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ABALONE INDUSTRY'S LOST CLASS ACTION CLAIM AGAINST STATE OF VICTORIA PROVIDES LESSONS FOR FUTURE GOVERNMENT CLAIMS IN AUSTRALIA

KEY POINTS

- Class actions against governments and public authorities following natural disasters and other incidents are becoming increasingly frequent, with significant class actions now on foot and foreshadowed in relation to the 2007 Australian equine influenza outbreak, 2009 Victorian and 2013 New South Wales bushfires and 2011 Queensland floods.
- The Victorian abalone industry's class action against the State of Victoria was unsuccessful but provides important guidance on when a duty of care and a breach of that duty may be found in the context of alleged negligence by the State.

SUMMARY

The *Regent Holdings* class action dealt with claims against the State of Victoria following the outbreak of an abalone virus and disease along the Victorian coast in 2006. The representative claim, brought by Regent Holdings Pty Ltd, was based on a duty of care said to be owed by the State to protect the company from economic losses caused by the escape of the virus and disease from a privately owned farm into the wild.

The Victorian Supreme Court's judgment provides guidance on the circumstances in which such a duty may or may not be imposed and factors relevant to the assessment of whether any such duty has been breached.

Regent Holdings was unsuccessful in its claim in this case. However, the judgment is currently the subject of an appeal to the Victorian Court of Appeal.

FACTS

In 2006, abalone and abalone habitats along the western and central parts of the Victorian coast were infected with a herpes-like virus resulting in a disease known as Abalone Viral Ganglioneuritis (the "disease"). Having contracted the disease, abalone in affected habitats died or otherwise became unavailable for harvesting by the commercial abalone industry.

In November 2010, a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) was commenced on behalf of Victorian abalone licence-holders, abalone divers and others affected by the outbreak of the virus and disease. The representative party was Regent Holdings Pty Ltd ("Regent"), which held an Abalone Fishery Access Licence. The defendants to the proceedings were the State of Victoria and Southern Ocean Mariculture Pty Ltd ("SOM"), which operated an abalone aquaculture farm alleged to have been the source of the outbreak and spread of the virus.

Regent's claims against SOM were compromised by a settlement approved by the Court pursuant to s 33V of the Act on 18 September 2013, although SOM technically remained a party to the proceedings for the purposes of s 24AI of the *Wrongs Act 1958* (Vic).

As against the State, Regent alleged that the outbreak of the disease was caused by various breaches of duty committed by the Minister for Agriculture (the "Minister"), the Secretary to the Department of Primary Industries (the "Secretary"), the Chief Veterinary Officer of the State of Victoria (Dr Millar) and the Executive Director of Fisheries Victoria (Dr Appleford) (together, the "State tortfeasors"), and that the State was vicariously liable for their acts and omissions.

THE PLAINTIFF'S CLAIMS

The claims made by Regent in the proceedings were that:

- The State tortfeasors knew or ought to have known, at relevant times, that it was probable that the virus was causing abalone mortalities on SOM's farm.
- A proper exercise of the powers available to the State tortfeasors under the *Livestock Disease Control Act 1994* (Vic) and the *Fisheries Act 1995* (Vic) would probably have prevented the virus and disease escaping into the wild.
- The State tortfeasors owed Regent a duty to take reasonable care to protect it from economic losses caused by an escape of the virus and the disease from SOM's farm because they knew of the risk of harm to specific individuals, had power to take particular steps to eliminate the risk and, at an earlier stage, had in fact given directions to eliminate the risk.
- The State tortfeasors breached their duties of care by failing to take certain steps or precautions, including declaring parts of SOM's farm an infected place and directing SOM to cull or dispose of abalone and cease the flow of effluent discharge from SOM's farm, amongst other things.

Regent also relied on the Victorian Abalone Fishery Management Plan 2002 (implemented pursuant to s 28 of the *Fisheries Act* by the Minister, "Management Plan") and 2002/652 *Victoria's Arrangements for the Management of Aquatic Animal Disease Emergencies* ("VAMAADE"). Regent asserted that had the protocols in those documents been implemented "in the manner intended" the virus would not have existed in Victorian wild abalone.[1]

COMMON QUESTIONS

For the purposes of the group proceeding, Regent proposed three common questions of law or fact, which can be summarised as:

1. With respect to each of the State tortfeasors, was there a foreseeable and not insignificant risk at the relevant times that the virus would escape from SOM's farm and cause the disease in wild abalone?
2. With respect to each of the State tortfeasors, in the circumstances, would a reasonable person in each of their positions have taken the various precautions Regent alleged that each of them should have taken?

3. Did the virus escape from the SOM farm into the wild and cause the disease in wild abalone in Drain Bay and along the Victorian coast, and if so, how and when?

The State accepted that 1 and 3 were common questions to be answered in the proceedings but submitted that 2 was not a common question of law or fact among all group members and that it should not be answered.[2]

THE STATE'S DEFENCE

The State denied all of Regent's claims.

In relation to the duty of care, it argued that because the powers Regent argued ought to have been exercised were "quasi-legislative" (each creating an offence), a common law duty of care could not compel or constrain the State's exercise of those powers.[3] The State also argued, relying on the joint judgment of Gummow and Hayne JJ of the High Court in *Graham Barclay Oysters Pty Ltd v Ryan*,[4] that the exercise or potential exercise of those powers would provide an insecure basis for such a duty of care and, further, that such a duty of care would impose conflicting duties on the State tortfeasors.[5]

Further, if a duty was found to exist, the State denied that there was any breach by the State tortfeasors, arguing that Regent's case "... amounted to an assertion that the State tortfeasors were required to choose [Regent's] interests over the interests of the owner of [SOM's] farm..."[6] and that it was not unreasonable for the State tortfeasors to have taken the actions that they took having regard to the developing state of knowledge at the relevant time.

Further, the State submitted that there was no direct evidence as to when the virus first escaped from SOM's farm—in fact, there were many possibilities. As such, it could not be established that reasonable care by the State tortfeasors would have prevented the virus escaping.[7]

Finally, the State relied upon the proportionate liability provisions in the *Wrongs Act*, arguing that SOM had been able to exercise control over the relevant events and act autonomously (whereas the State tortfeasors had not), in an attempt to reduce its own liability at the expense of SOM.[8]

JUDGMENT OF JUSTICE BEACH (BEACH JA)

Whether the State Tortfeasors Owed Regent a Duty of Care. Beach JA found that the State tortfeasors did not owe a duty of care to Regent to protect it from economic losses caused by an escape of the virus or disease from SOM's farm.[9]

Taking into account several High Court authorities,[10] Beach JA concluded that there were several factors militating against the imposition of such a duty, including:

- The conflicting duties that the State tortfeasors would owe to the owners and operators of SOM's farm (and indeed other farms) on the one hand, and the duties that might be owed to those involved in the catching, storing and processing of wild abalone on the other hand.

- The indeterminacy of the class of people to whom the alleged duty of care might be owed.

- That the potential liability of the State tortfeasors would be disproportionate to any fault that might be attributed to them, in preferring the interests of one group over another, when deciding whether to exercise one of the relevant statutory powers (noting that Regent's expert accounting witness had calculated Regent's claim alone, excluding the group members and any other persons, at $8.19 million).

- The quasi-legislative nature of the statutory powers in question.[11]

Beach JA also found that the State tortfeasors did not have the requisite degree of control to justify the imposition of a duty of care as alleged by Regent. Regent's alleged "vulnerability", in the sense that it could not take steps to prevent the virus or disease spreading into the wild, was not a sufficient foundation upon which to base a duty of care.[12]

Further, Regent's argument that Dr Appleford and Dr Millar contributed to the risk of Regent suffering loss, by permitting SOM to translocate interstate abalone onto its farm and by advising, directing and entering into agreements with SOM in the management of the disease outbreak, was rejected by Beach JA, who found that it was plain "that any risk created was created by SOM—not by the State tortfeasors".[13]

Breach of Duty and Causation. While not strictly necessary to do so, Beach JA went on to consider whether any of the State tortfeasors had breached any duty to Regent. He considered the answer to that question depended upon an analysis of "what each of the State tortfeasors did from time to time, having regard to what was known or ought to have been known by each of them at the relevant time."[14]

In that respect, after considering the Management Plan and VAMAADE (noting that more important than following any sentence or sentences in those documents was "an intelligent, reasonable and rational approach"), Beach JA concluded that none of the State tortfeasors had taken action inconsistent with the Management Plan and that VAMAADE did not mandate steps which would have prevented the spread of the disease in the wild (and, in any event, a line-by-line examination of what VAMAADE required was not justified in this case).[15]

Beach JA rejected Regent's assertion that the State tortfeasors did not possess relevant qualifications or experience and that this constituted negligence on their part.[16] He also accepted the State's argument that there were significant considerations that the State tortfeasors were entitled to take into account in deciding whether or not to exercise their statutory powers, including the novelty of the virus and limited scientific knowledge at the time.[17]

Ultimately, Beach JA concluded that none of the State tortfeasors had committed any breach of duty (had such a duty in fact existed). Regent's case was also found to fail at the causation level—one could only speculate about how and when the disease had come into the wild, and many possibilities existed.[18]

CONCLUSION

As Regent had failed to establish that any of the State tortfeasors owed a duty to it to take reasonable care to protect it from economic losses caused by an escape of the virus and the disease from the SOM farm, its claim against the State was dismissed.[19] Beach JA's judgment is now the subject of an appeal to the Victorian Court of Appeal.

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ENDNOTES

1 *Regent Holdings v State of Victoria* [2013] VSC 601 at [53].

2 *Regent Holdings v State of Victoria* [2013] VSC 601 at [43].

3 Relying on the judgment of Gummow J in *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 449-450: [54].

4 (2002) 211 CLR 540.

5 *Regent Holdings v State of Victoria* [2013] VSC 601 at [55], [56].

6 *Regent Holdings v State of Victoria* [2013] VSC 601 at [58].

7 *Regent Holdings v State of Victoria* [2013] VSC 601 at [59], [60].

8 *Regent Holdings v State of Victoria* [2013] VSC 601 at [61].

9 *Regent Holdings v State of Victoria* [2013] VSC 601 at [223], [233].

10 Principally, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, *Sullivan v Moody* (2001) 207 CLR 562, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 and *Tame v New South Wales* (2002) 211 CLR 317.

11 *Regent Holdings v State of Victoria* [2013] VSC 601 at [223]-[226].

12 *Regent Holdings v State of Victoria* [2013] VSC 601 at [229].

13 *Regent Holdings v State of Victoria* [2013] VSC 601 at [230].

14 *Regent Holdings v State of Victoria* [2013] VSC 601 at [255].

15 *Regent Holdings v State of Victoria* [2013] VSC 601 at [247]-[255].

16 *Regent Holdings v State of Victoria* [2013] VSC 601 at [263].

17 *Regent Holdings v State of Victoria* [2013] VSC 601 at [272].

18 *Regent Holdings v State of Victoria* [2013] VSC 601 at [275], [279].

19 *Regent Holdings v State of Victoria* [2013] VSC 601 at [281].