much force in the argument that the costs of carelessness on the part of the solicitor causing foreseeable loss to innocent third parties should in such a case be borne by the professionals concerned for whom it is a business risk against which they can protect themselves by professional negligence insurance and so spread the risk, rather than be borne by the hapless individual third party.

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6 *North Shore City Council v Attorney-General* above n 3.

7 *Spencer on Byron* above n 4. See also [21] per Elias CJ, and at [203] per Chambers and McGrath JJ.

8 *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at 51.

[18] Interestingly, earlier developments which first recognised a duty of care in defective building cases made "assumptions" about how insurance worked which were "often adrift from reality".[9] Such assumptions may lead to inefficient tort remedies.[10] Recent appellate authority also emphasises the importance of determining the duty question, including the question of whether policy factors count against a duty of care, once the facts are known.[11]

[19] Subject to the pleading point, I accept that the defendant's actual insurance arrangements are relevant in a discovery sense. Relevance is not the same as admissibility. If the defendant has insurance which covers some part of the losses claimed in this case, that provides some evidence that insurance is available at least to the extent of the cover provided. It may not be the best evidence. For example the existence of insurance does not inform the Court about what other insurance arrangements were potentially available to the defendant and at what cost. But for a document to be discoverable it does not have to provide the best or the complete evidence on a particular issue. The defendant's position in seeking discovery of the plaintiffs' insurance illustrates this.

[20] Pleadings, discovery and the exchange of briefs of evidence are all pre-trial steps intended to ensure the parties are not surprised if the matter goes to trial. The pleadings frame the issues and therefore the scope of discovery subject to proportionality concerns.[12] In this case both the plaintiffs and the defendant provided detailed particulars in support of their pleading as to why a duty of care did or did not arise. This includes:

(a) The amended statement of claim:

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9 *Spencer on Byron* above n 4 at [255]-[259] per William Young J. This is discussed in more detail in John Smillie "Compensation for latent building defects" [1990] NZLJ 310.

10 At [261]: "All in all, I think that there is scope for the view that a not entirely adequate tort remedy has occupied the policy space which other, possibly more efficient, loss-avoidance and loss-spreading mechanisms might otherwise have occupied." See also Ivor Richardson "Law and Economics" (1998) NZBLQ 64 at 70 discussing the limitations of assumptions made about the economic consequences of a duty of care: "Who bears the cost in the short run? In the long run? At what price? What would be the likely effect on behaviour of all of those involved – including insurers?"

11 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [35]-[38] per Elias CJ and Anderson J and [126]-[130] per Blanchard, Tipping and McGrath JJ.

12 High Court Rules 2016, r 8.7. See *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [8.7.01].

123. The duty pleaded at paragraphs 122 to 123 above arises by reason of the proximity of the relationship between the plaintiffs and officers, agents and/or employees of MAF, the foreseeability of harm and policy factors going to the fairness and justice of the pleaded duty of care (including a lack of any policy factors that count against a duty being owed by officers, agents and/or employees of MAF to the plaintiffs in these circumstances) including (but not limited to) the following:

...

(h) MAF and officers, agents and/or employees of MAF could have reasonably foreseen that the plaintiffs, and members of the plaintiff classes were particularly vulnerable to serious consequences if MAF and officers, agents and/or employees of MAF failed in their biosecurity responsibilities.

...

(k) In all the circumstances, and considering all relevant policy factors, it is fair and just, in the public interest and in the interests of justice that the pleaded duty be recognised, including but not limited to the following factors:

(i) the functions and responsibilities of MAF acting by and through its officers, agents and/or employees under the Act;

...

(l) There are no policy reasons which may make it inappropriate to recognise the pleaded duty of care in the circumstances.

(b) The amended statement of defence:

121. He denies [a duty of care is owed] and further says:

121.1 National biosecurity functions and responsibilities involve major policy considerations including:

...

121.1.3 the allocation of central government funding

...

121.5 The imposition of private law obligations on MPI and other border regulation agencies, and their

relevant personnel, would involve unlimited indeterminacy of risks;

...

121.17 It would not be just, fair or reasonable to impose a duty of care on border regulation agencies and/or their personnel in general, nor any duty as pleaded against MPI and/or its personnel in particular.

(c) In the reply to the amended statement of defence the plaintiff states:

121.1 They admit in paragraph 121.1 that in performing national biosecurity functions, a number of public policy considerations are relevant, but they otherwise deny the affirmative allegations in paragraph 121.1 and say further that:

121.1.1 Under the Act the Director-General has broad powers to raise funds to properly carry out the duties owed under the Act.

...

121.1.3 The available methods of cost recovery are not limited but can include fixed charges, hourly or unit based charges, recovery of actual and reasonable costs, and charges imposed on users of services (s 135).

...

121.1.7 In the circumstances there is no reasonable cost-based justification for diluting the duties and obligations owed by the defendant, including under the Act.

[21] In light of this detailed pleading I accept the defendant's argument that the availability of insurance is not, at present, relied on by the plaintiffs as supporting recognising a duty of care. Nor did the plaintiffs raise the availability of insurance covering the defendant's biosecurity role in their evidence, as they might have done by adducing expert evidence. I am unpersuaded that such evidence would not have been available in the absence of information about the defendant's particular insurance cover. This counts against the plaintiffs' application at this stage, for discovery of documents that relate to the availability of insurance, at least beyond the particular policy or policies that provide some cover for the present claim.

[22] The plaintiffs' pleading does not preclude the Court from considering the consequences of allocating the plaintiffs' loss to the defendant and how that impacts on the justness, fairness and reasonableness of imposing a duty of care. But insofar as the Court considered whether the loss might be borne partly via insurance, it would be doing so without evidence. The Court could only do so on the basis of assumptions. Such assumptions may of course be unwise and the parties can make submissions about this. However it is not appropriate at this stage in the trial for either party to now call new evidence about the availability or not of insurance for biosecurity risks.

[23] Nevertheless I consider the plaintiffs should have discovery of the defendant's particular policy or policies that provide some cover for the present claim. It was clear from the plaintiffs' opening that they regarded the existence of insurance as potentially relevant and they might question witnesses about this. Asking questions of the senior MAF employees (who might be expected to know the insurance position) called by the defendant was one avenue for obtaining this information. Any such insurance, to the extent it is relevant to the availability of insurance for liability for biosecurity risks, is arguably relevant to whether policy considerations make it just, fair or reasonable to impose a duty of care. As already mentioned, it may not be particularly probitive evidence but that does not mean it is not relevant at all. Prejudice in the Court knowing about the actual insurance position does not arise given this is not a jury trial. The defendant's sensitivities about making this policy or policies available to the plaintiffs should not be given weight given the defendant's request of the plaintiffs that they give discovery of their insurance arrangements.

[24] In saying this I note the defendant's submission that such insurance is not relevant at all. To the extent that insurance is relevant to whether a defendant can bear the reallocation of loss, it may be irrelevant here because the defendant is the Crown and the Crown will always meet any judgment against it. The defendant can make this submission in its closing. Likewise, as is the case if the Court had no information at all about the availability of insurance, it remains open to the defendant to submit in its closing that it would be unsafe to make any assumptions about the availability of insurance for liability for biosecurity risks (or any other

risks for which the Crown may be liable if a duty of care in this case is recognised) based simply on the defendant's insurance cover.

[25] However the current position is that the Court has incorrect evidence about whether the defendant has any insurance cover relating to this claim. The defendant's memorandum seeks to correct that. Now that has occurred, the plaintiffs wish to understand the extent of that insurance at least in order to be comfortable that the corrected position is accurately conveyed from its perspective. This is not to doubt the accuracy of what has been conveyed in the memorandum. Rather there may be subtleties of expression which are relevant from the plaintiffs' perspective. The plaintiffs should have that opportunity.

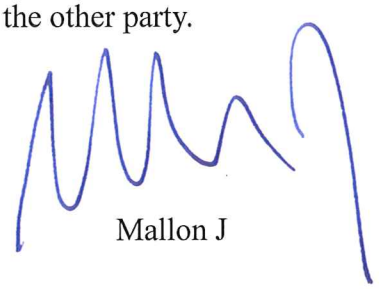
Decision

[26] I therefore rule that the defendant is to give discovery of its insurance cover as it relates to this claim. The purpose of this discovery is, as a matter of fairness to the plaintiffs, to ensure the information before the Court about the defendant's insurance position is accurately corrected from the plaintiffs' perspective. This is the first step.

[27] I am not persuaded at this stage that either party should call further evidence about what insurance may or may not have been available apart from the insurance that was obtained. Once the corrected position is before the Court, preferably by a consent memorandum (noting Dr Butcher did not have knowledge of the insurance arrangements), the parties will be able to make submissions in closing as to whether this assists the Court or not, in light of whether the availability of insurance is relevant at all and in light of what little information may be before the Court about this.

[28] Finally I note that neither the plaintiffs nor I have details about the actual insurance cover. Because of this I will reserve leave to either party to apply to call further evidence once the plaintiffs have discovery of the defendant's policy or policies as they relate to this claim. However, in the absence of consent by the parties, leave is only likely to be granted if the party seeking leave can persuade me

that the information before the Court is materially misleading without further context and that context is readily available and without unfair prejudice to the other party.



Mallon J