

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 24/2019
[2019] NZSC 65

BETWEEN BLUE REACH SERVICES LIMITED AND
BLUE REACH WIRELESS LIMITED
Applicants

AND SPARK NEW ZEALAND TRADING
LIMITED
Respondent

Hearing: 21 June 2019

Court: O'Regan, Ellen France and Williams JJ

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

Judgment: 28 June 2019

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$4,500 plus usual disbursements.**
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REASONS

[1] The applicants seek leave to appeal against a decision of the Court of Appeal,¹ upholding a decision of the High Court striking out their claim against the respondent (Spark).²

¹ *Blue Reach Services Ltd v Spark New Zealand Trading Ltd* [2019] NZCA 2, [2019] NZAR 333 (Gilbert, Dobson and Mander JJ) [*Blue Reach* (CA)]. For ease of reference we will call the applicants collectively "Blue Reach".

² *Blue Reach Services Ltd v Spark New Zealand Trading Ltd* [2018] NZHC 847, [2018] NZAR 912 (Lang J) [*Blue Reach* (HC)].

[2] The background to Blue Reach's claim is, in brief, as follows. Spark is a provider of telecommunication services, as is Blue Reach. Spark sought clearance from the Commerce Commission to acquire certain radio spectrum rights under s 66 of the Commerce Act 1986. Although Blue Reach was made aware of the application, it did not seek to take any part in the Commission's process for considering the application. Clearance was granted and Spark acquired the rights.

[3] Some time after that acquisition, Blue Reach commenced proceedings against Spark claiming that Spark had misled the Commission in the information contained in its clearance application in breach of s 9 of the Fair Trading Act 1986 and that this caused or contributed to the Commission's decision to grant the clearance. It claimed compensation for loss it said it suffered because it did not have the spectrum rights that Spark had acquired.

[4] The claim was struck out in the High Court on the basis that it was precluded by s 106(9) of the Commerce Act, which provides that information, documents and evidence provided to the Commission are privileged "in the same manner as if [they were provided] in proceedings in a court".³

[5] The Court of Appeal considered s 106(9) conferred an immunity on anyone who provided information, documents or evidence to the Commission in connection with the discharge of its statutory functions and this included protection from claims under s 9 of the Fair Trading Act.⁴ It considered that such a claim would have been precluded if the allegedly misleading statements made to the Commission had been made in court.⁵

[6] Counsel for Blue Reach, Mr Wigley, advanced the application for leave on the basis that it raised a point of public importance, namely the scope and nature of the privilege applying in court proceedings. A subsidiary issue is the way in which the material provided to the Commission by Spark can be characterised when applying the analogy with court proceedings. Mr Wigley essentially argued that there should

³ *Blue Reach* (HC), above n 2, at [32].

⁴ *Blue Reach* (CA), above n 1, at [29].

⁵ At [30].

be an exception to that privilege for information provided by Spark to the Commission because of the duty of candour applicable to Spark in making its application to the Commission.

[7] We accept that there may be cases calling for this Court to consider the scope, nature and extent of the privilege applying in court proceedings. But we do not see the present application as such a case. There is nothing in the facts of the present case that provides a basis for concern about the application of the settled law on the privilege applying in court proceedings. If leave were granted, Blue Reach would need to convince the Court that the privilege applying to court proceedings should be abolished or curtailed in order to succeed on appeal. We do not consider such an argument has sufficient prospect of success to justify the grant of leave.

[8] As an alternative to the broader argument just mentioned, Blue Reach submitted that it should be allowed to argue on appeal that the privilege referred to in s 106(9) did not apply in proceedings under the Fair Trading Act. This argument strikes the same difficulties as the broader argument and would also need to confront an Australian authority to the contrary.⁶ We do not consider it has sufficient prospects of success to justify the grant of leave either.

[9] Blue Reach also wishes to argue on appeal that the case should have been allowed to proceed to trial so the interpretation of s 106(9) could occur with full knowledge of the facts. However, it did not advance any particular factual issues that would need to be decided. We do not consider this raises any point of public importance: the test for strike out is now well settled⁷ and we see no appearance of a miscarriage in the way in which this was applied by the Courts below.⁸

[10] We do not consider that the case meets the criteria in s 74 of the Senior Courts Act 2016 for the grant of leave. We therefore dismiss the application.

⁶ *Commonwealth of Australia v Griffiths* [2007] NSWCA 370, (2007) 70 NSWLR 268 at [121].

⁷ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J; *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267–268; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146] per Blanchard, McGrath and William Young JJ; and *Sandman v McKay* [2019] NZSC 41 at [111] and [113] per Elias CJ.

⁸ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522 at [5].

[11] Blue Reach must pay to Spark costs of \$4,500 and usual disbursements.

Solicitors:

Wigley and Company, Wellington for Applicants

Minter Ellison Rudd Watts, Auckland for Respondent