

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY
I TE KŌTI MATUA O AOTEAROA
TE AHURIRI ROHE

CIV-2024-441-00053

BETWEEN

KOPU ROAD ORCHARDS LTD

First plaintiff

AND

DR DOWNEY & CJ NEALE as trustees of
the CABBAGE TREE TRUST

Second plaintiffs

AND

HAWKES BAY REGIONAL COUNCIL

Defendant

Judicial Officer: TBA
Next Event Date: TBA

FIRST AMENDED STATEMENT OF CLAIM

DATED: 5 December 2024

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EXPERT
INSURANCE
LAWYERS

FIRST AMENDED STATEMENT OF CLAIM

Thursday the 5th day of December 2024

THE PLAINTIFFS BY THEIR SOLICITOR SAY:

Parties

1. The first plaintiff:

- (1) Is a duly incorporated company with its registered office at 272 Kope Road, Wairoa;
- (2) Carries on business:
 - (a) From properties at 266-272 Kopu Road, Wairoa
 - (b) As a fully integrated and certified lime grower and processor under the trading name of "*The Limery*".

2. The second plaintiffs:

- (1) Are trustees of the Cabbage Tree Trust;
- (2) Own the properties at 266-272 Kopu Road, Wairoa being all the land comprised and described in CT's:
 - (a) HB86/186;
 - (b) HB86/191;
 - (c) HB86/192;
 - (d) HBD2/1201.

("the properties")

3. The defendant is a local territorial authority:

- (1) Constituted by the *Local Government (Hawke's Bay Region) Reorganisation Order 1989* ("the order");
- (2) With its head office at 159 Dalton Street, Napier South;
- (3) Responsible for the Wairoa area.

Flood 26 June 2024

4. On 26 June 2024 the Wairoa River burst its banks in rain.
5. The timing and extent of the rainfall was forecast:
 - (1) About 10 days prior in the windy app;
 - (2) By NIWA prior to 21 June 2024;
 - (3) By Met Service by 21 June 2024.
6. The river swept into about 500 properties and reached as far as four blocks away from its banks.
7. More than 400 Wairoa properties were affected by the flooding, including more than 100 homes significantly impacted.
8. The flooding physically damaged:
 - (1) The first plaintiff's
 - (a) Machinery;
 - (b) Vehicles;
 - (c) Processing plant;
 - (d) Packhouse;
 - (e) Stock and fruit;
 - (f) Business operations;
 - (2) Second plaintiffs' properties and structures on the properties.

Classes

9. Other Wairoa property residents/owners are/were in a similar situation to the plaintiffs being businesses/residents/property owners that suffered loss/damage by the floods on 26 June 2024.

10. The residents/owners form class(es) of persons having the same interest in this proceeding, in that each of them suffered property loss/damage by the Wairoa floods on and after 26 June 2024.
11. In addition to individual claims the plaintiffs seek to bring claims on behalf of similarly affected people under r4.24 of the High Court Rules.
12. The plaintiffs claim relief on their behalf and on behalf of other group members in amounts to be quantified.

Background

13. The Wairoa Catchment is 3563 square kilometres and ranges in altitude from sea level to approximately 1,300 metres above sea level.
14. The Catchment is prone to frequent flooding and carries large volumes of water in comparison to other major Hawke's Bay rivers.
15. All major tributaries converge into one main stem, the Wairoa River, at the start of a 3,000-hectare, flood plain.
16. The tributaries and the Wairoa River are steep and a short run of approximately 40 - 70 kilometres whereas the flood plain has a very gradual fall to the sea.
17. The Wairoa River carries large volumes of silt, as do the tributaries.
18. The small urban settlement of Wairoa is located on the flood plain on either side of the Wairoa River close to the river mouth.
19. Significant technical work was undertaken on flood protection options for the Wairoa Township by the defendant between 1994 – 2000 including assessment of riverbank risks, stop bank options, and river mouth management options.
20. None of the hard infrastructure options above were progressed.
21. The Wairoa River mouth is the main frequently occurring flood risk issue for the lower Wairoa Township, surrounding farms and businesses.

22. The mouth has been manually opened continuously since early European settlement.
23. Manual opening of the river mouth is the only flood protection measure.
24. The methods of manual bar opening have evolved over that time from human to mechanical and progressively between 1997-2000 physical infrastructure options for bar management were investigated but eventually discounted due to complexity, cost, and uncertainty as to efficiency.
25. In the case of Cyclone Gabrielle the bar was open in an optimal position, as was the case during Cyclone Bola.
26. The defendant is the governing authority with accountability for management of the river mouth.
27. During the tenure of the Catchment Board a river engineer was based in Wairoa with accountability for river mouth management.
28. At the formation of the Regional Council, engineering operations were centralised out of Napier and the responsibility for mouth opening decisions transferred to other Wairoa based HBRC staff.
29. These staff worked closely with one local contractor.
30. Through that time the bar has been successfully manually opened approximately 20 times⁷ ahead of significant storm events.
31. During that period there were, according to the personnel involved, no flooding issues other than for the yacht club, located in the lower berm section of the river.
32. At the time of the flood in June 2024 there was no:
 - (1) Operational plan for the ongoing management and maintenance of the Wairoa river mouth;
 - (2) River gauges ;
 - (3) Cameras;
 - (4) Bathymetric surveys done of the river dynamics;

- (5) Model that included:
 - (a) Sea conditions;
 - (b) River bed information;
 - (c) River silt information.

Bar work

- 33. In March 2022 Pryde opened the Wairoa bar in half a day.
- 34. As of January 2024 the defendant knew that the river mouth was in an adverse position so as to increase the risk of flooding.
- 35. As of Friday 21 June 2024 the defendant knew of the risk:
 - (1) Of severe weather forecast.
 - (2) Of flooding outcomes to Wairos if the bar was not successfully manually opened.
- 36. Over the weekend of 22 & 23 June 2024 the defendant successfully opened and/or directed the opening of the bars at Nuhaka and Waitahuna so as to minimise flooding risks.
- 37. On 24 June 2024 at about 2pm the defendant instructed Pryde to mobilise machinery to the site to start preparatory work on Tuesday mouth opening on Wednesday.
- 38. The bar was not mechanically opened by the time of the flooding on 26 June 2024.
- 39. The defendant was too late in giving the instruction to open the bar which instruction should have been given in sufficient time to enable the bar to be opened given the severity of the outcome if the bar was not manually opened.

Status

- 40. Between January 2024 and 26 June 2024 the defendant did not open the bar to decrease the flood risk.

41. At the time of the 26 June 2024 flood:
- (1) The bar had not been cut open;
 - (2) There were no stopbanks or spillways to assist with flood prevention/minimisation;
 - (3) The river had not been dredged for many years.
42. The flooding was caused by:
- (1) Lack of a functional operational plan for ongoing management and maintenance of the Wairoa river mouth;
 - (2) The failure by the defendant to ensure the cutting open of the bar in sufficient time to enable the river water to flow into the sea;
 - (3) Lack of stop banks;
 - (4) Lack of spillways;
 - (5) Failure to dredge the river.
43. As a result of the flooding:
- (1) About 500 houses/building were damaged requiring repairs details of which the plaintiffs do not currently have;
 - (2) Houses and businesses required to be evacuated;
 - (3) Residents' and land owners' chattels, vehicles, machinery and tools were damaged, full details of which will be provided:
 - (a) Upon receipt by the plaintiffs;
 - (b) In stage 2 of the representative action by individuals/entities that are part of the approved class.
 - (4) Residents and land owners suffered stress, inconvenience, pain and suffering; full details of which will be provided:
 - (a) Upon receipt by the plaintiffs;

- (b) In stage 2 of the representative action by individuals that are part of the approved class.
- (5) People suffered lost income full details of which will be provided:
 - (a) Upon receipt by the plaintiffs;
 - (b) In stage 2 of the representative action by individuals/entities that are part of the approved class.
- (6) Residents were required to pay for:
 - (a) Temporary accommodation;
 - (b) Repairs/replacement of buildings and contents;
 - (c) Moving and storage.

Full details of which will be provided:

 - (d) Upon receipt by the plaintiffs;
 - (e) In stage 2 of the representative action by individuals/entities that are part of the approved class.

Loss

- 44. In June 2024 Bayleys completed a written appraisal of the business of the first plaintiff and the properties of the second plaintiffs.
- 45. The written appraisal valued the:
 - (1) Business of the first plaintiff at about \$3.63M;
 - (2) Properties of the second plaintiffs at about \$1.8M.
- 46. As a result of the flood the:
 - (1) First defendant has suffered the following loss/damage:
 - (a) Business has decreased in value;
 - (b) Damage to stock and packaging;
 - (c) Damage to trees and fruit;

- (d) Damage to equipment;
- (e) Damage to vehicles;
- (f) Damage to shelter;
- (g) Contents;
- (h) Lost income;
- (i) Damage to buildings

in sums yet to be determined;

(2) Second plaintiffs have suffered the following loss/damage:

- (a) Properties have decreased in value;
- (b) Damage to buildings;

in sums yet to be determined.

47. Other people suffered similar loss/damage full details of which will be provided:

- (1) Upon receipt by the plaintiffs;
- (2) In stage 2 of the representative action by individuals/entities that are part of the approved class.

Obligations

48. By clause 16 of the order the functions, duties and powers of the defendant shall be inter alia the functions, duties, and powers of a catchment board and a regional water board under the *Soil Conservation and Rivers Control Act 1941* and the *Water and Soil Conservation Act 1967*.

49. By s126 of the *Soil Conservation and Rivers Control Act 1941*:

- (1) It shall be a function of the defendant to minimise and prevent damage within its district by floods and erosion;

- (2) The defendant shall have all such powers, rights, and privileges as may reasonably be necessary or expedient to enable it to carry out its functions, and in particular shall have power to construct, reconstruct, alter, repair, and maintain all such works and do and execute all such other acts and deeds including the breaching of any stop bank as may in the opinion of the Board be necessary or expedient for:
 - (a) Controlling or regulating the flow of water towards and into watercourses;
 - (b) Controlling or regulating the flow of water in and from watercourses;
 - (c) Preventing or lessening any likelihood of the overflow or breaking of the banks of any watercourse;
 - (d) Preventing or lessening any damage which may be occasioned by any such overflow or breaking of the banks;
 - (e) Preventing or lessening erosion or the likelihood of erosion;
 - (f) Promoting soil conservation.

First cause of action against defendant – Negligence

- 50. In the circumstances the defendant had obligation(s) to the plaintiffs and others to exercise reasonable skill and care in respect of:
 - (1) Monitoring and maintenance of the Catchment scheme and its elements;
 - (2) Implementation of recommendations about Catchment scheme improvement/management;
 - (3) Operation of flood control elements;
 - (4) Response to the risk of flooding in late June 2024;

so as to minimise/prevent flooding of the Wairoa township and surrounding area.

51. The defendant breached the obligation(s) by failing to:

(1) Monitor and maintain the Scheme and its elements with reasonable skill and care:

(a) No operational plan for the ongoing maintenance of the Wairoa river mouth;

(b) No dredging of river;

(c) Late decision to cut open bar;

(d) No cameras;

(e) No gauges;

(f) No bathymetric survey of river;

(g) Model did not include:

A Sea conditions;

B Riverbed info;

C River silt info

(2) Implement recommendations about Catchment scheme improvement/maintenance:

(a) Did not install stopbanks prior to 26 June 2024 ;

(b) Did not install spillways prior to 26 June 2024;

(c) Did not have a person in Wairoa to decide on bar opening;

(3) Operate the flood control elements with reasonable skill and care:

(a) Too late to instruct on bar opening;

- (b) Did not open bar so as to prevent flooding;
 - (c) Instructions for bar opening not clear or specific;
- (4) Respond to the risk of flooding with reasonable skill and care:
 - (a) Did not commission and attempt bar opening well in advance of forecast rain;
 - (b) Did not ensure opening of bar to prevent flooding.
- 52. As a result of the defendant's breaches the:
 - (1) River banks breached;
 - (2) Flooding occurred;
 - (3) Plaintiffs and others suffered loss and damage including stress and inconvenience.
- 53. It was reasonably foreseeable that breaches would cause the flooding and resultant loss/damage.
- 54. The plaintiffs and group members seek interest from 26 June 2024 under ss9 & 10 of the *Interest on Money Claims Act 2016*.
- 55. Interest from the Ministry of Justice interest calculator is to be calculated.

WHEREFORE THE PLAINTIFFS SEEK ON THEIR OWN BEHALF

- A Judgment for amounts to be determined;
- B Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;
- C Costs.

AND THE PLAINTIFFS SEEK ON BEHALF OF EACH GROUP MEMBER

- A A declaration that the defendant is liable on the cause of action;
- B Judgment for the loss/damages for each group member;

C Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;

D Costs.

Second cause of action against defendant - Nuisance

The plaintiffs repeat paragraphs 1 to 55.

56. The plaintiffs and others (those people or entities within the class specified in the Schedule to the Representative Order Application whose details are currently unknown to the plaintiffs) occupied and/or owned land and buildings in Wairoa near the River and were entitled to the right to use and enjoy the land and buildings.

57. At all material times, the defendant was responsible for maintaining and monitoring the River and its levels and ensuring that the River was contained.

58. On about 26 June 2024 the River flooded the plaintiffs' and others' properties (the flooding), which in turn caused loss/damage to the plaintiffs and others.

59. The flooding interfered with the plaintiffs' and others' use and enjoyment of the land to a substantial and unreasonable level so that the plaintiffs and others suffered distress and inconvenience.

60. The plaintiffs and group members seek interest from 6 April 2017 under ss9 & 10 of the *Interest on Money Claims Act 2016*.

61. Interest from the Ministry of Justice interest calculator is to be calculated.

WHEREFORE THE PLAINTIFFS SEEK ON THEIR OWN BEHALF

A Judgment for the amounts to be determined;

B Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;

C Costs.

AND THE PLAINTIFFS SEEK ON BEHALF OF EACH GROUP MEMBER

- A A declaration that the defendant is liable on the cause of action;
- B Judgment for the loss/damages for each group member;
- C Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;
- D Costs.

Third cause of action against defendant – *Rylands v Fletcher*

The plaintiffs repeat paragraphs 1 to 55 above.

- 62. At all material times, the defendant was responsible for controlling the River catchment and ensuring that the River did not burst its banks in the area of the Wairoa township.
- 63. The water in the River in flood was a hazardous substance which would cause damage if it escaped.
- 64. The use of the bar as a part of the flood defences was a non-natural use of the land and brought increased danger to the area given it failed and caused River water to escape and flood properties.
- 65. On about 26 June 2024 the River water escaped and flooded the plaintiffs' and others' (those people or entities within the class specified in the Schedule to the Representative Order Application whose details are currently unknown to the plaintiffs) properties.
- 66. As a consequence of the flooding, the plaintiffs and others have suffered:
 - (1) Damage and loss;
 - (2) Distress and inconvenience.
- 67. The plaintiffs and group members seek interest from 26 June 2024 under ss9 & 10 of the *Interest on Money Claims Act 2016*.

68. Interest from the Ministry of Justice interest calculator is to be calculated.

WHEREFORE THE PLAINTIFFS SEEK ON THEIR OWN BEHALF

- A Judgment for the amounts to be determined;
- B Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;
- C Costs.

AND THE PLAINTIFFS SEEK ON BEHALF OF EACH GROUP MEMBER

- A A declaration that the defendant is liable on the cause of action;
- B Judgment for the loss/damages for each group member;
- C Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;
- D Costs.

Fourth cause of action against defendant – Breach of statutory duty

The plaintiffs repeat paragraphs 1 to 55.

69. Pursuant to section 126 of the *Soil Conservation and Rivers Control Act 1941* the defendant at material times:

- (a) Had a duty to minimise and prevent damage within its district by floods and erosion;
- (b) Had all such powers, rights, and privileges as may reasonably be necessary or expedient to enable it to carry out its functions, and in particular shall have power to construct, reconstruct, alter, repair, and maintain all such works and do and execute all such other acts and deeds including the breaching of any stopbank as may

in the opinion of the Board be necessary or expedient for:

- (c) Controlling or regulating the flow of water towards and into watercourses;
- (d) Controlling or regulating the flow of water in and from watercourses;
- (e) Preventing or lessening any likelihood of the overflow or breaking of the banks of any watercourse;
- (f) Preventing or lessening any damage which may be occasioned by any such overflow or breaking of the banks;
- (g) Preventing or lessening erosion or the likelihood of erosion;
- (h) Promoting soil conservation.

70. In breach of this statutory duty, the defendant failed to prevent/minimise the flooding of Wairoa township and surrounding areas on 26 June 2024.

71. As a result of the defendant's breach of statutory duty, the plaintiffs and others have suffered:

- (1) Loss and damage;
- (2) Distress and inconvenience.

72. The plaintiffs and group members seek interest from 26 June 2024 under ss9 & 10 of the *Interest on Money Claims Act 2016*.

73. Interest from the Ministry of Justice interest calculator is to be calculated.

WHEREFORE THE PLAINTIFFS SEEK ON THEIR OWN BEHALF

- A Judgment for the amounts to be determined;
- B Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;
- C Costs.

AND THE PLAINTIFFS SEEK ON BEHALF OF EACH GROUP MEMBER

- A A declaration that the defendant is liable on the cause of action;
- B Judgment for the loss/damages for each group member;
- C Interest under the *Interest on Money Claims Act 2016* together with ongoing interest;
- D Costs.