IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA283/2018
[2019] NZCA 2

BETWEEN	BLUE REACH SERVICES LIMITED AND BLUE REACH WIRELESS LIMITED Appellants
AND	SPARK NEW ZEALAND TRADING LIMITED Respondent

Hearing: 15 November 2018

Court: Gilbert, Dobson and Mander JJ

Counsel: M B Wigley and J A Young-Drew for Appellants
Z G Kennedy and D M Kraitzick for Respondent

Judgment: 12 February 2019 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are jointly and severely liable to pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Gilbert J)

[1] The respondent (Spark) operates a telecommunications business which includes the provision of fixed wireless broadband access services utilising management rights to radio spectrum. In December 2015, Spark applied to

the Commerce Commission (the Commission) for clearance to acquire management rights to additional radio spectrum to enable it to provide extended coverage for its customers. The Commission was satisfied the acquisition was not likely to substantially lessen competition in the relevant market and it accordingly granted clearance in a determination dated 23 March 2016.[1]

[2] The appellants (Blue Reach) also carry on business as telecommunications providers and hold management rights to other radio spectrum. Blue Reach was notified of Spark's clearance application but did not contest the application or participate in the process.

[3] In October 2017, over 18 months after clearance had been granted, Blue Reach commenced proceedings against Spark in the High Court claiming that Spark misled the Commission in its clearance application in breach of s 9 of the Fair Trading Act 1986 (FTA) and this caused or contributed to the Commission's decision to grant the clearance. Blue Reach ambitiously sought orders requiring Spark to transfer the management rights to it or requiring Spark to supply access to the spectrum to Blue Reach but these claims were abandoned following the hearing of this appeal.[2] Blue Reach also sought unspecified compensation for loss allegedly suffered as a result of not having management rights to this particular radio spectrum.

[4] Spark responded by applying to strike out the claim on three grounds. First, it argued Blue Reach's claim was in substance a collateral attack on the Commission's clearance determination and therefore an abuse of process. Secondly, it argued the Commerce Act 1986 is a code and implicitly excludes the operation of the FTA in connection with the functions and powers exercised by the Commission under the Commerce Act. Thirdly, Spark contended that Blue Reach cannot obtain the remedy it seeks because this would require the Court to find that Spark's acquisition would be likely to have the effect of substantially lessening competition, contrary to the Commission's conclusion which can only be challenged under the appeal procedure provided in the Commerce Act or in judicial review proceedings.

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1 *Spark New Zealand Trading Ltd* [2016] NZCC 7.

2 After the hearing of the appeal, counsel for Blue Reach filed a memorandum dated 15 November 2018 advising that this part of the prayer for relief is withdrawn.

[5] Lang J granted Spark's application and struck out the proceedings in a judgment delivered on 30 April 2018.[3] The Judge found that the claim was precluded by s 106(9) of the Commerce Act:[4]

> **106 Proceedings privileged**
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> …
>
> (9) Anything said, or any information furnished, or any document produced or tendered, or any evidence given by any person to the Commission, shall be privileged in the same manner as if that statement, information, document, or evidence were made, furnished, produced, or given in proceedings in a court.

[6] The Judge rejected Spark's alternative contentions based on the Commerce Act being a code excluding the operation of the FTA and that the claim amounted to a collateral attack on the Commission's decision.[5]

[7] Blue Reach appeals. Spark supports the judgment on other grounds, being the two grounds rejected by the Judge.

[8] For the reasons set out below, we agree with Lang J that the claim cannot succeed because of s 106(9) of the Commerce Act and the Judge was correct to strike it out.

The claim — alleged misleading and deceptive conduct

[9] Blue Reach claims Spark misled the Commission in its clearance application and in other communications with the Commission by:

(a) stating that Blue Reach had sufficient spectrum for its purposes;

(b) omitting to state that new entrants and those building new networks would likely be constrained if they could not access the spectrum Spark wished to acquire;

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3 *Blue Reach Services Ltd v Spark New Zealand Trading Ltd* [2018] NZHC 847, [2018] NZAR 912 [High Court judgment].
4 At [32] and [49].
5 At [34]–[48].

(c) focusing on historic uses of the spectrum rather than those available with current technology;

(d) overstating the substitutability of spectrum bands given most spectrum is closely held by incumbents and not available to new entrants and parties building networks;

(e) misstating that any alternative bidder would be likely to offer only fixed wireless access services, not mobile;

(f) stating that the spectrum is better suited to fixed wireless access services than mobile services when this only applies to existing operators;

(g) suggesting the use of the spectrum for mobile services is in practice limited;

(h) not disclosing related agreements and information;

(i) stating the acquisition will not have any adverse effect on competition for mobile services;

(j) relying on a decision of the Australian Competition and Consumer Commission relating to an acquisition in 2012 to support its submission on the likely counterfactual;

(k) suggesting the acquisition would not be likely to substantially lessen competition or have any detrimental impact on competition in any market; and

(l) not including Blue Reach in the list of suppliers in the application.

High Court judgment

[10] Lang J considered the immunity conferred under s 106(9) of the Commerce Act is clear in its terms and covers all information Spark provided in support of its clearance application.[6]

[11] The Judge identified several obvious policy reasons why Parliament would wish to grant such immunity.[7] First, the Commission is a specialist body with wide investigative powers including the power to compel any person to provide information or documents it considers necessary or desirable for the purposes of carrying out its functions and exercising its powers under the Commerce Act. It is important that an applicant for clearance is candid and fulsome in the information it provides to the Commission. Secondly, the Commission may consult with any person who, in its opinion, can assist it in making clearance decisions under s 66 or in authorising business acquisitions under s 68. Such persons could include an applicant's competitors as well as customers and other consumers in the relevant market. The Judge considered it imperative that such persons know they can respond to the Commission's requests for information without fear of subsequent civil action by the applicant or any other party who may be adversely affected by the disclosure. The immunity in s 106(9) achieves that purpose.

Submissions

[12] Mr Wigley, for Blue Reach, emphasises that the courts should take a cautious approach to striking out claims before trial, particularly where the law may not be settled. In particular, he relies on Elias CJ's judgment in *Couch v Attorney-General* which confirms the importance of determining such cases on their facts found at trial rather than on hypothetical facts assumed for the purposes of a strike-out application.[8] He submits the present case falls into this category because the scope of immunities for witnesses and others involved in court processes is still evolving as demonstrated by this Court's recent decision in *EBR Holdings Ltd (in liq) v McLaren Guise Associates Ltd* which described the position of expert witnesses as being a "work in

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6 At [32].
7 At [29]–[31].
8 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

progress".[9] Mr Wigley refers to Lord Cooke's observation in *Darker v Chief Constable of the West Midlands Police* to support his submission that immunities are always granted grudgingly and should not be given any wider application than is necessary.[10] He also refers to the decision of the Court of Appeal of England and Wales in *Smart v The Forensic Science Service Ltd* where Aikens LJ stated, after referring to *Darker*, that the general principle is that where there is a wrong there is a remedy and any immunity is a derogation from a person's right of access to a court which must be justified.[11]

[13] In considering the scope of the immunity in s 106(9) of the Commerce Act and whether it protects applicants in the position of Spark from claims under the FTA, Mr Wigley suggests it is necessary to start by considering the purpose of these Acts which were passed by Parliament in the same year. The purpose of the FTA is to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, and consumers and businesses participate confidently.[12] The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.[13] Mr Wigley says that Blue Reach's claim against Spark raises substantial consumer welfare issues that both Acts were designed to safeguard.

[14] Mr Wigley submits that s 106(9) does not cover the types of statements which are the subject of Blue Reach's claim under the FTA. This is because these statements were made by Spark voluntarily in its own interests and were not tested by cross-examination at any hearing. Mr Wigley argues that Spark derived a considerable advantage from the alleged breaches of the FTA and achieved an outcome that is to the detriment of consumer welfare contrary to the purpose of the Commerce Act. His central submission is that the policy reasons for the immunity do not apply to Spark's unilateral action in applying for clearance. Information voluntarily supplied by an applicant should be distinguished from information provided by other persons

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9 *EBR Holdings Ltd (in liq) v McLaren Guise Associates Ltd* [2016] NZCA 622, [2017] 3 NZLR 589 at [38].
10 *Darker v Chief Constable of the West Midlands Police*, [2001] 1 AC 435 (HL) at 453.
11 *Smart v The Forensic Science Service Ltd* [2013] EWCA Civ 783 at [36].
12 Fair Trading Act 1986, s 1A.
13 Commerce Act 1986, s 1A.

in response to the application as may be required by the Commission in determining the application.

[15] Mr Wigley observes that Spark certified to the Commission, as any applicant for clearance is required to do, as follows:

(a) all information specified by the Commission has been supplied;

(b) all information known to Spark that is relevant to the Commission's consideration of the application has been supplied;

(c) all information supplied is correct as at the date it was supplied; and

(d) Spark would advise the Commission immediately of any material change in circumstances relevant to the application.

[16] Mr Wigley submits this certification imposes a high responsibility on Spark, similar to that imposed on a party applying for an order from a court *ex parte*. He says the Commission and other stakeholders such as consumers and competitors rely heavily on clearance applicants to provide accurate and fulsome information to the Commission in the same way as courts rely on *ex parte* applicants. For these reasons, Mr Wigley says Spark should not be immunised from liability under the FTA in respect of certified statements made to the Commission, even if the 'privilege' in s 106(9) provides immunity for other claims such as for defamation or negligence. He says the information volunteered by Spark in support of its application is in a different category from that provided to the Commission by third parties under compulsion and does not justify the same immunity.

[17] Mr Kennedy, for Spark, supports the Judge's analysis on the interpretation and application of s 106(9). He argues that the word "privileged" in this subsection is intended to mean the immunity conferred on witnesses in respect of evidence given by them in court proceedings. Mr Kennedy says there is no indication in the statute that Parliament intended to differentiate between information supplied by an applicant and that provided to the Commission by a third party.

Analysis

[18] Section 106 of the Commerce Act, which is headed "Proceedings privileged", provides a wide-ranging suite of targeted protections for the Commission and persons engaged in assisting or providing information to the Commission to enable it to carry out its functions under the Act. These provisions are mostly directed at protecting the Commission and its officers, employees or committee members. However, s 106(9) extends certain protections to any person who furnishes information, produces or tenders documents or gives any evidence to the Commission. These provisions draw on the rules that would apply under common law if the proceedings were conducted in a court, such as judicial immunity, the privilege against self-incrimination, collateral use of documents produced and witness and party protection from claims.

[19] Subject to the limited exceptions in s 106(3), no proceedings, civil or criminal, can be brought against the Commission for any act or omission in the exercise or intended exercise of its functions unless it is shown that the Commission acted without reasonable care or in bad faith.[14]

[20] Immunity from civil and criminal proceedings is also conferred on any member of the Commission or any officer or employee or committee member of the Commission for anything that person may do or say, or fail to do or say, in the course of the operations of the Commission including where such persons fail to exercise reasonable care. However, the immunity does not apply if it can be shown that the person acted in bad faith.[15] The immunity covers claims that might otherwise be brought by the Commission in reliance on s 59(3) of the Crown Entities Act 2004.[16]

[21] Section 106(4) is significant because it abrogates the long-established common law privilege against self-incrimination now codified in s 60 of the Evidence Act 2006. This privilege is removed for any person required to furnish information, produce documents, or give evidence under the Act, or, on appearing before the Commission, from answering any question or producing any document.

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14 Section 106(1).
15 Section 106(2).
16 Section 106(3A).

[22] Although the privilege against self-incrimination is removed, Parliament has enacted various countervailing protections. First, subject to the limited exceptions in s 106(6), any statement made by a person in answer to a question put by or before the Commission shall not be admissible against that person in any criminal proceedings or proceedings for pecuniary penalties.[17] Secondly, subject to the limited exceptions in s 106(8), no court or other person can require any member of the Commission or any employee of the Commission or any other person present at any meeting of the Commission to divulge or communicate any information furnished or obtained, documents produced, obtained or tendered or evidence given in connection with the operations of the Commission.[18] Thirdly, there is the protection in s 106(9) with which this appeal is concerned. As already noted, this is cast in very wide terms — anything said, any information furnished, any document produced or tendered and any evidence given by any person to the Commission is privileged in the same manner as if given in proceedings in a court.

[23] Although the word "privileged" is used in the heading to s 106 it is apparent that this is no more than a convenient label for the provisions that follow and was not intended to be interpreted in a technical sense and meant to be distinguished from an "immunity" strictly so called. For example, as Mr Wigley acknowledges, subs (1) confers an immunity on the Commission for civil or criminal claims even though the word "immunity" is not used. Subsection (2) also provides an immunity for members, officers or employees of the Commission. Moreover, as Tipping J observed in *Chamberlains v Lai*, an immunity can properly be regarded as a privilege.[19]

[24] Parliament has conferred the same standard of protection in numerous other similar contexts, including, for example, under the Commissions of Inquiry Act 1908,[20] the Ombudsman Act 1975,[21] the Fair Trading Act 1986,[22] the Residential Tenancies Act 1986,[23] the Human Rights Act 1993,[24] the Privacy Act 1993,[25]

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17 Section 106(5).
18 Section 106(7).
19 *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7 at [111].
20 Commissions of Inquiry Act 1908, s 6.
21 Ombudsman Act 1975, ss 19(5) and 26(3).
22 Fair Trading Act 1986, s 47G(2).
23 Residential Tenancies Act 1986, ss 97(7) and 101.
24 Human Rights Act 1993, ss 128(1) and 130(4).
25 Privacy Act 1993, s 96(4).

the Health Practitioners Competence Assurance Act 2003,[26] the Real Estate Agents Act 2008,[27] the Immigration Act 2009,[28] the Legal Services Act 2011,[29] the Inquiries Act 2013[30] and the Customs and Excise Act 2018.[31] In most instances, Parliament has used a variant of the word privilege ("privileges" or "privileged") to describe the protection but occasionally has used the formulation "privileges and immunities". However, in each case the reference is to the same benchmark protection, namely the long-established and well-understood privilege or immunity that protects witnesses from civil claims arising out of their evidence given in court.

[25] Contrary to Mr Wigley's tentative suggestion, we do not consider that the word "privileged" in s 106(9) was intended to be interpreted in a technical sense and confined to the absolute privilege under s 14 of the Defamation Act 1992 for evidence given in court. If that had been the intention, one would have expected Parliament to have said so expressly, including by referring to the Defamation Act as it did in subs (10).

[26] Rather, it seems clear from the text and in the light of the purpose of the provision that the expression "privileged in the same manner as if … given in proceedings in a court" has been used to import the absolute immunity from suit for any civil claim afforded to witnesses in respect of their evidence given in court proceedings. Although there is an unresolved question in New Zealand about the position of expert witnesses, it is long-settled that any lay person giving evidence in a court enjoys an absolute immunity from any civil suit for damages, regardless of whether it can be shown that their evidence was false, defamatory, without reasonable foundation, or even malicious.[32] This immunity was developed centuries ago under the common law to serve the public interest in the due administration of justice. The immunity was considered necessary to encourage witnesses to give their evidence

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26 Health Practitioners Competence Assurance Act 2003, sch 1, cl 11.
27 Real Estate Agents Act 2008, ss 96 and 97.
28 Immigration Act 2009, sch 2, cl 15.
29 Legal Services Act 2011, s 108(1).
30 Inquiries Act 2013, s 27.
31 Customs and Excise Act 2018, sch 8, cl 25.
32 *R v Skinner* (1772) Lofft 54; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 264; *Darker v Chief Constable of the West Midlands Police*, above n 10, at 446 (HL); and *New Zealand Defence Force v Berryman* [2008] NZCA 392 at [67].

freely and frankly without fear of later being vexed by claims from disgruntled litigants or others.

[27] The same public policy considerations apply with equal force in the context of the Commission's investigative and disciplinary functions under the Commerce Act. These include, for example, the investigation, detection and policing of serious wrongdoing such as cartel conduct which is typically attended by high levels of secrecy, concealment and little or no documentary evidence. The Commission has been given broad powers to compel the provision of information, documents and evidence from any source, including employees, competitors, other market participants and consumers. The information, documents and evidence available from these sources will inevitably be of varying quality and reliability. It may be no more than supposition based on hearsay and not even admissible as evidence in a court. The Commission is not expected to accept any claims, information or evidence uncritically and it is not required to rely on the opinions of others. The Commission's responsibility is to exercise its wide investigative powers and apply its own expertise to rigorously test all claims and evidence placed before it and make any further inquiries it considers necessary.

[28] Further, it can be expected that anyone providing such information, documents or evidence will seldom have access to all relevant information bearing on the key issues that must be investigated and determined by the Commission as an independent specialist body. It would place an unfair and unjustifiable burden on any such person if they were vulnerable to suit by third parties for providing information that ultimately could be viewed as incomplete, misleading or even false in the light of all relevant facts. This would be contrary to the public interest because it would be likely to have a chilling effect on the provision of relevant information and consequently impede the Commission from fulfilling its functions and securing the objectives of the Act.

[29] For these reasons, we are satisfied that Parliament's purpose in enacting s 106(9) was to confer immunity upon all those who provide information, documents or evidence to the Commission in connection with the discharge of its responsibilities under the Act. This purpose was achieved by giving such persons the same protection they would have if the information had been given by them in evidence in a court.

This includes protection from claims of alleged misleading or deceptive conduct in breach of s 9 of the FTA.

[30] The question then becomes whether Blue Reach's claim alleging that Spark's statements to the Commission breached s 9 of the FTA would lie if those statements had instead been made by a witness in court. Despite Mr Wigley's careful submissions, we are satisfied the answer is plainly no.

[31] Unlike subs (4), there is no indication in the text that the privilege conferred under s 106(9) was intended to be confined to information provided or documents tendered to the Commission under compulsion. The protection extends to "anything said", "any information furnished", "any document produced or tendered" and "any evidence" given "by any person" to the Commission. The purpose of the protection would be frustrated if it were available only to those who provide information or documents under compulsion and did not extend to those willing to cooperate and assist the Commission without insisting that the Commission first exercise its coercive powers to compel the production of the documents or evidence.

[32] Mr Wigley contends that the Judge erred by treating the information provided by Spark as equivalent to information provided by witnesses such that witness immunity would be engaged. Mr Wigley notes that s106(9) does not refer specifically to witnesses. We are not persuaded by these points. The effect of the privilege, whatever its scope, is to provide protection to the persons supplying the information, documents or evidence. Importantly, we see no justification for reading down "any person" as meaning "any person other than an applicant". Nor do we see any justification for reading down "any information furnished" or "any document produced or tendered" as meaning "any information furnished or document produced or tendered under compulsion". These interpretations, urged by Mr Wigley, are not consistent with the text or the purpose of the provision which is to serve the public interest in full and frank disclosure to the Commission by anyone of anything that could be relevant and helpful to the Commission in performing its functions under the Act.

[33] Although all civil claims are barred, it is an offence to attempt to deceive or knowingly mislead the Commission punishable by a fine of up to $100,000 for an individual or up to $300,000 for a body corporate.[33] Accordingly, the certification provided by an applicant for clearance as to the completeness and correctness of all information supplied is important. If the person providing the certificate knows it is incorrect, serious consequences can follow. However, we do not see the certificate as justifying a carve out from the broad protection conferred under s 106(9) as Mr Wigley contends.

[34] Our conclusion on this issue is sufficient to dispose of the appeal. For this reason, we do not need to consider the other grounds relied on by Spark to support the judgment.

Result

[35] The appeal is dismissed.

[36] The appellants are jointly and severely liable to pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Wigley and Company, Wellington for Appellants
MinterEllisonRuddWatts, Auckland for Respondent

[33] Commerce Act, ss 103(2) and 103(4).