IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 24/2019
[2019] NZSC Trans 7

BETWEEN **BLUE REACH SERVICES LIMITED**
BLUE REACH WIRELESS LIMITED
Applicants

AND **SPARK NEW ZEALAND TRADING LIMITED**
Respondent

Hearing: 21 June 2019

Coram: O'Regan J
Ellen France J
Williams J

Appearances: M B Wigley for the Applicants
Z G Kennedy and O J Skilton for the Respondent

ORAL LEAVE HEARING

MR WIGLEY:
As your Honours please. Wigley for the applicants.

O'REGAN J:
Mr Wigley.

MR KENNEDY:
May it please the Court. Kennedy and Skilton for the respondent Spark.

O'REGAN J:
Thanks Mr Kennedy, Mr Skilton. Mr Wigley?

MR WIGLEY:

I have in mind if I could starting for about 10 minutes just going straight through how I see the case. I think I can keep it to 10 minutes, and I do have a roadmap if it assists the Court, or if you'd rather not have it?

O'REGAN J:

No, hand it up, let's have a look.

MR WIGLEY:

I don't intend to refer to any authorities apart from what's quoted in my submissions on the application. I'll try and keep it fairly high level. So point 1, the standard position that on a case like this, on a strike out, it's appropriate to let it go to trial, these complex issues to be dealt with there and the core of the leave application is that there are conflicting policy objectives to be determined as they stand today. It's a today issue not a historical issue. That hasn't been addressed by the Court below. It's appropriate to address those conflicting issues in the current context and to draw the balance between the right of parties to have a full claim, a full civil claim on the one hand, and on the other the protection of witnesses and others putting material before the Court. That's essentially the nub of the application for leave.

Paragraph 2, if I can take your Honours, these paragraph references are to my submissions on the application, and if I could take your Honours to paragraph 10. It's important to get what's being said in the relevant section right. In my submission that hasn't happened in the Courts below. This is the section here and the key point is that this is all about what the Court would do faced with the same information. It's not about what the Commission would do, it's about what the Court would do. That has implications as to how one goes about this. It also has implications for the relevance of this appeal because it is not just relevant to this arcane area of competition law, it is also relevant to what happens in courts. That also is a key point.

Three, if I can take your Honours over the page, of my submission. Obviously there's been various steps happening in the UK and the New Zealand courts,

which are eroding the long-standing privileges; solicitor's immunity, expert evidence. There's the case I've referred to involving a tort of deceit, so this is something of a moving feast, and something of an evolving area where long-standing law is changing, and my friends refer a great deal to the fact that we're in an area of long-standing law, but actually, despite that, areas which attract immunity are tumbling in light of the changes in policy objectives. So, at paragraph 13 I've quoted from the majority judgment in *Lai v Chamberlains* [2006] NZSC 70; [2007] 2 NZLR 7, at paragraph 2, public law as policy is not static, you need to look at it as it is today. Things change. Paragraph 14, the same observation from Lord Reid in the original solicitor's immunity, barrister's immunity case, *Rondel v Worsley* [2006] NZSC 70, [2007] 2 NZLR 7. You've got to look at things as they stand today and Lord Cooke in paragraph 15, you've got to look at things as they stand. You've got to look at the facts. I'm not suggesting, your Honours, that that happens in every case going forward, obviously you've got to set out general benchmarks so that people know where they stand, but at some stage these things need to be visited to ensure they're correctly handled. Then at paragraph 15, we have here a case which is not about witness immunity, as such, and the Court below –

O'REGAN J:
Do you accept there is witness immunity or are you challenging that?

MR WIGLEY:
I accept that there is an applicable concept which is witness immunity, and I certainly accept that it applies under the Commerce Act 1986 provision, but one cannot just carte blanche apply witness immunity and say that's the end of it.

O'REGAN J:
No, I'm not asking you that. I'm just trying to understand where your case is. You accept that if a witness gives evidence in court, a witness of fact, they have immunity?

MR WIGLEY:

It's more complex than that. So there is a general and long-standing principle, of course, that there is witness immunity. That is clearly eroding and the best example of that is –

O'REGAN J:

Well are you asking the Court to overturn the idea that witnesses have immunity in court proceedings. Is that your case?

MR WIGLEY:

I think it's more nuanced than that. Can I just explain. First of all, on the question of witness immunity one cannot just say that there is witness immunity and that's the end of the matter, because, and that's strongly illustrated by the fact that one type of witness immunity, which is expert witness immunity, has gone. So, yes, there is a general principle witness immunity, which I imagine is going to stay, and I'm not challenging the general application, but I am saying that in certain circumstances the witness immunity is clearly going, and the obvious example of that is expert evidence. But more fundamental is that one cannot just look at this in terms of witness immunity, because this is a case which does not involve witnesses as we know them in court, people that do affidavits and people that stand up and give sworn, oral evidence.

O'REGAN J:

Section 106(9) requires us to pretend that, doesn't it?

MR WIGLEY:

It requires the Court to stand in the – yes, it requires the Court to pretend that hypothetically it is getting, it has to assess what happens with particular information. So, for example, an application, a clearance application for the Commerce Commission, is not analogous to a witness statement. A statement of claim in a court does not attract witness immunity yet it does attract immunity. One has to be very careful about categorising what's going on here. So the application by the, if we take a hypothetical application in the

Commerce Commission, it entails a document which sets out some facts. It entails setting out some submissions on the facts, on the law. It very often entails an expert report from an economist and it can come in various other forms as well. It is important not to treat that as being witness immunity per se. There is a broader issue going on here, and of course we know that there are various types of immunity which are going, which are being eroded.

O'REGAN J:
I'm just trying to understand whether you're saying that the Court needs to overturn the immunity that would apply in court proceedings, or whether you're saying this case is different from a court proceeding and therefore the Court process, the immunity that applies in a court process, doesn't apply here. So are you attacking the immunity generally or are you just saying it doesn't apply to your situation?

MR WIGLEY:
I am saying that it does not apply to my situation.

O'REGAN J:
Thank you.

ELLEN FRANCE J:
And why doesn't it apply?

MR WIGLEY:
Because that entails an analysis of the policy objectives as to whether or not it should apply in this particular case. In my submission the use of the word "witness immunity" here tends to take one down the wrong path. There are no witnesses here. There is a submission being put forward on facts and so on and so forth. One needs to look at what actually is happening here. It's what the Court would also do if, for example, it was faced with an immunity question on the statement of claim. It doesn't say, well, witness immunity applies here. What it says is there is an immunity, but it is because it's a statement of claim.

WILLIAMS J:

You would read 106(9) to say, in respect of anything that's put before the Commission in a clearance application, if that item in question attracts privilege in a court, or immunity in a court, then it's entitled to it in this context.

MR WIGLEY:

Absolutely.

WILLIAMS J:

But otherwise not?

MR WIGLEY:

Correct. Therefore, to illustrate that if the clearance application includes an expert report, I should have thought that that would be dealt with under the law applicable to witness evidence given in court. But one has to look at the facts, what actually is going on here, to see whether or not the immunity applies and overriding this –

O'REGAN J:

But I mean an expert report would be a sideshow here because your case depends on Spark misleading the Commission on the facts, doesn't it?

MR WIGLEY:

Mmm.

O'REGAN J:

So an expert report dealing with the economics of the situation would not be the source of your claim. It would be what Spark said.

MR WIGLEY:

Not in this particular case.

O'REGAN J:

Yes, so even if you're right about that, it doesn't help you in this case does it, if you're right about expert reports.

MR WIGLEY:

I think the relevance, Sir, is that it's a broad picture which is that there is a general change in the area of immunity in court.

O'REGAN J:

Yes, but I think we've established you're not attacking the immunity for witnesses of fact.

MR WIGLEY:

Correct.

O'REGAN J:

So your case is there's something different about the Commission procedure, and so are you accepting that if the information before the Commission is just fact, is just stating the facts, that information attracts the immunity that would apply to statements of facts in court or not?

MR WIGLEY:

No, I'm not accepting that.

O'REGAN J:

You don't accept that, okay.

MR WIGLEY:

And the main reason for that is that this is an instigating document. It's the instigation of a claim by an applicant to the Commerce Commission.

O'REGAN J:

Yes, but it's of no import unless it's got misleading facts in it, otherwise the Fair Trading Act 1986 doesn't get engaged, you've got to have something misleading. So what it states about the law is irrelevant to us. All we need to know is the factual part of the application for clearance, and the other factual material put before the Commission by Spark. Does that have the immunity

or not. I mean the fact that there is other material is irrelevant, isn't it, because the other material is never going to found a Fair Trading Act claim.

MR WIGLEY:

In my submission, the facts, if we stick with the facts for the moment, and of course these documents are more complicated, but stick with the facts per se, here is a bunch of facts that's put forward and of course it's alleged that they're misleading and a breach of section 9 of the Fair Trading Act. The submission is this, that because this is in an instigating document, and in particular because there is a duty of disclosure akin to the duty we have under ex parte applications in court, there is every policy reason why the normal rule as to witness immunity, or whatever immunity it might be, does not apply here because it's an instigating document, there is a duty on the applicant, they are the ones that know most what's going on, it's happening at the start –

O'REGAN J:

But that's like saying that the evidence given by a plaintiff in a court proceeding doesn't attract witness immunity.

MR WIGLEY:

No, there is a distinction for two reasons. The first, and most important, is that the applicant has a statutory, it's required under, prescribed for under the Act, under the Commerce Act, has an obligation to disclose everything to the Commission, warts and all, and there is every policy reason why it should be encouraged to have candour by having a civil remedy against it in that instance. It is different from, for example, a plaintiff, or the plaintiff's witnesses giving evidence in court in the thick of things.

O'REGAN J:

Do you say that a witness, someone who puts forward an affidavit in an ex parte application, doesn't have immunity, a witness doesn't have immunity?

MR WIGLEY:

I would say that there is a strong policy ground for a witness who is under an ex parte duty, is aware that it needs to disclose everything, warts and all, there is a strong policy ground for that witness to be subject, be at risk of civil proceedings, bearing in mind this is an instigating document, take an ex parte injunction. You turn up, you know most because you're the plaintiff. You can take time, within the bounds of whether it's urgent or not, to review the situation. You know you've got a duty of full disclosure.

O'REGAN J:

I think we know all that, but are you saying there is a different rule for witnesses in ex parte cases that –

MR WIGLEY:

I am saying there ought to be from a policy perspective.

O'REGAN J:

Do you have any authority?

MR WIGLEY:

I've dredged and there is nothing Sir. Well nothing that I've been able to find.

WILLIAMS J:

What are the alternative sanctions, if we're talking about ex parte applications, what are the alternative sanctions to liability to civil suit which would achieve your policy end without having to turn the law of immunity on its head.

MR WIGLEY:

Of course that's perjury and –

WILLIAMS J:

Well there's costs and the reversal of the order if Blue Reach comes along and says, "Stop, they lied."

MR WIGLEY:

There are, of course, and typically the Courts justify the immunity by saying there should be, freedom from attack and going to court and in any event there are some criminal sanctions, such as perjury, and there's a specific provision in the Commerce Act that addresses that as well. My submission is in the case of an applicant with this high duty of disclosure, there is every reason to encourage them to have candour by the threat of, or the risk of civil liability, as well as the perjury liability. That's the position.

O'REGAN J:

We should let you continue with your roadmap. Sorry, we've interrupted you.

MR WIGLEY:

That's helpful, thank you. Paragraph 6, we've pretty well covered what's above there Sir. Paragraph 6, my friends, and also the Court below, talk about well settled law but that hasn't been a barrier to removal obviously of barrister's immunity, expert witness immunity, which is a type of fact immunity, so that's an important point because one cannot just say carte blanche that factual witness immunity applies, and that's the end of the matter, because it has been carved out as far as the fact evidence, or the evidence called expert evidence. Privilege as to tort of deceit, I've mentioned the Court of Appeal in the United Kingdom on that England and Wales.

Paragraph 7, it's not enough to say that the trends in these cases are confined to those cases. There is clearly a general trend in the courts to review the current position as to the question of immunity and where the balance lies, taking into account the current climate and policy objectives.

Paragraph 9, we're talking here of the statutory remedy, not a common law remedy. My submission is it's treated differently, both from a, including, because of the broader objectives of both Acts that are applicable here. My friend's will –

O'REGAN J:

Is it actually in trade? Doesn't the Commerce Act only apply to statements that are made in trade? I mean if you're making a statement to a regulator is that in trade?

MR WIGLEY:

Yes. I don't have the authority with me but of course I checked that before, the authorities to check whether that was applicable. In trade, and I'm speaking from memory, is widely defined to include whatever broadly commercial people might do in trade, including dealing with the regulators, and there is authority on that. If it assists I can dig that up and give it to the Court later.

O'REGAN J:

No, that's all right, it was an idle enquiry really. It suddenly occurred to me that section 9 does talk about in trade and I think there had been some cases on that.

MR WIGLEY:

My friends are going to refer to a case which shockingly they dragged out that says that my point here is wrong, so I'll deal with that in reply. They just found it in the last 24 hours. I think it's appalling, of course, but I suppose –

MR KENNEDY:

It was more like 48 your Honours.

MR WIGLEY:

I don't think it's going to help, my point 10 is fairly complicated and it is actually very important, but I think rather than take your Honours to the detail of it, but the point essentially is this, if I can summarise it, and if need be now or later I can take your Honours to it. The Court of Appeal seems to have assumed that my concern was on whether or not the section in the Commerce Act should be read down to exclude parties like Spark. Now that absolutely could not be the case. The words are the words. Clearly the

section applies to Spark. That was not the point that I was making. The point that I was making was that it is the assessment is to be made hypothetically by the Court and in my submission clearly, as one reads the judgment alongside my submissions on the point where I go through in some detail, the Court in my submission has erred and got it wrong in terms of what I've submitted and how they've concluded. It is a very important point because my fundamental point is that the assessment is based on the way the Court figures out the privilege position, not how the Commission figures it out, and you can't just say, as the Court of Appeal in my submission has said, witness immunity applies and that's the end of the story. It is significantly more complex than that and requires consideration of each of the categories.

ELLEN FRANCE J:

My query is quite how the Court then, what's the sort of reasoning that takes the Court to a different view from what subsection (9) would provide. So, if it is, let's assume the material is privileged before the Commission, the Court would be saying although there is privilege there, there's not privilege in these proceedings, and what's the sort of reasoning that – so I suppose it's potentially undermining the statutory provision, isn't it?

MR WIGLEY:

So there is at no point any question of whether the document is privileged in the hands of the Commission. One doesn't have to look at it. Rather the question is, in determining whether it is privileged in the Commission, one looks, one does the hypothetical and says, "What would the Court have done there." It's a little hypothetical because there's no direct equivalent.

ELLEN FRANCE J:

I see what you're saying, right.

O'REGAN J:

You're saying, let's pretend the Commission process had been a court process, is really what you're saying, isn't it?

WILLIAMS J:

Yes, because you say the Commission has no greater immunity attaching to its proceedings than a court does, in accordance with 106(9). No greater or different.

MR WIGLEY:

I think it's more accurate, actually, just to stick with, rather than to try and put a gloss on what's happening here, is to actually stick with the words of the section, which is at paragraph 10 of my submission. That when you're working out privilege in the Commission context, you need to address privilege in the same manner as the Court would do, as would happen in the court. Hypothetically. That's the point that, in my submission, one of the points that the Court of Appeal has gone wrong. It's a hypothetical because the Courts don't have an inquisitorial role, it's a hypothetical because a clearance application doesn't have a close facsimile for a statement of claim and witness evidence and so on and so forth, so the Court is tasked with doing something as though. If there's expert witness in there, maybe it's not immunised, and my submission is that because of the unique circumstances here it's like an ex parte application. The policy drivers are quite different, and should be applied differently.

O'REGAN J:

In your submission you say that a case should go to trial because these decisions should be made with all the facts on the table. I mean there's two questions about that really. One is, what facts that we don't already know, because we're dealing with an error of the law, you say, about what privilege attaches, and the other is, wouldn't a trial effectively mean the privilege had been lost because there would have to be presumably discovery of all the material and you would be using it in a court proceeding? So, you'd sort of win the case without winning it, wouldn't you, in that situation?

MR WIGLEY:

That's quite a complicated little chain there to follow through. Well to your Honour's first point, and I haven't said this in the submission, but a

primary submission could be to do as happened in *Lai v Chamberlains*, that on a strike out application the Court has enough to go through the policy objectives, that is not necessary to go to trial. This, after all, is a fairly simple case in this particular area. The facts are straightforward. Yes, even now the Supreme Court could do the policy objective analysis one way or another weighing up and balancing, without having to go back to trial. I perhaps did short-circuit the point too much, the cases of course talk about if a thing is fairly evenly balanced or uncertain that it should go to trial first so that the Court has the benefit of full analysis of the facts and so on, but in fact here it could be that it could be resolved at the appeal stage.

WILLIAMS J:
You think there's no nuance in the fact that might require the evidence to be drawn out a little more before you could decide if, and if so, how the policy considerations applied in this context. You say that's not necessary?

MR WIGLEY:
Well a number of the cases, of course, do say that actually it really needs to go back to trial to drag out.

WILLIAMS J:
I understand that, yes. But what do you say in this case?

MR WIGLEY:
I would now say, to be quite clear –

O'REGAN J:
We should cut to the chase.

MR WIGLEY:
I would now say that if this matter was to get leave, then I would certainly seek to argue that the facts and the policy issues are sufficiently clear for the Court to be able to decide the issue, and that's essentially what happened – no it

didn't happen in *Lai v Chamberlains*, that was a – yes, sorry, it did happen in *Lai v Chamberlains* so it could be resolved at appellate level.

WILLIAMS J:
But wouldn't that require us, if you got leave, to decide that the material was misleading and therefore privilege lost?

MR WIGLEY:
Yes, I'm sorry, you're right. I've got myself quite mixed up on this.

WILLIAMS J:
It's easy to do.

MR WIGLEY:
We're only talking about a strike out here at the moment and it's obviously not going to go any further than – the Supreme Court is obviously not going to have the full trial. The Supreme Court is able to make a reasoned decision on the pluses and minuses of the policy issues, and come out with a –

WILLIAMS J:
Do you mean assuming your case at its highest?

MR WIGLEY:
That's right.

WILLIAMS J:
Right.

MR WIGLEY:
And that's what happened in *Lai v Chamberlains*, there was a clear decision that – so rather than the Supreme Court in *Lai v Chamberlains* saying, "This is too hard for us, we'll kick it back down to the High Court to go to trial," the Supreme Court there did say, "We can conclude that barristerial immunity is gone." So that would be the highwater mark, as your Honour says, but if we

don't get across the line on that then it ought go back to trial so that the various issues should be resolved.

WILLIAMS J:

Yes, *Lai v Chamberlains* was easy because that's purely an abstract question of principle. Here, the existence of immunity, if your argument is right, still relies on particular facts, which have to be established, otherwise the immunity still protects the witness, I would have thought.

MR WIGLEY:

Yes, I –

WILLIAMS J:

It's circular, I know, but…

O'REGAN J:

I think we would have to decide that the immunity doesn't apply to certain types of information, and then there would have to be a trial where the other immunised material would be before the High Court determining whether there was the liability you say there is.

MR WIGLEY:

With respect your Honour, I don't think the Supreme Court would have to go that far, and the cases seem clear on this. The Supreme Court is able to say, as the cases say, that actually this is too hard for us to decide. It clearly needs to be addressed and should go back to the High Court.

O'REGAN J:

Well I agree, we could do that, but I don't think you're very likely to get leave if that's all you're seeking because that doesn't take us very far. I mean I think the Court would have to grapple with the underlying argument which is, is there privilege attaching to this material or not.

MR WIGLEY:
Which of course I seek and of course I regard as lay-down victory so…

O'REGAN J:
Thank you. That's your submissions?

MR WIGLEY:
Thank you.

O'REGAN J:
Mr Kennedy.

MR KENNEDY:
Thank you, your Honours. What I think I might do is summarise Spark's position in response to that application for leave, and obviously that'll bring up some of the issues which your Honours have been discussing with my friend and I'll look to deal with those in an appropriate order which will hopefully make some sense.

As I apprehend my friend's submissions there are two parts to the application for leave. So the first one he says simply is that there is, in fact, no immunity that applies to Spark in these particular circumstances, and Your Honours have explored that with him today, and that's provided a little more detail for why he says that might be the case, and is in his written submissions, and he effectively seems to be saying that the nature of the originating document, which is represented by the application made by Spark to the Commission, should be treated differently from other documents, or evidence, which might otherwise be given in the court, which would clearly, as I understand his submission, attract the immunity. Now that just simply isn't right as a matter of principle, and I'll return to that very shortly.

The second point that he does emphasise in his submissions is that this is not an appropriate case for summary determination and strike out because there are facts that require final determination at trial. Now as I again apprehend

my friend's interaction with the bench, he now seems to have resiled from that, and he now seems to be suggesting that there are, in fact, no additional facts that need to be determined for the Court to be able to address this particular issue as a matter of principle. Just quickly dealing with that, that is Spark's position here as well because what Spark says simply is that if you assume the case as pleaded is made out, which of course is the test for strike out, it simply can't succeed and that is because of the established width or breadth or scope of witness immunity, and I'll quickly come back to that.

So in respect of the first point, which is that there is no immunity, my friend, he described in his submissions what he says is his central argument and that is that the Court in the particular circumstances in this case would not grant immunity because of, and he lists three or four different characteristics, this is in paragraph 11 of the submissions, he refers, for example, to Spark's superior knowledge of the circumstances, to the fact that Spark is, as the applicant, motivated by the benefit that it's seeking to achieve. He refers to the fact that key information is going to be, or could be redacted, and that because it is an applicant its position is distinguishable from other witnesses or individuals who would be otherwise entitled to the benefit of the witness immunity. That then is a springboard for him to embark upon, in the balance of his submissions, effectively the weighing up of public policy, policy considerations afresh for the purposes of then arguing that the public policy considerations supporting Spark providing information to the Commission which he says ought not to have been misleading and deceptive, outweighs the public policy considerations associated with witness immunity.

Now the problem with that approach is that it is completely contrary to authority, and the nature of witness immunity itself is that witnesses and other participants in the court process must know before time that what they are going to say is to be protected by the immunity, and for that reason Courts have, for hundreds of years, turned their face against the notion that on a case by case basis you step back and say, well, I'm going to weigh up the particular circumstances of the case and determine whether witness immunity applies to the circumstances before me.

Now the exceptions that my friend has mentioned are very narrow exceptions. In fact they are very easily understood when you put them in their appropriate context. The first one, which is concerned with witness immunity, and I should say, your Honours, at perhaps the cost of being overly inventive, I don't like the term "witness immunity" because in fact it's not merely witness immunity. What is clear, going back hundreds of years, is that the immunity applies to all players in the courtroom, including the judge, and counsel, and jurors, as well as the witnesses, and the parties themselves. So whenever we speak of witness immunity we are perhaps unconsciously, unduly and unjustifiably restricting the ambit of the principle. It applies to all of those players, and that actually really is an answer to one of my friend's primary submissions, that it should not apply to Spark, because it's the applicant. Spark –

WILLIAMS J:
I guess it's called witness immunity because that's usually how it comes up.

MR KENNEDY:
That's right Sir. That's absolutely right, but if you look at the way it's being described by what used to be the House of Lords and so on, they talk about the immunity, or the core immunity, and it seems to me that if we described it as the court or a court immunity, that would be a much better way of describing really what it does. But to the extent that there has been debate in the case law over that particular principle, it's been almost solely concerned with exactly how far back the immunity should be taken into preparatory or investigative steps, and case law like *Darker v Chief Constable of West Midlands Police* [2000] 4 All ER 193 (HL) and many of the others that my friend relies upon, are consumed solely with that. At what point does a policeman who is investigating a crime change from the investigation phase of the work that he's doing and start the preparation phase as a witness because that is a point in time when the witness immunity principle will cover him. Prior to that he will be exposed, and that's precisely what the position was in *Darker*. We have nothing like that here. We're not concerned –

O'REGAN J:

What about *Lai v Chamberlains*? I know that's dealing with the party suing their own lawyer, isn't it, rather than…

MR KENNEDY:

Yes, I'm glad you asked that question Sir, because it's interesting. It seems to me that *Lai v Chamberlains* is undoubtedly concerned with barristerial immunity, and when you go back and you look at the origins of barristerial immunity, which go back again hundreds of years, it's a different beast from what I'll call court immunity. It arose from what appears to have been the historical oddity of the position of barristers in England where they could not accept instructions directly from clients, they could not sue clients for their fees, and the quid pro quo would appear, and certainly it was justified on this basis in a number of cases, was that they could not be in breach of contract because by definition there wasn't a contract, and that has been overtaken over the hundreds of years in the intervening time by the reality that barristers, in fact, are subject to contractual obligations.

So when you look at it like that there's two ways of characterising that immunity, and to a certain extent, although it remains not entirely clear in this country because I don't think *EBR v McLaren Guise* went onto trial, I presume it settled, there's nothing in the law reports, but the reason why expert witness immunity is different from the court immunity I'm talking about is for the same reason that barristerial immunity exists, and that is that there has been a voluntary assumption of obligations between the barrister and the expert witness to their client, and in those circumstances first there is a duty of care, whereas there would not be a duty of care in respect of the other individuals or players in the courtroom, when we're talking about court immunity, and I think the alternative way that it's been rationalised by the courts is that it makes perfect sense for a common law rule of the immunity, the court immunity, to give way to the sanctity of contract, in those particular circumstances.

O'REGAN J:

But in both cases we're only talking about liability to your own client.

MR KENNEDY:

Exactly.

O'REGAN J:

We're not talking about liability to the other side, which is really what Mr Wigley's case is.

MR KENNEDY:

Yes, and I was going to say that I don't think, what my friend's submissions just simply assume that barristers are not covered by court immunity, and that's just not so. They undoubtedly are. It just, they have a very narrow exception, to the extent there's an overlap at all, where they can be sued by their client, but they can't be sued by the other side or by third parties in civil proceedings, which is what we're concerned about with Court immunity.

WILLIAMS J:

Well that brings up the different underlying policy reasons for the two sets of laws, they're really quite distinct, aren't they?

MR KENNEDY:

Totally, and so what I say, your Honour, is that none of the cases that my friend relies upon help him at all because unlike those cases, the ones that are concerned either with the scope of court immunity and the point in time during the preparatory phases at which it starts to bite, or the expert witness immunity or barristerial immunity, none of those issues come to the fore in this case.

WILLIAMS J:

What about his point that I guess voluntarily an applicant for clearance takes on the without notice obligations of candour and so on, because the statute requires them to do that if they're going to make the application. It's a little

analogous, isn't it, to the assumption of reasonable care by contract or by tort of an expert witness, or indeed a lawyer, even if it's a different party that gets the benefit of it.

MR KENNEDY:

Yes, I saw my friend's submission to that effect Sir and I think what it does do though is it conflates what are two distinct issues. So one as counsel and also a party applying ex parte to a court for orders, has an obligation to make full disclosure, and if that obligation is breached and full disclosure is not made, then both counsel as a matter of their ethical obligations, and the party are subject to sanction by the court, and that can be, as your Honours pointed out, costs, fines, contempt. There's a whole raft of sanctions available. That doesn't mean there's not witness immunity available in respect of both what the counsel and the party did. The witness immunity protects them from being sued by the third party, or a third party who may have been adversely affected.

WILLIAMS J:

So the long and short of that is, I guess, that the policy that might underpin such a proposition is already amply met elsewhere.

MR KENNEDY:

Absolutely. If you go back to the scheme of the Commerce Act, and so the Commerce Act, if you look at it, the corresponding ability of a court to take sanctions against someone who breaches the obligations of full disclosure, they are met in the Commerce Act, or enshrined in the Commerce Act in section 103, and what that says is that the Commerce Commission has the ability to bring criminal sanctions against anyone who knowingly attempts to mislead or deceive the Commission. But where someone unknowingly misleads or deceives the Commission, then the section 106(9), and in fact the other privileges as well in section 106, make it clear that there isn't the ability for third parties to bring a separate civil claim.

O'REGAN J:

In a court process you can also, as Justice Williams said earlier, apply to have the order discharged on the basis that it was given on a false premise.

WILLIAMS J:

You can do that here.

O'REGAN J:

So I suppose here you'd have to take judicial review proceedings.

WILLIAMS J:

No, 65D would do it for you, wouldn't it? Just apply to revoke?

MR KENNEDY:

There's only a limited ability to do that here in respect of the clearance Sir. In fact once the clearance is given effect to then under section 69 there is immunity conferred upon the participants to that particular transaction, and the reason that the statute is framed in that way is to ensure that commercial certainty is obtained from parties who voluntarily seek a clearance application, or authorisation from the Commission, then they can carry on, complete the transaction, it can't then be unwound, and that's why again, from a civil perspective, this whole raft of remedies which would be available under a consumer protection statute like the FTA are entirely inconsistent with the scheme of the Commerce Act.

O'REGAN J:

Is there a right of appeal against the grant of a clearance, or presumably the refusal of one?

MR KENNEDY:

A very limited right of appeal, and then only to the parties who were involved, but your Honour is right to say that there are judicial review proceedings available in respect of the Commerce Commission's decision, but what you

have to do is to seek an injunction to prevent the transaction from being completed before those proceedings are brought.

O'REGAN J:
That's not unheard of though, is it, I mean that has happened I think.

MR KENNEDY:
No Sir, in fact I was involved in one, that was the claim that was brought by 2 Degrees and Spark against the merger clearance for Sky and Vodafone, and in fact the clearance wasn't granted but we were concerned that it would be, and so we obtained an injunction prior to the decision being made in case it was, in fact, in support. So it's not unusual but it's…

O'REGAN J:
Because one of the things about the applicant's conduct here is that it didn't participate, as I understand it, in the clearance process, but presumably if it had of and the Commission had been sufficiently exercised about it to have a conference, wouldn't that have given it a right of appeal if it had been part of a conference?

MR KENNEDY:
Now your Honour used to be right. I think there has been a recent amendment to the Commerce Act that now removes the ability of participants to a conference from being able to appeal the outcome, but as a matter of –

O'REGAN J:
So the only avenue would be judicial review then?

MR KENNEDY:
Yes. As a matter of pragmatism the Commission just simply stopped having conferences so that people couldn't easily challenge its decisions.

WILLIAMS J:

Can you tell me then what, I've just been scrolling through the legislation, what 65D for Delta means?

MR KENNEDY:

Off the top of my head –

WILLIAMS J:

"The Commissioner may revoke a clearance given under section 65A." Is this not a 65A clearance?

MR KENNEDY:

This is a section 66 application.

WILLIAMS J:

Okay, that explains it, thank you.

MR KENNEDY:

Yes. So the Act actually consists of a number of careful checks and balances which are designed to ensure that the Commission which, as we know, is an investigative and an inquisitive Tribunal. It obtains the information it needs. It then makes the decision, and then it's that decision which must be challenged by anyone who is adversely affected by judicial review proceedings within a period of time prior to the transaction being completed, after which the doors shut, and there isn't anything more that can be done. Although, if there is a concern by the Commission that there has been a breach of the obligation of parties' obligations, including those that are analogous to the ex parte obligations, the obligation to make full and proper disclosure, and it was a knowing or intentional breach, then those criminal sanctions remain available to be taken I think up to a period of three years after the decision. So it's the Commission which has all the information under section 106, I think it's (7). The Court can't compel the Commission or its members to disclose the evidence which it actually gathered during the process. I mean it's up to it to decide whether to clear or not to clear, and

then to take any action it thinks is appropriate by way of sanction if there has been a breach.

Obviously, and I know I probably don't need to say this your Honours, but obviously Spark doesn't accept for a minute that there was anything which was misleading or deceptive in respect of its application, but what we're saying here is that given the breadth of court immunity, which expressly extends to statements it made in court, by any of the players that we've talked about, which in fact are malicious and dishonest and untrue, it just doesn't matter. It doesn't matter whether my friend can demonstrate that there is anything wrong with the application because it's all blanketed by court immunity, and it cannot be the basis, or form the basis of a subsequent civil claim.

O'REGAN J:
So you'd say that would include pleadings?

MR KENNEDY:
Well it has to Sir because the way in which it's expressed, and if you go back to *Darker* and those authorities, anything said or done in court proceedings, or sufficiently connected to court proceedings by any of the parties that I've described, including counsel, are subject to this immunity.

ELLEN FRANCE J:
What do you say to the submission that in the present case that should be looked at, the application of section 106(9) should be looked at in a hypothetical sense in terms of what the Court would do?

MR KENNEDY:
I agree. I agree with it Your Honour. So we are concerned with the nature of the Court immunity that would apply in a court process. That's what 106(9) says, and that immunity, and that of course brings in all of the authorities that we've been discussing, *Darker* and *New Zealand Defence Force v Berryman* [2008] NZCA 392 and so on and so forth. That immunity is clear and it

covers, your Honours probably won't need any of the case references, but it covers the parties that I've already mentioned. It confers an immunity from civil suit on those individuals who, everything said or done, and necessary preliminaries notwithstanding, false, malicious or statements made without reasonable cause, justified on well recognised public policy grounds to ensure that there isn't the chilling effect on witnesses who are concerned about being vexatiously sued in third party proceedings, and to avoid the multiplicity of litigation, to achieve finality of litigation.

So that is clear. It's absolutely settled law across the Commonwealth, and I can tell your Honours that we have a number of juniors who have worked long hours checking all of the Commonwealth jurisdictions, and literally there is not a single case in any jurisdiction which has suggested that this core court immunity should be reviewed or reconsidered. It's in a very different situation or a different, it's a different species from barristerial immunity or expert witness immunity where you've got those contractual obligations voluntarily assumed to clients. That's not the case here. It applies to civil actions no matter how they're framed and that includes statutory causes of action like the FTA and the case that my friend was very gently complaining about, we did unearth I think in the last week or so, which was an appellate level case from the New South Wales Court which confirmed that the principle of court immunity was sufficient to dispose of a pleaded breach of section 52 of the Trade Practices Act, which of course was the then equivalent of our section 9. So that's in the bundle.

WILLIAMS J:
Is this *Commonwealth of Australia v Griffiths* [2007] NSWCA 370, (2007) 70 NSWLR 268 is it?

MR KENNEDY:
Yes it is. Yes, that's right. At page 294 your Honour. The courts have well recognised, as I've mentioned, the need for the immunity to be clear and for it to be predictable so people know precisely that they will be protected by it. It can't just be applied on an ad hoc basis depending upon what one judge

might think about the way in which the various public policy considerations are best balanced in any given scenario. That is to undercut the whole purpose of the immunity and if this case was to be permitted to trial, that defeats the immunity. It defeats the very purpose of it, which is to avoid these individuals or parties, and that includes a corporation like Spark, from being troubled with a trial on the very matters that it's meant to be immune from.

O'REGAN J:
That's why I was engaging with Mr Wigley about this because you can't have a trial where the immunity is still an issue, can you. I mean – because you'd still have to decide it as a preliminary issue before the evidence came in. So it seems to me it's a do or die now. We have to make a call on it now, don't we?

MR KENNEDY:
Yes you do, Sir, and the only –

O'REGAN J:
I mean maybe it should have been dealt with as a preliminary point rather than a strike out, but it doesn't change it.

MR KENNEDY:
Well it was dealt with as a strike out, Sir, because again I'm here in front of your Honours, as I was in the High Court and the Court of Appeal, proceeding on the assumption that my friend's allegations as a matter of fact are made out. But they simply can't succeed based on the acknowledged and settled breadth of the principle of court immunity. So there is no need for any further evidence. The application that was made by Spark is a matter of record. It's been in front of the courts. There's no suggestion that there's any other facts that need to be determined. It's there in black and white. So it is about –

O'REGAN J:

I think Mr Wigley accepts that if we're going to give leave it's to give leave to decide whether the immunity exists, not to decide whether there should be a trial to decide whether the immunity exists.

MR KENNEDY:

Yes, and I guess my submission here Sir is that there can be no question, based on the authorities, and based on what I think we now agree are the settled facts of this matter, that the immunity exists and therefore the Court of Appeal was right, and none of the usual criteria for leave are met here. There is no appearance of a miscarriage of justice. This doesn't have any particular wider commercial import. We're not aware of any other case where this type of claim has been brought, an allegation that a decision of the Commerce Commission, some 18 months after it was made and given effect to, can be attacked by a sidewind through a consumer protection statute. It just has never been made before so it's not exactly an issue which is crying out for determination, a concern or some sort of troublesome issue for the commercial community. These are matters which are well settled and they don't actually require the Supreme Court to confirm that they are well settled, in my respectful submission of course.

So I'll just quickly wrap things up Sir. Against that background the issues that my friend has raised in the application for leave, they all fall away because it's clear that they simply don't have substance. There isn't any necessity, as I've said, to balance public policy considerations afresh, and that is certainly one of the focuses of my friend's submissions, but that isn't what is done. The considerations he's identified, even if you were to take them into account, they don't weigh against the application of the settled doctrine. As I say, the community plainly applies to parties, and my friend has put a great deal of emphasis on the fact that Spark is in a different position here because it's the applicant, and it's originating document is an application as such, but –

O'REGAN J:

I think he protested that the Court of Appeal put those words in his mouth rather than – I think he was really more focusing on the nature of the material that Spark put before the Commission rather than the fact that Spark was treated differently from anybody else. So his argument was, well Spark's application is not the same as evidence tendered by some third party who's been asked to comment.

MR KENNEDY:

Yes, it's been put slightly differently in the submissions, and it wasn't entirely clear, but I did wonder when I was reading his submissions where he was unduly reading down the scope of the immunity to, as they were applied onto to witnesses and –

O'REGAN J:

Well I think you've made that point.

MR KENNEDY:

I think that's right.

O'REGAN J:

We know where you're going.

MR KENNEDY:

The suggestion that Spark has superior knowledge of the circumstances and reliance placed on its advice was given that the immunity applies for people who deliberately say things that are wrong, you know, that are false, and maliciously so obviously means it's intended to cover people who are wanting third parties to act on the basis of what they say, even though they know it to be untrue, but the breadth is there. We're done with that.

That's everything that I had to say Your Honours, unless there's any other questions I can help you with.

O'REGAN J:

No, thank you.

MR KENNEDY:

Thank you, your Honours.

O'REGAN J:

Anything in reply Mr Wigley?

MR WIGLEY:

Just a couple of short points, and then a bigger point, and that's all I'll have if I may. If I might, with respect Justice O'Regan, quibble with just a couple of the points that your Honour has made. First of all if the matter goes back to trial at some stage, it's decision is reversed in the Supreme Court, and it goes back, I don't think that's a problem for the trial because what will happen is that an attempt will be made to lead the relevant evidence, which is from the Commission proceedings, the application for example, and then my friend is going to jump up and say that's inadmissible because it's privileged. So I don't think there's any procedural problem with the trial dealing with this. That would be the normal way, or some other variation on that theme.

O'REGAN J:

No, I'm not sure that's right. My point was that if the information is required in order to decide the privilege claim, there's a sort of cart before the horse aspect. If you're saying we need the full facts in order to decide the privilege claim, by definition that means you've got to put the privileged information before the court, which means you're assuming there isn't a privilege. So all I was saying is I think the privilege point would still have to be resolved in a way that's sort of a preliminary point and it's probably better resolved by this Court on the appeal, if we can do that.

MR WIGLEY:

So if I can follow through on that point into that issue about that, this court resolving it, I haven't brought *McGechan* with me Sir, and I can provide

the court with the references, but there is clear authority that where on a strike out the issue is, let us say, a line call, or it's quite uncertain, it's not clear cut, then it is appropriate for the appellate court to not make, or the first instance court to say, "It is not appropriate to make this decision now. We don't have all the facts." The decision is best made on the basis of all the facts rather than a fairly hypothetical basis of a statement of claim, and therefore it should be dealt with in the High Court."

O'REGAN J:

But I think, in the discussion we had earlier, you accepted there aren't any other facts that would help make the decision, so it can be made at the strike out stage, and what I'm saying is that I think if the court gave leave, we probably wouldn't say, "We're not going to make a decision on this." We would actually make one.

MR WIGLEY:

Yes Sir. The way I was trying to frame this, and didn't get the point across well, is that, yes, I would expect this Court to look to resolve the issue. After all it's probably not suitable material for the Supreme Court if that was not the case. But one of the outcomes of a Supreme Court decision could be, well we've looked at this, and we've balanced all the issues, and at the end of the day actually we can't so…

O'REGAN J:

I see. Okay, sorry, we're not apart then. I accept your point, yes.

MR WIGLEY:

Really my major point, Sir, is that generally speaking there is this privilege that exists of which witness, court based privilege, of which witness privilege – sorry, immunity, I beg your pardon, which witness immunity is a part, it doesn't look like it's going to go away generally for many decades, if at all, because of the strong driver of giving protection to witnesses in court, and as to pleadings and so on and so forth. My point, Sir, is that what is happening at the moment, and should be happening, is that in certain areas there should be a

carve out in particular circumstances, and those circumstances have to be special. Someone has to be a barrister, someone has to be an expert witness, perhaps the tort of deceit is alleged and so on, and in this instance, which is akin to an ex parte application where there's a high level of duty, and this is an instigating approach, there is strong policy grounds for having a civil remedy to encourage that candour in this instance.

Yes, there is a conflicting policy ground which protects Spark or any applicant from attack, but that is a policy debate that should be had, and has not been had in the lower courts, and that's really the substance of the argument, and stated at a common sense level, and a sort of a general level, there is every reason to say that ex parte applicants, and what Spark has done here, should be under a very high level of duty reinforced by a civil standard. One can see that as being a strong policy objective which may well override the countervailing policy objective. This is a unique situation because it is like an ex parte.

WILLIAMS J:
The logic of that would be that the same would apply to affidavits on ex parte applications.

MR WIGLEY:
Probably but – yes, probably, but again –

WILLIAMS J:
They're a bit more common.

MR WIGLEY:
They're a bit more common but I suppose the point to make here is that we're asking the Court to address an issue under the Commerce Act on Commerce Act specific issues, but it is the decision is also relevant to application to a broader set of circumstances such as ex partes in a court context, and it may be that the same rule determined in this Court is then applied in the, as to ex partes and affidavits, and there is every reason for an

ex parte affidavit from say the plaintiff to be subject to the same constraints. Candour, as the judgments keep on saying, is a very important feature of ex parte.

So therefore one can see a good policy argument overriding the countervailing policy argument. Now I'm not certain about the answer, I obviously say that it should be, it does override, but that requires it is appropriately addressed and it requires a very close analysis of various policy objectives to get the right answer. Sadly in the court below, because in my submission the Court of Appeal misunderstood my submission, and thought I was dealing only with reading down the section when it fact I was addressing the very point I'm doing now, which is that what do you do when it gets to court. What are the policy situations? This was not addressed below and that's a substantial miscarriage of justice point as well.

My friend referred to broader implications. This is not just a unique situation. It can be applied to ex partes. It is part of the general evolution of this area of the immunity law. It's not exceptional in that sense. Yes, it's exceptional in the sense of being a Commerce Act matter and of course there's plenty of statutes out there which have a similar immunity clause as well. Unless I can assist that's…

O'REGAN J:
Do you accept in relation to barristers and expert witnesses that the cases about undermining that immunity are about their liability to their own clients rather than to third parties or the other party to the litigation?

MR WIGLEY:
And in 50 or 60 pages of *Lai v Chamberlains* I don't think it just comes to those types of issue, but yes that clearly was an important issue. It does not necessarily, it does not apply directly here, but that doesn't mean that this is not a similarly exceptional case for, but for different reasons. I can't apply those cases directly, accepting that Sir.

WILLIAMS J:

Can I just ask a practical question? To the extent that you say you're carving out from immunity the originating document supporting evidence and let's say exhibits, or whatever they're called, whatever was put to the Commission in the application, do you say the immunity is lost only if that material is misleading and to the extent that it is, or do you say there is no immunity from the start? Is misleadingness a precondition to the loss of immunity?

MR WIGLEY:

The immunity, the exception from immunity to which I'm referring, I'm not sure if this is the way of answering your Honour's point, the exception from immunity to which I am referring may well apply not only to causes of actions, such as under the FTA, but also, for example, to causes of action in negligence, deceit – I don't think, it's unlikely the immunity is specific to the Fair Trading Act cause of action. Is that your Honour's point?

WILLIAMS J:

Well it's just, do you lose the immunity following proof of a wrong, or is there no immunity from the start. You see the reason I ask that is that if you need proof of the wrong to lose the immunity, then immunity would always be a trial question.

MR WIGLEY:

Yes, I'm not sure I'm following the point.

WILLIAMS J:

Well, if it's always a trial question, then as soon as you claim a civil wrong against someone who's a witness, or counsel, or whatever in these sorts of circumstances, the immunity is meaningless even without the wrong because you've got to try it and the underlying policy for the immunity is to stop trials. Do you see the point I'm trying to get to? So I need to understand whether you say in these sorts of cases there is just no immunity, or whether your point is narrower.

MR WIGLEY:

I haven't analysed it fully, but in these sort of cases there is no immunity would be the – obviously it depends on the particular category of information we're talking about, because that analysis has to be done first, but it is possible, for example, that the decision could be that certain categories are immune and some are not. Pure fact, perhaps immune. I'm not saying that's the case. This does require an examination of the categories of information.

WILLIAMS J:

Right, but it's category-based not wrong-based, even though your policy for taking away the immunity is the avoidance of wrongs on innocent parties?

MR WIGLEY:

Category-based, yes.

O'REGAN J:

Thank you counsel. We'll reserve our decision and release it in writing in due course.

COURT ADJOURNS: 11.08 AM